tive of law. Finally, many of the remarks made by Rochus (*De Consuetudine*, Qu. 5, no. 34) on use and custom are to the same effect, especially that in which he contends that two acts are sufficient for a custom, particularly in judicial matters.

12. Nevertheless, having reviewed the essential elements of the question and taken into account the points of difference in the matter involved in it, I find nothing peculiar in this respect in judicial acts, setting aside those in which the person and authority of the sovereign prince vested with legislative power are involved. For his power is a special one in respect to certain matters, as I shall immediately explain. Therefore, although it is certain that law can be established by means of unwritten style, as all jurists teach in their commentaries (on *Decretals*, Bk. I, tit. 11, chap. xi and on *Code*, VIII. lii. 2) and as, in particular, Baldus asserts (on *Code*, IX. xlix. 7), as well as Jason (on *Digest*, XXX. lxxi, § 2, no. 5); nevertheless, I do not find that it is defined in any law that two acts or any fixed number of them are sufficient for establishing a legal style, nor that such is proved by any plausible reason; nor that any distinction has been established in this respect between style and customs made up of other kinds of acts.

What must be said of judicial acts.

Baldus. Jason.

I assert, therefore, that in judicial acts, just as in others, there are required such a frequency of the act and such a lapse of time as is sufficient either for validating the custom by prescription, or for manifesting sufficiently the common consent of the prince and of the people.

What duration of time is required in judicial act.

13. And, first of all, this is the meaning of the laws, which require absolutely for style or its acts frequent use and custom. This is evident from the *Code* (VIII. lii. 1), which uses the words: 'when those acts have been proved, which have been frequently used in the city in the same kind of controversy'. The same is also evident from the *Digest* (V. ii. 5)—cited by Sylvester [word *consuetudo*, Qu. 4] which says: 'when [certain practices] are constantly in use'; for the word 'constantly' signifies more than two actions. The other law, however (*Digest*, XXIX. v. 3, § 1), cited by Sylvester, is in no way applicable to the present situation. In the same way, the other laws which require a frequency of acts do so in general terms and without determination as to number.

Sylvester.

Bartolus.

Moreover, this is clearly the meaning of Bartolus (on *Digest*, I. iii. 32, no. 14); for, even in the case of judicial decisions, he requires for the establishment of custom a period of ten years and the tacit consent of the people. Decio (on rubric to *Digest*, I. iv, no. 35), states the same doctrine more clearly. He says that for the establishment of a style of the legislator no lapse of time is required; that in other cases, however, a lapse of time is necessary for the introduction of the style. He then proceeds to the conclusion that the frequency of actions necessary be determined by a prudent judgment, in the manner explained earlier in this Book. Saliceto (on *Code*, VIII. lii. 2, no. 23) holds the same view. He says that the repeated acts of a single judge do not establish a style, unless he is a magistrate clothed with sovereign authority. This opinion is defended by Baldus in his comment (on *Code*, VIII. lii. 3), and by Bartolus (on *Digest*, XXVII. i. 30, near the end). Many arguments in favour of this view are to be found in Burgos de Paz (in Pref. to the laws: *Tauri.*, nos. 220 *et seq.*), and in Cristóbal de Paz (on Rubric to law on style, Pt. I, nos. 86 *et seq.*).

Saliceto.

Baldus.

Bartolus.

Burgos de Paz.

The reason on which these laws and legal opinions are based has already been touched upon: it is that neither a judge nor his subordinates possess the power to make law, even if they should expressly wish to do so; they cannot, therefore, by two or three acts tacitly establish law: such authority has not been granted them either by reason or by the law.

14. It may be objected that even though this may be true of certain judicial acts which are preparatory (so to speak) to the decision itself, it is not true of that decision, for the latter has a special character in that by it law is stated and made clear: it would, therefore, seem to have the power of making law, since it is passed by public authority. This would seem to be especially true where the judicial decision has been twice handed down and accepted by popular consent, for it then seems to be law approved by common consent.

An objection.

I reply that if the judge giving the decision is not a sovereign prince, and so does not possess legislative authority, his decision, even if it is given more than once, or if it is repeated by different judges of the same rank, has not, on the mere ground of the number of acts performed, the effect of making law. This is the meaning of the *Digest* (I. iii. 38), where it says: 'or of cases always decided in the same way'. The reason is that those decisions are not sufficient to establish law either after the manner of a custom, for reasons already given; or after the manner of a written law, since a judge possesses no power to make law. In this respect, such a decision is different from one which is given by a sovereign prince: for that of the prince has the force of establishing law, not through the medium of custom, but by means of written law, in the manner described in Books Three[1] and Four[2] of this treatise. In the case, then, of a decision handed down by the prince, two acts are not required: one only is sufficient.

Solution.

In the case of an inferior judge, however, not even many repeated
820 acts suffice, according to an express provision of the emperor given in

[1] [Only Chapters i–iv and xxxii–xxxiii of this Book are included in these *Selections*. *Vide supra*, pp. 361–413.—Tr.]

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

Gloss. the *Code* (VII. xlv. 13). On the ground of that law, the Gloss (*De Consuetudine*, Chap. xi, word *legitime*) says that two occasions do not suffice 'since,' in the words of the law, 'judgment must be given not by precedents, but by laws'. Hence, the decision of a private judge has some weight of authority; and if he is a senator of the commonwealth or of the kingdom, the authority of his decision will be much greater; and it will be further enhanced by the handing down of decisions in agreement with his own: but even so, these decisions will have the authority not of law, but rather of an opinion of a Doctor of high authority, or even of many Doctors, as is evident from the decisions of the Rota[1] and the like. And if in a kingdom it is especially provided by statute, that judges shall not dissent from a decision which has been handed down twice or oftener by the royal senate, that rule will be one peculiar to the realm in question; and that, not by virtue of a custom, but by that of written law. Such law apart, however, the tacit consent of the people, or of the prince, is not to be presumed, unless a sufficient lapse of time, and a sufficient frequency of actions make such consent clear.

15. In reply to the objections contrary to our thesis in respect of style, I reply that any assertion touching that kind of custom must take into account the two kinds of style: that which has the force of law, and that which is merely factual. As to the first, I assert that it does not exist until the style has either been approved by written law or established by a completed prescriptive custom; or, at least, when it is a style so clearly of the sovereign prince who has authority to make law, that he sufficiently declares through it his will that it be law. Again, the term 'style' may be used of custom based on the authority not of the sovereign prince, nor of the law, nor established through a sufficient custom; that is, it may be used of style that has become usual through a few actions—and such a style, I say, is to be followed and observed, not because it is legally binding but because it displays a prudent and fitting mode of action. It is to be observed unless the most urgent reasons are brought against it, or some grave necessity compels a contrary procedure. This, it seems to me, is the purport of the remarks of Rochus and Antonio de Butrio on observances and style of fact, as well as the remarks of many other writers referred to in Section 11 of this Chapter.

Two kinds of style taken into account.

Rochus. Antonio de Butrio.

[1] [The Rota, called the Sacred Roman Rota, is a Roman ecclesiastical tribunal established early in the fourteenth century to hear cases of appeal to the Holy See. Under present discipline it decides, in the second instance, on appeal, cases tried by Ordinaries. Matrimonial cases now form a large part of its business.—Reviser.]

CHAPTER XII

WHETHER ONLY VOLUNTARY ACTS AVAIL FOR THE INTRODUCTION OF CUSTOM

1. That the actions by which a custom is established must be voluntary is the certain and generally accepted doctrine on this point.

This assertion is proved as follows: the actions constituting a custom are of effect in the establishment of the custom only in so far as the consent of the people is manifested through them. But they cannot manifest that consent unless the acts are voluntary. The acts, therefore, by which a custom is established must be voluntary.

The acts establishing a custom must be voluntary.

The inference is evident. The minor premiss is an unquestioned principle of moral philosophy. The major premiss is likewise generally agreed to by all the Doctors who deal with this subject. For this reason, as we also saw in the first Chapter of this Book, many writers desire that this consent be expressly included in the definition of custom; that it must be included, at least implicitly, all agree. The reason is that, even though the consent of the prince is also necessary, as we shall state presently, nevertheless, his consent assumes the consent of the people, with which, in this usage, he complies. This is manifest when the custom derogates from the law of the prince; yet the same is true when the custom establishes law, since this legal custom originates (so to speak) with the people, and thus assumes their consent. Whence, even though the expression of the people's consent is necessary in some way for the validity of all law, the mode of its expression need not be the same with respect to this unwritten law [of custom] as with respect to written law. For, primarily and directly, the law emanates from the prince, and he requires consent from the people in obliging them to accept the law, as I have stated in Books Three[1] and Four.[2] But legal custom originates with the people by their willing that the law be introduced, in so far as they have the power to do so, and by their tacitly requesting consent thereto from the prince. It is for this reason that their customary acts must be voluntary.

2. From this principle I infer that a custom cannot be established by means of acts done in ignorance, or in error, since these are involuntary. This is the doctrine set forth in the Gloss (on *De Consuetudine*, Chap. xi), and that of the Cardinal[3] on the same passage. It will be found also in the Gloss (on the *Decretum*, Pt. I, tit. viii,

A custom cannot be established by means of acts done in ignorance or in error.

Gloss. The Cardinal. Gloss.

[1] [Only Chapters i–iv and xxxii–xxxiii of this Book are included in these *Selections*. *Vide supra*, pp. 361–413.—Tr.]
[2] [Not included in these *Selections*.—Tr.]
[3] [i.e. Gratian.—Reviser.]

Innocent. Bartolus. Baldus.

chap. vii), in Innocent (on Rubric to *Decretals*, Bk. I, tit. iv, no. 4); in the Gloss and Bartolus (on *Code*, VIII. lii. 2, qu. 17, at the end); also in Baldus (on *Digest*, I. iii. 32, in the fifth objection).

The others, to whom I shall refer, assert almost the same thing except that they add a qualification and a proof from the *Digest* (I. iii. 39), of which we shall speak presently. The stronger proof is that drawn from the *Digest* (*ibid.*, 32), inasmuch as it places the whole force of custom in the consent of the people, which is, obviously, nullified by error. This position is also supported by the *Digest* (*ibid.*, 35) which states that a custom has the force of law from the tacit agreement of the citizens; now a true agreement is lacking where an error intervenes. The law farther on in the same title of the *Digest* (*ibid.*, 36) says that consuetudinary law is of great authority, 'for the reason that it has been proved so clearly that it had no need of being reduced to writing'. But a custom introduced through error cannot 821
have such authority; nor can it be held to have been truly proved, but merely thought to be so. So also in the *Code* (VIII. lii (liii). 2 [1]), it is said: 'An anterior custom, and a reason [for acting] which has resulted in a custom must be preserved.' This law, then, assumes that a custom should emanate from reason, and not from error. For if it has been established through error, upon discovery of the error, there disappears the apparent reason which might justify such a custom; and consequently the custom itself lapses also, because it cannot persist without a reason. Wherefore, even though the custom will seem to prevail and to establish law before the error is detected, it will do so only from an erroneous persuasion; for when the truth is known, the force of the custom vanishes. It was never, therefore, true law, but was merely thought to be such; and the same is true of the custom itself.

3. The objection is brought against this reasoning, that the pas-

Objection.

sage from the *Digest* (I. iii. 39), says: 'What has been first introduced not by reason, but through error, and was then held to be binding through custom, does not hold in similar cases.' The apparent inference from this text is that a custom established and confirmed by error is valid as to that subject-matter in respect of which it was initiated, but that it must not be extended to similar cases. This is the opinion of Bartolus (on *Digest*, I. iii. 32, no. 5, and *ibid.*, 33, and on *Code*, VIII. lii. 1 [, no. 21], with the Gloss thereon) as well as that of Baldus, and other authorities. Panormitanus holds the same view (*De Consuetudine*, Chap. xi, no. 12), as does Antonio de Butrio on the same Chapter. Rochus is in agreement with these writers (*De Consuetudine*, Sect. 4, at the beginning), and cites others whose opinion may be summarized in three points.

Bartolus. Gloss. Panormitanus. Antonio de Butrio. Rochus.

First, they assume that a custom founded upon certain knowledge and without error, and with other adequate conditions, is not only

valid in the subject-matter with which it is concerned, but may also be extended to similar matters. They add, secondly, that a custom established through error is also valid in its own subject-matter. Thirdly, they conclude that the latter custom differs from the first, [only] because it cannot be so widely extended to similar cases.

While the first of these points seems to have been most favourably received by the jurists, I find great difficulty in accepting it. But, since it cannot be properly analysed or explained in general terms, we shall deal with it when we come to the chief particular effects of custom.

Explanation of the law which has been brought forward as a proof.

The second statement, however, is directly opposed to our assertion, and these writers prove it not by any argument but by a reference to *Digest*, I. iii. 39, nor do they answer the argument advanced in support of our thesis—that error annuls consent—whereas they themselves use the same argument to prove their third point.

4. Accordingly, I do not think that this [second] opinion is valid with respect to true custom, with which alone we are at present dealing. This I shall prove in detail, assuming certain points which have been conceded by the Doctors above cited. In the first place, Cynus and other ancient authorities, with whom Bartolus also agrees, qualify that assertion for the reason we have given. They hold that that assertion does not apply to a custom which is opposed to law. Their reason is that if the people act contrary to law from ignorance, or if they err in their judgment of its terms, it is clear that they have no intention of derogating from the law.

The foregoing interpretation of the above-cited law is attacked.

Cynus. Bartolus.

In what manner, then, is *Digest*, I. iii. 39 to be explained in its relation to a custom of this [erroneous] sort? For is not such a custom a very clear example of custom introduced without reason and through error? Indeed, many writers in touching on custom of this kind hold that the law of the *Digest* is to be read as referring especially to custom established in opposition to a positive law, inasmuch as it refers to custom 'not initiated by reason', in order that it may not seem to be referring to unreasonable custom.

Moreover, concerning even a custom that is outside the law, Bartolus and others distinguish between error of fact and error of law. Respecting a custom established by an error of fact, they admit that it is invalid owing to a defect in consent, according to *Digest*, II. i. 15. If the error be merely one in respect of the law, they say that the custom is nevertheless valid, with the aforesaid limitation, however, that it is not to be extended to similar cases.

Bartolus.

5. Therefore, we admit that the first member of this latter assertion

thus distinguished is not contrary to our contention, and we attack the second member of that assertion; for an error concerning the introduction of law removes the element of consent in introducing it. For in those customs which are outside the law there can be no error as to law, save by the misapprehension that their subject-matter is either forbidden or enjoined. For under the misapprehension that the matter is prohibited, the custom is not one intended for establishing new law, but rather one in derogation of [misapprehended] existing law. But no custom can derogate from law where there is no law in existence from which departure is made. Again, an erroneous custom of the second sort [, based on the misapprehension that the matter is enjoined by law,] cannot establish law, since it was formed not with that intention, but rather with that of obeying the law [, misapprehended as existing]. For, just as a custom that has sprung from true law does not establish any legal rule, as we said above, neither is it possible for a custom which has grown out of a falsely presumed legal obligation to establish any 822
legal rule, for the popular consent is annulled by the false presumption —as will be more clearly evident from what we shall say in the following Chapters. Therefore, a custom derived from error never has the effect of establishing law, even in its own subject-matter. Whence it is clearly the more logical and better grounded conclusion that it is not to be extended to other cases.

Rochus. Baldus. Accordingly, I do not approve of the example which Rochus borrows from Baldus, to the effect that if a people are accustomed not to reap a crop of grain from a certain locality, because they believe that this is forbidden, this custom establishes law, for the reason that even though the people are in error as to the law in the matter, they do consent to the fact. But I hold that such material consent to fact

Rochus. is not sufficient: rather, to establish law, they must consent to the fact as establishing a legal rule. The reason is (as Rochus himself admits in the Chapter to which I have referred and as will be said in that which here follows) that law is not established by a custom apart from a purpose to establish a custom, that is, a legal custom. Now error takes away such purpose, as we have clearly demonstrated. Therefore, . . .

An excellent example is that of religious profession tacitly made which is not established as valid by any usage, so long as error concerning the validity of the previous profession persists, owing to want of consent. This is a well-known example.[1]

6. But in regard to the argument drawn from *Digest*, I. iii. 39, my first reply is that this law can be explained as having applica-

[1] [Suárez here refers to the case of a Religious who takes vows invalidly, in consequence of some unknown defect. In order to validate the vows, such a Religious must give explicit consent, and take the vows again, conscious of their previous invalidity. No amount of religious observance, as though the vows had been valid, is of any avail.—Reviser.]

tion to a legal prescription, but not to a true legal custom. For in the

Answer to the objection drawn from *Digest*, I. iii. 39. case of prescription, it can happen that a custom may originate without a reason, that is, without a true title, and in error, when the custom begins in good faith and so continues and persists up to the point of the establishment of a valid prescription. But this can scarcely be understood of a true and legal custom; and this, both for the reasons we have already set forth as to the force of error in annulling consent; and because consuetudinary law cannot be established without a ground in reason. However, that last clause of the above-cited law, ['it] does not hold in similar cases, might not seem applicable to prescription, since there is never question of extending the identical prescription to subject-matter other than its own, merely because of a similarity existing in such subject-matter. Whereas, if the manner of establishing prescription is identical, in another similar situation, the same prescriptive right will arise.

Nevertheless, I think *Digest*, I. iii. 39 is correctly interpreted in regard to this point by the legal rule that 'what is a matter of special concession to any one, ought not to be used as a precedent by others' (in *Sext*, Bk. V, *De regulis iuris*, rule 74). This opinion is confirmed by another rule (*ibid.*, rule 78), which states that, 'what has at times been granted, on account of necessity, cannot be employed as an argument' [in other cases]. It is also stated in the *Digest* (I. iv. 1), that grants to particular individuals are not to be set up as a precedent. Thus, what *Digest*, I. iii. 39 may have been framed to say was, that what is permitted to one person on the ground of a consuetudinary prescription made in good faith, but lacking in reason and founded in error, cannot be taken advantage of by others, even if in other respects their cases are identical or similar. This is the interpretation of the law that I draw from the Gloss on *Digest*, I. iii. Gloss.
14, which is similar to the passage in the *Digest* which we are discussing. The one law assists us to the correct reading of the other.

7. A difficulty against this reading of the law may be drawn from the

Objection. fact that the law of which we are speaking [law 39] is found under the title *De Legibus* [*Digest*, I. iii], whereas the laws that precede and follow it deal with legal custom.

But it is not to be wondered at, if, to avoid another absurd reading

Solution. of law 39, we extend somewhat the meaning of the word 'custom' in that context. And we do so especially, since many points in those laws apply equally to both sorts of custom,[1] and the Doctors, in expounding these common points and setting forth the conditions of custom, succeed only in confusing everything, as I have frequently remarked. The common example, which the jurists use as an

[1] [i.e. legal custom and prescriptive custom.—Tr.]

Gloss.

illustration of an established custom, that if the owner [that is, the buyer] of wine has placed his hand upon the cart,[1] from that moment the wine will be at his own risk, certainly refers to a custom of prescription. The explanation of the Gloss on the aforesaid law[2] is that such a custom is not transferred to any like cases, that is to say, as a prescription against persons against whom no prescriptive right was set up in virtue of such a custom as we have mentioned. The whole of this matter may be considered as relating to the title *De Legibus*; for although this custom does not make law, it does change the subject-matter of the law, in such wise that by reason of the custom the laws must be applied in a different way in a case of this kind.

8. Secondly, if we wish to read the aforesaid law 39 [*Digest*, I. iii. 39] as applying to true legal custom, we shall reply that it does not say it is possible that a custom may be introduced without reason, and by error; but rather that it sets forth the contrary. This is the meaning of the Glosses cited in our assertion, and in our reasoning, which refer to this law in support of the interpretation they set forth.

Another interpretation of the law, i.e. *Digest* I. iii. 39.

Hence, the sense of the words, 'it [, i.e. the custom,] does not obtain in other cases, of a like sort' is not that the custom does obtain in that particular matter, but that it does not in similar matters. For probably this same statement could be made of every custom, even of one established with certain knowledge, as I state later on. Certainly, if other customs extend [, as our opponents hold,] to similar cases, a custom [founded upon error and lacking reason] would also extend to like cases if it were true law [; but this our opponents deny]. The ground of this conclusion is that such extension can never be made except in so far as the reason of the law permits, a principle that is verified in 823 every true law. Therefore, that interpretation of the law is at variance with sound reason. Therefore, the meaning of the words, 'that it does not obtain in other cases, of a like sort' will be that such a custom does not persist, and that when the error is recognized, there exists no right to perform actions similar to those which were previously done in error, that is, in observance of a custom which was thought to be, but was not, legitimate. This interpretation is neither absurd, nor does it do violence to the words [of the law], and thus read, the aforesaid law 39 proves our assertion, as the Glosses imply.

9. Finally, the inquiry can be made on this point, namely: what

[1] [Presumably a cart belonging to another person who has agreed with the buyer of the wine to transport it to the buyer's house. Though the translation is exact, is it not rather a case of the buyer of the wine accepting responsibility of transport, and thus freeing the seller of the wine from all liability? At owner's risk, as we say. The argument of Suárez is somewhat difficult to follow here.—Reviser.]

[2] [The Gloss says: 'If the owner of wine put his hand to the cart even to help, the wine is then at his own risk.' This is contrary to reason, and is a custom introduced by error; it is therefore not a valid custom in the case of other liquids, even though this custom was afterwards approved with certain knowledge and with tacit consent.—Reviser.]

sort of ignorance or error is to be understood here [in the assertion that custom is not established by acts arising from ignorance or error]?

The kind of ignorance or error that does not establish custom.

For on this point also, Cynus and the other jurists distinguish, as usual, between the motive [, i.e. cause,] and the final cause,[1] and they say that the assertion [which we are here defending] must be understood of an error as to the final cause [of the custom], not as to its moving cause. But I have had much to say of this and similar distinctions in my other works (*De Iuramento*, Bk. II, chap. xi, and *De Voto*, Bk. I, chap. xi),[2] and what I have there said is applicable in due proportion to the present question.

I shall, therefore, here content myself with saying that the assertion of this Chapter must be understood as pertaining to an ignorance concerning those things which relate to the substance of the custom, whether in respect of the law or of the fact on which the law is founded. Ignorance of this kind precludes the necessary consent, as has been previously stated. If, however, the ignorance is one that concerns other motives which are accidental, no hindrance is created, since such ignorance does not destroy consent. Some writers, however, interpret the aforesaid law 39 [*Digest*, I. iii. 39], as applying to this sort of error regarding incidental matters. They assume that the law states that a custom in accordance with law is established despite the existence of errors of this sort. But these writers have not been able to explain satisfactorily why they should have to say that such a custom does not hold in similar cases, since an error that does not touch essential matters cannot present an obstacle to such extension, if a true custom [, as they teach,] is permitted such extension. In the light of this interpretation, their teaching is not conclusive.

The assertion must be understood of an ignorance which relates to the substance of a custom.

10. In the second place, it is to be inferred from this assertion that a custom does not prevail, nor is it established validly by acts done under compulsion or from grave or unjust fear. This is substantially the doctrine of Bartolus (on *Code*, VIII. lii (liii). 2, qu. 18 in its entirety, and in no. 19, in reply to the last objection but one [and *ibid.*,

A custom is not established by means of acts done by compulsion or from grave fear.

[1] [Aristotle recognizes four causes of being (*Physics*, II. iii; Loeb ed., Vol. I, 129): (*a*) material; (*b*) formal; (*c*) moving, or efficient; and (*d*) final. In the scholastic philosophy, following Aristotle, the immediate moving cause is called the efficient cause (*causa efficiens*); and the ultimate purpose of the action, the final cause (*causa finalis*). The efficient cause is that which, by its action, produces an effect substantially distinct from itself. In other words, it is the cause '*cuius virtute effectus immediate producitur*'. Efficient causes acting towards ends are distinguished as (*a*) acting by intelligence; or (*b*) acting by nature. For example: the sculptor using the chisel (intelligent efficient cause) produces the statue which he intended (this intention, or purpose, being the final cause). The final cause, or end, therefore, is that for the sake of which the effect, or result of any action is produced. See St. Thomas Aquinas, *Summa Theologica*, I.–II, qu. 1, art. 2. But, where the efficient cause acts through nature alone, the intention of a rational creature is not involved; thus, excessive heat coming in contact with a piece of paper *of its own nature* reduces that paper to ashes.—Tr.]

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

no. 23]), and of Antonio de Butrio (*De Consuetudine*, Chap. xi). But Rochus Curtius (*De Consuetudine*, Sect. 5, no. 3) seems to hold the contrary opinion, for he says that a custom is established by acts done from fear. However, he refers to the above-cited authors, and evidently intends his own assertion to be understood in the light of the assertions of these writers. Hence, Rochus does not differ from us; but by acts done from fear he means either that the fear is of slight and trifling importance, or, at least, that the acts, though inspired by fear at the time of their performance, are later freely confirmed and accepted in the course of time. For that is Bartolus's doctrine also. The ground on which our present inference is drawn is that force and fear preclude the consent required for the introduction of custom. This, however, applies to compulsion strictly so called.

11. A difficulty may be raised as to the validity of customary acts done out of fear, because, although fear may make an act involuntary under one aspect, still of itself it leaves the act an entirely voluntary one.[1] Whence arose the occasion for the dispute as to whether from the nature of the case fear alone is sufficient to invalidate a forced consent, in such wise that the consent shall not have the effect of establishing consuetudinary law, and as to what kind of fear can have this effect. But since the question is general and one that arises in connexion with other matters, and since I have discussed it at length in *De Iuramento* (Bk. II, chap. ix) and in *De Voto* (Bk. I, chap. vii),[2] I now refrain from discussing it.

In what way fear may cause an involuntary action.

I shall say no more than that there is a much stronger reason why, in the case of custom, fear should be a bar to validity: and it is that, for a custom, mere actions are not sufficient; it is essential that those actions be performed with the intention of introducing custom, and this intention is commonly tacit rather than expressed. But when the actions are done solely from fear—when they would not be done except under its compulsion—they lack that intention; nor can such an intention be morally presumed, since the fear in itself, in a certain way, excludes it. Thus, a frequency of actions done solely from fear, is never sufficient evidence of the public consent of a whole people to the establishment of a custom. There is the additional consideration that the prince cannot be presumed in such a

In connexion with the present subject-matter, there is greater reason why fear precludes the establishment of custom.

[1] [The concept of a *voluntarium* and of the species into which it is divided is of the first importance in ethics and Catholic moral theology, &c. A *voluntarium* is an act that proceeds from the will with a clear [i.e. 'intellectual'] knowledge of the purpose [i.e. nature] of the act. The act of jettison [, of throwing the cargo out of the ship in order to escape shipwreck by lightening it,] is, under the circumstances, an absolutely voluntary act; but there is, in the will, as an active faculty, a *certain reluctance* in throwing cargo away, and consequently, the act, though absolutely voluntary in the will, is done with regret, and under that aspect, it is called and is an involuntary act *secundum quid*, i.e., the act would not be done under other more favourable circumstances.—Reviser.]

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

situation to give his consent, since he does not wish his subjects to be forced to adopt customs of that kind under unjust fear. And if he himself brings force and fear to bear [upon his people], he commits an injustice, because he would *morally* oblige the people to adopt the custom, as I have said in connexion with the passage cited above, in similar cases.

CHAPTER XIII

WHETHER THE CONSENT OF THE PRINCE IS NECESSARY FOR THE INTRODUCTION OF A CUSTOM, AND WHAT MUST BE THE NATURE OF THIS CONSENT

1. We must devote this Chapter to inquiries respecting the principal efficient cause of consuetudinary law. In this, the consent of the
824 prince must first of all be recognized as necessary for the introduction of a custom. This assertion I have derived from the common teaching of the Doctors. The opinion of the few who teach otherwise, I shall discuss at a later time, to better advantage.

We must, then, in order to distinguish what is certain from what is uncertain, mark the distinctions that exist between peoples [in respect to their power to make laws]. For, in the first place, a custom can be that of a people which is in possession of supreme legislative authority, a status enjoyed only in the domain of the civil law, and by those commonwealths which acknowledge no superior in temporal affairs.

In respect of communities of this sort, our assertion does not seem to be pertinent, but it is true in so far as it has reference to them. For in a state of this kind, the sovereign is the whole commonwealth, and so, if a custom is accepted by such a people, the consent is necessarily given by the sovereign, since in this case the two are identical. *Digest*, I. iii. 32 refers clearly to a community so organized.

Various classes of communities distinguished.

But if the sovereign power has been transferred to a senate, and some disagreement arises in that body, then it is necessary that a majority of its members hold to the custom, for otherwise the custom cannot be said to be observed by the larger portion of the community in respect of its power to establish law. And the senate could not be regarded as tacitly giving its consent, if the major part thereof does not hold to the custom. Accordingly, our assertion is found to be true with regard to peoples possessing such legislative authority, and of them nothing further need be said.

A first class of community.[1]

2. We may, next, have a people which recognizes a superior, but holds from him the authority to make laws or municipal statutes, even as, according to *Digest*, I. i. 9, the

A second class of community.

[1] [Suárez really discusses four classes of communities in this passage, though his marginal notes indicate only three.—Tr.]

cities especially have by commonly accepted law. It is certain that just as such a community is empowered to enact written law, so it can introduce law by custom (*Digest*, I. iii. 32 *et seq.*). Whence, just as they can enact law without the renewed consent of the prince, so they can establish customs. Nevertheless, the consent of the prince is not entirely lacking in such a case, since he has given it through his permission to make laws, and wishes it to be continuously available. Thus, under such an arrangement, the prince need not have particular knowledge of a custom newly introduced into this or that city; for even without this special knowledge, he could give an antecedent consent (so to speak) and has done so when he granted to the people permission to enact in one form or another a particular law for themselves, should they wish to do so.

Wherefore, if the permission were given under the limiting condition that the law must be later confirmed by the prince, it could not be strictly binding before such consent had been obtained, as seems to be the situation in Spain. Under such an arrangement, our assertion would not apply. For it would then be necessary that the custom be confirmed by the prince also, and hence a renewed consent would be required from him, since a renewed confirmation is not had without such consent. Such a community, then, is, to that extent, to be held as, in a certain sense, lacking in authority to make laws apart from the prince. Of this matter we shall speak presently: for we shall have to introduce this point again, in our discussion of the nature of that confirmation and the means of obtaining it.

A third class of community.

3. Furthermore, there are communities which possess no power of making statutes or enacting laws, even of a municipal character, but who must accept those given to them either by a sovereign prince, or by their overlords or pastors. This is the relation which the Universal Church bears to the supreme Pontiff, and the particular churches to their respective pastors. For the people have no power to make canon laws; nor have the clergy such power apart from their superiors or without their superiors' concurrence—the peculiar differences in the various laws and communities being always taken into account.

The first opinion.

Many secular communities stand in this same relation to their sovereigns, as is self-evident. Hence, some authorities have said that these communities cannot introduce a custom without the special tacit consent of the prince himself (which I term his personal will); so, for such a custom they demand both a knowledge and a toleration of the custom on the part of the prince.

Gloss. Panormitanus. Innocent.

This is the doctrine of the Gloss (on *De Consuetudine*, Chap. xi), and it is followed by many writers. It is stated by Panormitanus in his comments on this law, and it is expressly set down by Innocent (on

rubric *De Consuetudine*, no. 4 [*Ex parte*]). It is found, again, in the Gloss (on *Code*, VIII. lii. 2), which cites the authority of Giovanni d'Andrea and Azo. This is also the opinion of Gregory López ([on *Las Siete Partidas*,] Pt. I, tit. ii, law 3, gloss 7 [*glossa* f]) and would seem furthermore to be that of St. Thomas (I.–II, qu. 97, art. 3, ad 3). St. Thomas says that in those communities which have a superior, custom is so far able to introduce law 'as is tolerated by those whose office it is to give law to the people. From this toleration they may be considered as approving of the rule established by the custom.' With this doctrine, Soto agrees (*De Iustitia*, Bk. I, qu. vii, art. 2), as do Sylvester (word *consuetudo*, Qu. 3), Driedo (*De Libertate Christiana*, Chap. xii), and Angelus de Clavasio (word *consuetudo*, No. 9 at the beginning). But, in fact, many of these
825 authorities can without difficulty be understood in the sense which I shall explain.

Gloss. Giovanni d'Andrea. Azo. Gregory López. Soto. Sylvester. Driedo. Angelus de Clavasio. Sylvester.

4. A proof of this opinion can be developed, first, from the *Digest* (I. iii. 32), where the whole basis of custom is founded upon the consent of a people, which can give force and efficacy to its own laws. This, then, was the primary force of the custom among the people, when they still retained the sovereign power; therefore, after the people has handed over that power to the prince, the force of custom will mainly depend upon his consent. For this reason, it is necessary that he should have previous knowledge of a custom, since without that no consent is possible.

The second proof is taken from *Las Siete Partidas* (Pt. I, tit. ii, law 3), where, among the conditions for custom, it is laid down that it be introduced with the consent of the prince.

Thirdly, it is argued from reason that legislative authority is no less necessary for the establishment of unwritten law, than of written law, as is clear from our discussion upon laws in general. But legislative power does not exist in these peoples—this is the supposition of the argument—either because they never had this power, as is the case with the canon laws, or because they have transferred that authority to the prince, as is the case with the civil laws. Therefore, it is necessary that the one in whom the sovereign power resides should give force to custom by his will and consent.

Distinction between the power of making ecclesiastical laws and the power of making civil laws.

5. Some Doctors, however—but not many—seem to admit that this opinion is true of the canon laws, but deny that it is so of civil laws. They submit, as the ground of their distinction, the fact that the power of making the canon laws never resided in the people, but in the prelates; on the other hand the authority to enact the civil laws was originally vested in the people. This is the view of Antoninus ([*Summa Theologica*,] Pt. I, tit. xvi, § 2). Covarruvias follows St. Thomas

Antoninus. Covarruvias.

Driedo.

(I.–II, qu. 97, art. 3), and also, very clearly, Driedo (*De Libertate Christiana*, Bk. I [, chap. viii]).

But I cannot approve of this distinction, since I feel certain that it is not valid: for, although the civil power was originally in the community, after the community has transferred it to the prince, the former no longer has that power in itself. The people, therefore, are in this case not less dependent upon the prince than if the community had never possessed the power to make laws.

The distinction is attacked.

Those writers might here object that when the people transferred their power to the prince, they did not give it up entirely, but only for the express uses (so to speak) of government, and for framing written laws and oral precepts; they surrendered it, that is, in such a way as always to reserve to themselves the power of introducing customs. But this view cannot be well-founded, since it is not proved from any law, nor does it appear in a perfect monarchy, either by custom or through any other evidence. Still, in a given kingdom, the royal power may be limited in that or some like fashion, at least by tacit agreement; as, for example, where the monarchy is not absolute, but partly democratic—as we made clear above in our discussion of the acceptance of law.[1] Yet this is not the usual situation, and the exception rather strengthens the rule to the contrary. Again, this opinion does not seem probable, for the reason that a temporal sovereign can revoke the private customs prevailing among his people, and can, for a [good] reason, prohibit their introduction. On the same principle, the prince may ordain that a custom shall be invalid if it lacks his express consent; which is evidence that the entire legislative authority of every sort has been transferred to him.

6. The third and true opinion is that which first of all lays down the general principle that the consent of the prince is necessary for the validity of a custom. For this is the common teaching of the Doctors, as I have said, and is effectually demonstrated by the proof given in our discussion of the first opinion. [The third,] however, further specifies that this consent of the prince can be understood in two ways. One, I term personal, because it is given by the prince in person, either by expressly consenting, or by antecedently permitting the introduction of a custom, or by approving it subsequently or contemporaneously, and this either in express terms, or when being aware of the custom he does not check it. The second kind of consent we may term legal or juridical, because it is given not by the prince personally, but through the law itself. Thus, if the prince enacts a law to the effect that a custom which contains such and such conditions shall be valid, he

The consent of the prince is necessary for the validity of a custom.

[1] [*De Legibus*, Bk. I, chap. xi, no. 7, which is not included in these *Selections*.—Reviser.]

thereby gives his consent, which is applied in particular to like customs which are introduced in virtue of that law.

Hence, we assert that consent of the first sort is not always necessary, the latter being sufficient. For it is self-evident that the first sort of consent is sufficient. That such express consent is not necessary, and that consent of the second sort is sufficient, I shall prove as follows. The law is never silent, and the will of the prince, speaking through the law, is no less efficacious than his immediate wish and command. What occasions are proper for the one or the other mode of consent, I shall discuss in the following corollaries [to this general principle].

826 7. My first inference is that, when a law is established by prescriptive custom, the personal consent of the prince is not required; nor, therefore, is any special knowledge of the custom on his part called for: but the custom is efficaciously established, even though he may have no specific knowledge of it, or may not have manifested his will with respect to it, either tacitly or expressly.

First inference: that the personal consent of the prince is not required.

This is the common opinion of the jurists according to Panormitanus (*De Consuetudine*, Chap. xi, no. 13). The same is set forth in the Gloss (on *Decretum*, Pt. I, dist. iv, can. iii, § *leges*, after the canon, at end and also *ibid.*, dist. viii, can. vii, in the last words), if the latter Gloss is carefully weighed, and by Cardinal Alexander[1] thereon, at the end. The same position is held by Antoninus and Barbatia and others (*Repertorium*, *De Consuetudine*), to which Rochus Curtius (*De Consuetudine*, Sect. 4, no. 24) refers many times. This opinion is held also by Dominicus de Sancto Geminiano (*Summa*, Dist. xi, near end), Angelus de Clavasio (*Summa*, word *consuetudo*,[2] no. 9), and Sylvester ([word *consuetudo*,] Qu. 4). The last-named two writers assume that a prescriptive custom suffices, even though the Pope has no knowledge [of the custom]. Felinus (on *Decretals*, Bk. II, tit. xxvi, chap. xvi, no. 11) teaches the same, although he qualifies his assertion with respect to certain special cases which touch upon other matters. Among the theologians who defend this opinion are: de la Palu ([*On the Sentences*,] Bk. IV, dist. xlii, qu. 3, art. 1, no. 7 [, concl. 3]), *Supplement*, Qu. 2, art. 2, concl. 3,[3] Antoninus ([*Summa Theologica*,] Pt. I, tit. xvi, § 2), and Sánchez (*De Sancto Matrimonii Sacramento*, Bk. VII, disp. iv, nos. 11 and 14, and disp. lxxxii, no. 20), who cites a number of other writers.

Panormitanus. Gloss. Cardinal Alexander. Antoninus. Barbatia. Rochus Curtius. Dominicus de Sancto Geminiano. Angelus de Clavasio. Sylvester. Felinus. de la Palu. *Supplement*. St. Antoninus. Sánchez.

8. The principal basis of this opinion is taken from the *Decretals* (Bk. I, tit. iv, chap. xi), where only two conditions are required for a custom, namely, that the custom be reasonable, and '[validated] by prescription'. To demand, then, another condition, namely, one not

[1] [i.e. Giovanni de Sangiorgio.—Tr.] [2] [The Latin text incorrectly has *confessio*.—Tr.]
[3] [This reference to *Supplement* is apparently copied from Chap. xix, sect. 26, *infra*, p. 627, where *Supplement* of Gabriel Biel is cited as parallel to the passage from de la Palu; but the reference is wrong.—Reviser.]

included in these, is to demand a condition without a basis in law, in fact, one contrary to the law. But special knowledge [of the custom] on the part of the prince is such an added condition not included above. Therefore it is not necessary; and, therefore, neither is his personal consent necessary—since it is impossible without such knowledge.

This assertion is confirmed and explained as follows: the prince had the power to enact a general law approving a custom fulfilling such and such conditions laid down by him and giving validity to it without a renewed consent or knowledge of it on his part. But this he has done by means of that provision. Therefore, . . .

The major premiss is evident, for this course of action does not exceed the power of the prince, and this mode of manifesting his will is entirely sufficient, as I have shown; it is also the most convenient way, because it is practically impossible that all customs should come to the knowledge of the prince—as is noted (in *Sext*, Bk. I, tit. ii, chap. 1); and on other grounds it is expedient that reasonable customs should be observed and receive their [legal] force. Therefore, . . .

Finally, a confirmation of our assertion can be drawn from the similitude between this kind of custom, and prescription properly so called. It is because of this likeness that the custom of which we are speaking is called prescriptive: for in a prescription, knowledge on the part of the individual against whom the prescription is being established, is not necessary; so, also, a custom is said to be obtained against the prince by prescription, if it fulfils the terms of such prescription. Therefore, a custom of this sort, to be valid, does not call for a knowledge of it on the part of the prince.

9. An objection may be raised, namely, that the above holds true only of a custom abrogating law—which point is dealt with in the *Decretals* (Bk. I, tit. iv, chap. xi)—not, however, of a custom establishing law, because with respect to this custom there is no such rule. Again, it may be objected that the same holds true at most only for canon law, and canonical custom; for in the civil law no such rule can be found to have been laid down.

An objection.

My reply to the first part of this objection is that this rule in principle includes *a fortiori* custom constitutive of unwritten law, for the reason that the same power is necessary for abrogating a law of a prince, as is required to introduce a new law not contrary to the old. From another aspect, however, the need of the consent of the prince for permitting the revocation of the prince's own law would seem more necessary than that for the establishment of new law: since the revocation would seem to derogate more from his will and authority [, than would the introduction of new law]. This point is emphasized in the above-cited text [*Decretals*, *ibid.*]: 'Although the authority of an ancient custom is not slight, yet it is

The solution.

not to prevail so far as to prejudice even a positive law unless, &c.' Therefore, since this character is granted to a custom, if it has these two conditions aforesaid (Section 8, *supra*), every consuetudinary law that fulfils the said conditions is absolutely approved.

10. In reply to the second part of the objection, however, it is to be said first of all that, granting that the civil law has not declared this principle so expressly, nevertheless, it does not deny the validity of custom which fulfils those two conditions, whatever may be true of its effects, of which we shall speak in another place.

In fact, the civil law teaches virtually the same doctrine on this point, that the canon law sets forth in a clearer manner. For in the *Digest* (I. iii. 32) we find the words: 'It is most correctly admitted that laws are abrogated, not only by the decision of the lawgiver, but also through disuse, with the tacit consent of all.' In these words, a distinction is drawn between the people and the lawgiver, and the decision of the latter is not required. Further, in the following laws [*ibid.*, 33 and 35], nothing more is required—assuming that the custom is reasonable—in order that the custom may have legal force, than that it be
827 protracted, 'of long standing', or 'observed for many years'. In the *Digest* (*ibid.*, 38) it is added that the Emperor has ordained that an immemorial custom 'is to have' the force of law. In the civil law, then, according to its commentators, it is provided that a prescriptive custom is sufficiently complete, without any new knowledge of it on the part of the prince.

11. My second inference is that when a custom does not prevail in virtue of prescription, then the personal consent of the prince is requisite, that is, at least a tacit consent; and that, therefore, it is also necessary that he should have knowledge of the custom. This point we concede to the writers who defend the first opinion,[1] among whom is St. Thomas, whose language concerning the consent of the prince is general, and whose words can be interpreted as referring to either of the two ways by which the prince—as we have explained—may give his consent. This would seem also to be the opinion of Sylvester [word *consuetudo*, Qu. 4] and St. Antoninus [*Summa Theologica*, Pt. I, tit. xvi, § 2], who, while quoting and following the opinion and words of St. Thomas, nevertheless admit that sometimes a custom of which the prince is ignorant, does prevail. Finally, the authors cited for the opinion we have just discussed admit this.

If a custom does not prevail in virtue of a prescription, then a personal consent is necessary.

Sylvester.

St. Antoninus.

It is, further, proved by a sufficient exclusion of possibilities. The sovereign's consent is necessary; but in custom of this sort that consent is not given in virtue of any law, nor does any law definitely fix the terms under which it is given. Hence, his consent must be personal;

[1] [*Supra*, p. 554.—Tr.]

and for this, knowledge is necessary. This reasoning is also confirmed by the arguments brought forward for the first opinion.

12. On the question, however, whether such consent of the prince should be positive and explicit, or whether one which is inferred is sufficient—that is, it is sufficient that he knows and tolerates the custom or offers no opposition thereto—St. Antoninus indicates (*ibid.*), that an express consent is necessary, especially in the case of the supreme Pontiff. And this view might be urged in that toleration alone, even assuming that a knowledge of the custom exists, does not sufficiently indicate consent, because many things are allowed to be done which are not approved, according to the *Decretals* (Bk. III, tit. v, chap. xviii).

What sort of consent of the prince is necessary.

St. Antoninus.

Nevertheless, St. Thomas (I.–II, qu. 97, art. 3, ad 3), expressly teaches that a tacit consent is sufficient. This is accepted by other writers, and usage proves that tacit consent is regarded as of equal effect with explicit consent, as, with reference to this kind of custom, the aforesaid law 32 [*Digest*, I. iii. 32] states. It is necessary only that it be morally evident that the toleration is not merely permissive but an active or approving one; whether it is such will be easily seen from the circumstances and from usage, especially either when the approval is reasonable, or when, by a permission alone, the safety and well-being of the subjects is inadequately provided for, as I shall explain in the following Chapters. Nor in this matter is any exception to be made in the case of the supreme Pontiff. There is no law or reason for making such exception necessary. In some special cases, however, his explicit consent will perhaps be necessary, when the gravity of the matter or some particular law indicates that it is called for. But this can happen in the case of other princes also, and hence the rule we have given is, strictly speaking, a general one.

A tacit consent is sufficient.

13. To the basic principle of the contrary opinion, a ready reply is possible. For *Digest*, I. iii. 32 proves merely that there is required [, for custom,] the consent of him who is in possession of the supreme legislative authority, but it establishes no proof in favour of this or that mode of consent; nor does it obviate the possibility of this consent being given by law; in fact, it indicates that it can be so given, as I have argued. In the same way, the Spanish law [*Las Siete Partidas*, Pt. I, tit. ii, law 5] requires no more than that the custom be established with the consent of the prince. With this principle our theory is in agreement, and the law does not say that knowledge or personal consent of the prince is always necessary. If this law [, i.e. *Las Siete Partidas*,] had decreed that the consent of the prince must be of the latter kind, the law of Spain would have been a particular kind of law, and not one demanded by the nature of things, nor of the general type of law.

What consent of the prince is necessary.

The argument from reason for the contrary opinion serves only to prove the first member of our assertion, and to confirm the last. Nor does it hold against our second member, since in that part of our assertion we also say that the authority of the prince is a cause in the establishment of prescriptive custom, and that it does, through the medium of the prince's law, give validity to such custom.

CHAPTER XIV

WHAT SORT OF CUSTOM HAS THE EFFECT OF ESTABLISHING UNWRITTEN LAW?

1. We have discussed the essence and the causes of custom; now it remains for us to speak of its effects. For although we have, in passing, touched upon some of them, we must, to make our doctrine serviceable, apply these principles which have been set forth in a general way to the several effects.

Four effects of custom.

Four effects are usually attributed to custom: namely, the establishment, the interpretation, the confirmation, and the abrogation of law. To these are reduced all other conceivable effects of custom. We shall, however, pass over the third one of these, because its effect is not so much one of law as one of fact; for a custom which is said to confirm law is derived from law itself, and
828 so it does not confirm law by the introduction or the addition of new law beyond the written law, as explained above (Bk. VII, chap. ii, *supra*, p. 450). Hence, it confirms a law by the fact merely that it either brings men more readily to the observance or knowledge thereof by increasing in some way its authority and man's sense of its value; or, at least, by guarding the law against revocation and (as it were) keeping it from the influence of a contrary custom, and so preserving it from the abrogation which might be effected by such a custom. I have discussed this effect also, *supra* (Bk. I, chap. xi),[1] nor is there need for us to add here to the further remarks on this matter, given in Books Three[2] and Four,[1] in our discussion of the acceptance of human law.

The second effect, however—namely, the interpretation of law—inasmuch as it can pertain to law, is, as I shall show,[3] included under the first effect. Thus, the two remaining effects alone need to be explained; and we shall speak of the first one in the present Chapter, and of the last in a later Chapter.[4]

2. The first effect, then, of legitimate custom, is to establish unwritten law where neither written nor traditional law exists. I repeat 'where no written [. . .] law exists' because if there precedes, in point of

[1] [Not included in these *Selections*.—Tr.]
[2] [Only Chapters i–iv and xxxii–xxxiii of this Book are included in these *Selections*.—Tr.]
[3] [In Chapter xvii of the present Book.—Tr.]
[4] [Chapter xviii of this Book.—Tr.]

time, a written law in conformity with custom, and if the custom grows out of this law, then the custom does not, as I have said, establish law. If, however, a law contrary to the custom exists first, then such a law must first be abolished, as I shall prove in the following Chapters. Our assertion, therefore, applies properly to custom which is outside law,[1] one, namely, that is neither forbidden nor prescribed by a legal rule.

I have added also, '[. . .] nor traditional law exists', since not every unwritten law is a law of custom: that only is such which has its origin in the general conduct and usages of a people. For sometimes, although it may not be written, the law may derive its origin from the prince himself, or from the [ruling] prelate, who enjoins, at least orally, that a precept of a general and enduring nature shall be law; and that law may be preserved subsequently, solely through the usage and tradition of his subjects. This will also be unwritten law, but it will be the unwritten law of tradition, not of custom. Of this character are many laws of the Church, which are in force through tradition, as I have indicated, *supra* (Chapter ii, p. 450).

It is necessary, therefore, in order that a custom of fact may introduce that form of unwritten law which is called the law of custom, that there be previously in existence no law [on the matter in question] laid down by the superior either in written or in oral form. Thus defined, our assertion on this point is certain.

This doctrine is found in both canon and civil law (*Digest*, I. iii. 32 *et seq.*, and *Code*, VIII. lii, in entirety, and the whole title of *Decretals*, I. iv, and of *Sext*, Bk. I, tit. iv). It is assumed in *Sext* (Bk. I, tit. ii, chap. i), and in *Decretum* (Pt. I, dist. i, can. v, and Pt. I, dist. viii, can. vii). Again, it appears throughout *Decretum*, Pt. I, dist. xi, where in canon vii, Augustine, *Letters*, lxxxvi is cited; again in *Decretum*, Pt. I, dist. xii, can. xi where [Augustine,] *Letters*, cxviii, chap. ii is cited; and Tertullian (*On the Soldiers' Chaplet*, Chap. iv) says that, 'custom is received as law even in the civil law when the latter is wanting'.[2]

Augustine.

Tertullian.

The Doctors in theology are in accord upon this point, as well as the jurists of both canon and civil law, and it is the general teaching of the Church, respecting which doubt is not permissible.

3. The ground in reason for this assertion may be given as follows: in a legitimate custom, all the elements essential for the establishment of a true precept or law can be present; therefore, it is able to establish law. The minor premiss is proved first by the fact that three or four elements are necessary and sufficient for law: namely, fitness of subject-matter, power, and will

Proof of the assertion.

[1] [The reader will remember that customs are, *iuxta*, *contra*, or *praeter legem*; i.e. in accordance with, contrary to, and outside law. It is the last kind that is neither prevented nor forbidden by any existing law.—Reviser.]

[2] [Tertullian has *cum deficit lex*.—Reviser.]

sufficiently manifested externally; and all of these can be present in this kind of custom.

The fitness of subject-matter in this case is evident, for the custom in question should be reasonable; but it will be such in relation to this effect, provided its subject-matter is not opposed to natural or divine law, and if it is useful for the general welfare, and not excessively onerous, or a deviation from the general mode of upright living; and finally, it should be such that a written law enacted in this matter would be just, as I have stated in a previous Chapter (Bk. VII, chap. iii *supra*, p. 455). In respect of subject-matter, therefore, a reasonable custom has a fitness for the establishment of law.

Whence, the gravity of the law will be in proportion to that of its subject-matter: for if its matter is serious, the precept will be a grave one, binding under pain of mortal sin; if, however, the matter is not thus serious, the law will be law only in a limited sense, imposing a light obligation. Again, if the subject-matter pertains to spiritual welfare, the custom will belong to the ecclesiastical jurisdiction; but if it relates to temporal good, it will pertain to the civil jurisdiction, as I pointed out above. Finally, as touching this element of subject-matter, the custom will preserve in all respects an analogy with the written law.

4. On the second element necessary for law, it is evident from the discussion of the preceding Chapter that power is not lacking for the establishment of this kind of custom.

Authority requisite for the validity of a custom.

For a legitimate custom proceeds either from a free people, and hence from one having supreme power, and, therefore, the power of enacting law; or from one having a pastor or prince by whom it is governed. In this latter case, if a legitimate custom is thought of —as it should be—as proceeding not from a people regarded apart from its sovereign, but from the people jointly with its head, and displaying in some sufficient way his influence, either by his having given the people the power to make its own municipal laws or statutes, or by his approval of the custom, an approval given either by law itself [cf. Chap-
829 ter xiii, this Book], or by his proved tacit will, then in a people thus conjoined with its head there resides sufficient power to make laws, as is evident. Therefore, . . .

It is usual to inquire at this point, whether one family can establish a custom through a continuous succession, and in so far as the family is regarded as perpetual. But I have just stated above that a true custom is not established by a private family. Hence, even if a family remains always in existence, the fact is of no importance, because a custom never can originate from that source, nor, therefore, can it be continued in existence. Again in the Ninth Chapter of Book One of this treatise,[1] it was proved that one family has neither the authority

[1] [This is found in Chapter vi of Book I, *supra*, p. 73.—Tr.]

to make law, nor the capacity to receive law, save by way of privilege. Hence, it cannot introduce law by its own custom, even though it may acquire a privilege, as I shall state below. Rochus (*De Consuetudine*, Sect. 4, nos. 6 [nos. 62] *et seq.*) has much to say on this matter, as has Antonio Gabrieli ([*Communes Conclusiones*,] Bk. VI, tit. *De Consuetudine*, concl. 5).

Rochus.

5. The same conclusion holds with regard to [the third element for the enactment of law,] the element of will. For, in free peoples, it is to be supposed that the greater number of the people and the magistracy concur voluntarily in a custom. In other communities, the consent of the prince, expressed in one or other of the modes we have spoken of, is added to the will of the people or to that of the greater number. Thus, always, there concurs [in the introduction of custom] the sufficient will of one who has the power of making law.

Of the will requisite for the establishment of custom.

We need only note at this point that although the will of the prince or that of the prelate is the principal one in this matter, nevertheless, in a certain sense, more depends upon the will of the people. The reason is that it is to the will of the people that the prince (so to speak) conforms by granting that people permission (as it were) to introduce such legal custom as it may wish; or by approving of the popular intention, or confirming it.

Therefore, in respect of this effect, it is of the first importance to note that it is not enough that certain acts on the part of the people are frequently performed, from which results a custom of fact; but that it is essential that this very custom be intended by them; so that the acts are thus repeated to establish that custom for the common good, or for the integrity of religion, or for some like virtue which it contains. This is explicitly taught by the Glosses and the Doctors to be cited forthwith.

Glosses.

We have shown above that this last factor is of the essence of custom: since a custom cannot be voluntary except in so far as it is intended. This can also be shown from the nature of law; for it is of the essence of law, that its enactment be intended by the sovereign. But whatever is of the essence of law in general, or of positive law [in particular], is of the essence of legal custom also; for what is of the essence of the genus must be included in the species. It is on the ground of the truth of this principle that I advise that attentive thought be given as to whether the customs in question are intended as such, or whether they come into being in some other way; for if the customs come into existence in the latter fashion, they are not properly legal customs carrying a binding obligation of law. Thus, there is a general custom that sleep intervenes between the evening meal and holy communion: this, however,[1] was not intended in itself, but arose out of the ordinary habits of men's lives. Whence this sort of custom, as I have elsewhere remarked, does not establish any obligation.

It is of the utmost importance to note whether the custom as such was willed.

6. Furthermore, not only an intention to establish a custom of fact is required, but also one to make a legal custom, or (what is the same thing) to establish a custom that is binding. For these two sorts of custom are quite different in character; since a custom can be directly intended, and yet intended not as binding, but to be observed out of devotion, and as a matter of perfection. This is evidently the case with personal and private customs, but the same can be true even of the customs of a whole people. Thus, there prevails among Christian peoples the custom of paying honour to the Blessed Virgin at the sound of the evening bell,[2] which is practised out of devotion only, and not under obligation. Bellarmine (*De Romano Pontifice*, Bk. IV, chap. xviii) held that many of the customs observed among Christian peoples are of such a character; that, for instance, of receiving [on the forehead] the blest ashes on the first day of Lent, and that of receiving a palm on Palm Sunday, and of taking holy water at the door of the church. Such also is the custom among many peoples of going to church at daybreak, as is also the practice of hearing Mass for devotional reasons on days that are not holy days of obligation, and such also is the custom, on feast-days, of not taking breakfast before Mass. These customs, and others like them, even though they are practised by a majority of the people as a matter of devotion, establish no obligation in law. Indeed, Soto (*De Iustitia*, Bk. IX, qu. III, art. i) includes in this class even the custom of presenting offerings at the church for [Masses for] the dead on All Souls' Day; and this is also probably true of other voluntary offerings, except when the church shall have obtained a prescriptive right to such donations, as I have stated in my treatise on religion (*De Religione*, Tr. I, bk. II, chap. v [Tr. II, bk. I, chap. v]).[3] I have noted there, with Cajetan and Soto, that an examination must be made of the intention with which the customs were introduced, for if they begin from a motive of devotion, and continue as such, they do not establish a true [legal] custom.

What must be the character of the will to establish a custom.

Bellarmine.

Soto.

Cajetan. Soto.

830 7. Hence, the Gloss (on *Decretum*, Pt. I, dist. VIII, can. vii), says that for a [legal] custom it is essential that it be observed with the will and intention that 'it become a law for posterity'. The same statement is repeated in another Gloss (on *De Consuetudine*), on which Abbas [, i.e. Panormitanus,] also, comments (*ibid.*, no. 17) to the same

Gloss. Abbas.

[1] [Reading *at* for *ad*.—Reviser.]

[2] [i.e. the Angelus. The custom was to sound the bell half an hour after sunset. This was called the Evening *Ave* or the Angelus, from the opening word of the salutation, *Angelus Domini nuntiavit Mariae*. —Reviser.]

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

effect: 'that it [, i.e. the factual custom,] must be observed with the intention of establishing a [legal] custom.' Rochus Curtius sets forth the same view thereon at length (*De Consuetudine*, Sect. 4, no. 36), and cites the authority of other writers for his opinion.

The reason on which this opinion is founded is also clear: the acts of those observing the custom cannot have an effect not included in their intention. Again, it is of the essence of law that it is made to bind those subject to it. Likewise, no one puts himself under a strict obligation unintentionally, as is clear in the case of a vow, or of a promise. And although a people that lives under a superior may seem to bind itself not by a custom, but rather by unwritten law, and therefore by the will of its sovereign, nevertheless, since the prince does not wish to impose a greater obligation through custom than the people are willing to bear, an intention on the part of the people to establish, in so far as they have power to do so, a true custom and its accompanying obligation is an essential condition of such a [legal] custom.

The evidence of a will to establish a custom.

8. Finally, the evidence of this will and of this obligation is the custom of fact itself. For thus Julianus asked in his commentary (in the *Digest*, I. iii. 32, § 1): 'What difference does it make whether the people declare their will by a vote, or by facts and deeds?' Other laws are of the same tenor. Lastly, the custom [of fact], from common acceptance and as a kind of natural token, has come to be received as evidence sufficient to indicate such a will of the people, when it has been continued for an adequate time, and by a sufficient frequency of actions. A special difficulty, however, respecting this intention and its tokens, we have not touched upon here, since we shall be able to do so to better advantage in the following Chapters.

CHAPTER XV

HOW LONG MUST CUSTOM ENDURE IN ORDER TO SUFFICE FOR THE ESTABLISHMENT OF LAW?

Of the time required for the establishment of a custom.

1. In the preceding Chapters, we have sufficiently discussed the number and frequency of the acts adequate for a custom, and now it remains only to speak of the length of time necessary for the same. For although we have pointed out that one sort of custom is established by prescription, and there is another that is not so established, we have not explained in what way these types of custom suffice for the establishment of law; nor how much time each requires for that effect. We must, then, take up these points in the present Chapter.

A prescriptive custom is of itself sufficient to establish law.

2. In the first place, it is certain that a prescriptive custom is sufficient of itself for the introduction of law. This is clearly inferred from the *Decretals* (Bk. I, tit. IV, chap. xi), as I have explained in a former Chapter, in accordance with the common teaching of the Doctors cited therein.

First opinion.

But as to the time that is necessary for such prescription, there are various opinions. Some ancient writers demanded an immemorial length of time; but this opinion is without adequate basis, and has been abandoned as obsolete.

Second opinion.

Others require a space of forty years in the case of a canonical custom, as did Hostiensis (in *Summa*, on *Decretals*, Bk. I, rubric iv, § *Obtentum* [, no. 3]). But this rule has application to those customs which are contrary to law, not to those which are outside law.

True opinion. A period of ten years is requisite and sufficient.

Whence, for the latter sort of custom, ten years is held to be necessary and sufficient, even where canonical subject-matter is concerned. This was the teaching of the Glosses referred to above, and that of Bartolus, Panormitanus, Rochus, and others in passages frequently cited. The same is held by Covarruvias (*Variarum Resolutionum*, Bk. I, chap. xvii, no. 8, § *Quarto*), who refers to these and other writers, and Navarrus (in *Summarium de Consuetudine*, Consil. I, chap. xiii, no. 19).

Glosses. Bartolus. Panormitanus. Rochus. Covarruvias. Navarrus.

The proof of the first part of our assertion is that the laws declare that a custom which is ancient, or of long standing, is sufficient to establish a legal rule; and ten years are necessary and sufficient for a custom to be termed ancient and of long standing. Therefore, . . .

The premisses of this argument call for no further proof here, since we have dealt with them in an earlier passage.[1]

The proof of the second part of our assertion is that the custom in question is not contrary to law, but is, as we assume, outside of law. But we know from the matter of prescriptions that for those prescriptions which are not contrary to law, no more time is required in the canon than in the civil law for establishing the prescription; and in respect of this condition of the time requisite, a prescriptive custom follows the mode of a prescription, as I have said above. Therefore, . . .

A note.

3. I note, however, that the phrase 'a long time' is not, in the eye of the law, a single, fixed measure of years [, but one that varies]: when the parties to the prescription are present, ten years, and when they are absent, twenty years[2] (*Institutes*, II. vi, § 1 [II. vi, Pref.]). Nevertheless, the above-cited Doctors make

[1] [*Supra*, Chap. viii.—Tr.]

[2] [This was the rule of Justinian regarding real estate, which was acquired 'by possession for a long time, that is, after ten years, where the parties are present, and after twenty, where they are absent'. It was provided that personal property, however, should be 'acquired by use for three years' (*Institutes*, II. vi).—Tr.]

Bartolus.

no distinction between a prescriptive custom when parties are present and such a custom when they are absent; they do not, that is, require twenty years for the latter, and ten, for the former, but lay down the absolute requirement of ten years in all cases. Indeed, Bartolus (on *Digest*, I. iii. 32, in *Repetition*, no. 14) expressly states that in the present matter, that distinction is not to be made, for the reason that '"absent parties" can have no place here, since the people (as a whole) are always present, even if some of them are absent'. In these words, he indicates that this kind of custom is not obtained by prescription against people of other countries, but is established among the citizens themselves, who must be present at least in the majority, since, as we 831
have said above, they must have knowledge of it, if the custom is to be valid. Gregory López ([on *Las Siete Partidas*,] Pt. I, tit. II, law 5, gloss 4 [gloss 5, *glossa* a]) and Burgos de Paz (Law 1, *Tauri.*, no. 207) subscribe to this opinion.

Gregory López. Burgos de Paz.

But this reasoning does not seem to be altogether adequate; since, as I have said in an earlier passage, this custom, in its own way, is acquired by prescription against the prince, and he may be absent or present, and so in respect to him the prescription of this custom ought to require a length of time in proportion to that of a true prescription. Therefore, when the prince is absent, a period of twenty years ought to be necessary.

4. For this reason, other authors think that this distinction ought to apply also in the matter of our present inquiry. This is the view of Sylvester (word *consuetudo*, Qu. 2), and it is recorded by Hostiensis (in *Summa*, on *Decretals*, Bk. I, rubric iv, no. 3). He states in this passage that some of the canonists also held this opinion, and that many jurists take the same view with regard to civil customs; and refers [in particular] to Azo (in *Summa* on rubric of *Code*, VIII. lii). And in the aforesaid *Las Siete Partidas* (Pt. I, tit. II, law 5) this distinction is set down, together with the statement that custom is established through usage by the people during a period of ten or twenty years. On the ground of this law, certain writers hold that at least in Spain—because of this special law—such a distinction must be made. They argue that since the distinction in question is not unsuitable or useless, and does no more than require a custom of ten years in the case of present parties, and twenty years in the case of absent ones, this opinion is tenable, with regard to this part of the matter.

Sylvester.

Whether the distinction above made should apply in the present case.

Azo.

5. Nevertheless, I hold that ten years is in all cases sufficient for a custom to be held as establishing law and as being validated by prescription.

Ten years is a sufficient time for the establishment of a custom.

The first proof is that drawn from the common teaching on this matter, which, not without reason,

omits the use of that distinction in the case of prescriptive custom, although it is invoked in the cases of prescription properly so called. The same teaching I find in our Molina (*De Iustitia*, Tr. II, disp. 77), by comparing that disputation (77) with those that precede it and deal with the time requisite for true prescription in various matters.

Molina.

A second proof is the way in which custom is [in practice] accepted so that no account need be taken of the presence or absence of the prince in order to establish a custom by prescription in opposition to a law, a principle admitted by all. I use the words 'to establish a custom by prescription', because as I say below, the absence or presence of the prince may be of great importance in regard to other effects of non-prescriptive custom, and this, not that it is important in itself, but for the reason that his knowledge of the custom may be more readily and more certainly presumed when he is present than when he is absent.

A third and excellent proof is drawn from this last note. It is not required in custom of the latter sort that it be established by prescription with any reference to the prince, save to the extent that he is ignorant of the custom, or can be supposed to be ignorant of it; therefore, the presence of the prince or his absence is of no importance in settling the question of whether this custom may be established by prescription within such and such a time. For if the prince himself is acquainted with the custom, whether he is present or absent, the prescription is not necessary, as I say below. If, however, he is ignorant thereof, it is of no consequence that he be present, since although he be present in body, he is not so in mind, and hence the prescription will be established in as short a time against an absent person, as against one who is not aware of it, since such a person in either case is absent.

6. One may object that, in regard to a prince who is present, the presumption is that he can more easily have knowledge of a custom, and hence a shorter time ought to be sufficient for his gaining such knowledge. Again, if that proof [set forth above, to which objection is here made,] were valid, it would be more true to say that a period of twenty years is always necessary, since this prescription is always against a person formally absent, that is, against one who is unaware [of the custom].

An objection.

My reply to the first part of the above objection, is that in this kind of prescription attention is to be paid not to the ease or difficulty in the acquisition of knowledge of the custom on the part of the prince, but to the necessity of the common good which is served by the prescription. For it is very expedient for the general welfare that the people observe customs that are reasonable and confirmed by sufficient usage, and to this end it is fitting in the highest degree that such customs have the binding power of law. Prudent men, therefore, realizing this need, hold that a period of ten

The solution.

years is sufficient [to establish a legal custom], irrespective of the presence or absence of the prince.

The ground in reason in this case is that a custom of this sort is of itself adequately confirmed, and the time allowed for its introduction is ample, in any case, for the prince to have knowledge of it, if he wishes to do so; a greater or lesser ease [in his obtaining such knowledge] would seem to be of no importance. And this is the more true because, in the prescription of a custom, the prince is not to be considered as having a will in opposition to the movement, especially with regard to this effect of bringing in an obligation not contrary to his law; he is not, that is, in the situation of the owner of a thing against whom a prescription is acquired. The reason is that the bringing in of this obligation is in no way prejudicial to the prince, nor is it counter to his jurisdiction, since it is an outgrowth of his law and useful for good government. Thus the character of this custom is not that of prescriptions in 832 other subject-matters.

And so we answer the second part of the objection by denying the conclusion. For, since the laws lay down no distinction on this point, but demand only a 'long-continued' custom, the shortest period within the meaning of the phrase 'a long time', is to be understood here. And this for two reasons: because this is the more favourable interpretation and the one to be followed where there is question of the common good; and because, in respect of prescriptive custom, it is only the ignorance of the prince, whether he is absent or present, that is to be taken into account. This is not true of prescription properly so-called, for the same length of time suffices, other things being equal, whether the owner of the thing has knowledge of the usage of the person acquiring the prescriptive right or not.[1]

7. We need not consider at length the views of the authors cited for the opposite opinion. They are, in the first place, relatively few in number; and again, even of these, some authors are probably discussing not legal custom alone but custom in general, as it includes that by which prescriptions are acquired. This, as I have remarked before, is the common practice of jurists. Certainly, it is the practice of Sylvester in his discussion on the word *consuetudo*, and of other summists and jurists—as will be clear to any reader of their works. It is for this reason that they discuss custom under this distinction, and not because they believe it should be applied to every kind of custom, even to custom in regard to moral acts.

The contrary opinion of some Doctors does not affect this reasoning.

Sylvester.

It was in this sense, perhaps, that King Alphonso spoke in law 5 [of *Las Siete Partidas*, Pt. I, tit. II]. But this also bears, as I shall indicate in the next Chapter, another interpretation. Or, if he wished to intro-

[1] [In ordinary prescriptions, however, the consideration of presence or absence of the owner of the thing is important.—Tr.]

duce new law and to approve the opinion of Azo—whose works are said to have been the source of the laws of *Las Siete Partidas*—then that special law was, in my opinion, brought in not by custom, even in Spain [, but by enactment of the king].

8. It remains for us to discuss custom that is not validated by prescription. For sometimes such custom can suffice to establish law; and consequently it is possible that this result may be effected in a shorter period than ten years, in cases where a knowledge of the custom on the part of the prince is present. This was the opinion of Antonio de Butrio (*De Consuetudine*, Chap. xi), St. Antoninus, Sylvester, Angelus de Clavasio and others who agree with him, as we shall see when we discuss a similar question in a following Chapter. For these writers distinguish between a prince who is aware of, and one ignorant of, a line of conduct of the people; and they hold that a shorter time is required when the prince knows of the custom than when the opposite is true. But a custom of ten years is sufficient to establish law, even when the prince has no acquaintance with the custom: hence, a shorter time will suffice for that effect when he has knowledge thereof. But a prescriptive custom is not established in a period shorter than ten years. Hence, a non-prescriptive custom, which is known to the prince, can introduce a rule of law. Thus, we see the occasion when a prescription is required, namely, when the prince is ignorant of the custom; also, when a prescriptive custom is not necessary, that is, when the prince is aware of the custom. The reason for this distinction is that although the laws say that a custom of long standing is sufficient, they never state that one of a shorter period is not sufficient.

Antonio de Butrio. St. Antoninus. Sylvester. Angelus de Clavasio.

And, to take another ground, a custom of a shorter period will, in the nature of things, suffice for this effect, if the prince is aware of the custom. The reason is that under these conditions a custom of shorter duration can reveal adequately the consent of both the prince and the people, as appears evident. Therefore, a non-prescriptive custom may be sufficient, since the sole requirement is that there shall exist adequate evidence of the will of the legislator. And this is the difference that marks these two kinds of custom: that a prescriptive custom establishes a legal rule, not because it is evidence of a fresh consent of the prince, but because it includes all the elements required by law, in which a previous will of the sovereign is included. For it, therefore, no new knowledge of the custom on the part of the prince is called for, nor is the consideration of the possibility of his having such knowledge relevant here. But a non-prescriptive custom can operate only as a token of his will and as a sign of a fresh consent on his part; and this may be given to a custom of shorter duration, of which the prince has knowledge. It is self-evident that there never can be any evidence of such will and consent on the part of a sovereign ignorant of such a custom.

9. But the question may be urged, what period of time under ten years is adequate for the establishment of a custom of this kind? My reply is that a definite term cannot be fixed by any conclusive reasoning, both because the law is silent on this point, and because this signification [of consent]—since it is expressed through facts—depends upon inferences which are not equally valid in the case of all customs. And so the evidence of the prince's consent can be adequately manifested in a shorter period in the case of some customs, than in that of others. For some customs are made up of actions which are repeated more frequently, and are of a character more general and more public than is the case with others; and so, other things being equal, in the case of those customs, the fact of the sovereign's knowledge will be more speedily established, and thus—if he voluntarily tolerates the custom—evidence of his tacit consent is given.

The term of observance for the validation of a custom in less than ten years is not a fixed one.

Again, for establishing a presumption of the prince's consent in such cases, his presence or absence may be factors of great importance: for he is presumed to know what happens in a locality in which he is present, 833 but not what is done in his absence, unless other proofs are available.

Furthermore, for calculating the probabilities in the case of a custom of this kind, certain considerations brought forward in our discussion of judicial acts[1] may be of use. Thus, especially, a decision handed down in favour of a custom, if it be published and confirmed by the sovereign prince, would be fully sufficient evidence of his consent. Indeed, even if that opinion were known as having been given by a judge of a lower court, and were tolerated, it would be of no slight force as evidence.

Evidence of proof of custom.

Likewise, a judicial decision by any prudent judge at all may, of itself, give authority to the custom, since it is possible for the decision to be a just one, in view of a custom that is not prescriptive. The reason is that since the establishment of such a custom does not call for a fixed length of time, but depends rather upon certain probabilities in the situation, a decision in favour of the custom may be given on grounds of prudence and of the probabilities of the case, and so the custom, although it has not been validated by prescription, is held to be adequate [for the bringing in of law], on the ground that it is an adequate indication of the will of the prince and of the people. Whence, although such a decision is in itself not absolutely necessary for the validity of the custom in question—because this validity is itself assumed as the ground of the decision, and is but declared by it, as we have argued above in a similar case—nevertheless, if such a decision has at some time been delivered, it confirms in a high degree the probable validity of the custom. And if it be many times repeated, a strong moral certitude

[1] [See Chap. xi of this Book, *supra*, p. 534 *et seq.*—Tr.]

will exist in favour of the custom, for it will have been greatly confirmed by the testimonies of prudent men.

Finally, we can apply to custom of this sort the opinion of Soto and other writers [*supra*, p. 508], who say that the length of time necessary for the establishment of custom must be determined by the judgment of prudent minds, at least, when it is a question of interpreting the mind of the prince and of the people. The authority of the writers can, therefore, be cited in support of this part of our argument, for they clearly assume that a non-prescriptive custom can have the force of introducing a rule of law.

In what sense the opinion of Soto is to be applied here.

10. One difficulty arises, however, from the foregoing discussion: a custom of fact can never, it would seem, be a satisfactory indication of the will of the prince and of the people. For, as has been said, a custom ought to arise out of an intention to establish consuetudinary law, and such intention can never be sufficiently inferred from a mere repetition of like actions unless that intention is expressly declared, since the same acts could be repeated in the same manner without that intention. It is to be added, as I have noted in my work, *De Religione* [Tr. II, bk. I, chap. v],[1] that even though a custom may have its origin in a devotional practice, that intention can easily be changed later, and the very same actions may be done with a purpose of creating an obligation, even if no change is evident in the actions themselves. This difficulty is more a practical than a speculative one, and it has application as much to a prescriptive as to a non-prescriptive custom.

A doubt.

For a custom will never establish a rule of law by prescription, even if it lasts for a thousand years, unless the frequency of the acts arises from the intention of creating a legal obligation. Indeed, I think that it is even necessary that the custom be observed with that intention during the entire period of ten years, since otherwise, the customary actions cannot be said to concur as an expression of the popular consent essential for establishment of the custom by prescription. By what test, then, is this intention to be recognized?

The acts constituting the custom must be repeated with the intention of establishing law.

11. This question is touched upon by Angelus de Clavasio ([*Summa,*] word *consuetudo*, nos. 4 and 5), and he says in effect, that it must be decided on the basis of the frequency with which the actions are repeated and their number, or the fact that they are of a public character and widely known, and done with the consent of the people. But these tests and others like them do not solve the difficulty, since they may apply not less to a simple custom observed out of a devotional or other voluntary reason, than to one observed with the intention of establishing a binding rule of consuetudinary law.

Angelus de Clavasio.

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

Rochus.

Gloss.

Rochus proposes the same doubt (*De Consuetudine*, Sect. 4, no. 36), when he deals with the seventh requisite for custom, and refers the reader to question 6, after the Gloss, namely, to Sect. 5 from no. 10 onwards. In no. 27 of this Section he again proposes the question clearly, and he says merely that in the case of doubt it must be judged that each person observing the custom is to be held as acting with the intention of introducing a [legal] custom, when he does the act as by right, that is, in the belief that he has the right to act thus in future. But as to when a person acts, as though exercising a right, Rochus says this must be determined from the nature of the acts. Thus, if the acts are of the sort that are usually done out of pure friendship—as dining in the house of a friend—even if they are repeated many times, they are not regarded as done with the intention of establishing a right; the case is otherwise, however, with regard to actions which are wont to postulate a right. For this opinion, Rochus cites many Doctors.

But, in the first place, that rule, this method of interpretation, and these examples, seem to have reference rather to custom in virtue of which a prescriptive right is acquired, than to legal custom. For in the first case, the party observing the custom is presumed, when a doubt is to be settled, to be seeking or exercising his own right, because that right is useful or favourable to himself; but why, in the case of legal custom, is it to be presumed that any one in doubt would wish to establish a rule of consuetudinary law which is burdensome and inconvenient to himself? Again, in the present subject-matter, the nature of the actions cannot be used as a test of the probable intention of the agents; for the same acts are, from their very nature, such as may be performed, either out of devotion, or as a following of a counsel [of perfection], or as the fulfilment of a precept—as are evidently the making of offerings in the church, or fasting, or the observance of feasts [of the Church year], and the like.

Peter of Ravenna.

12. Finally, the same question is propounded by Peter of Ravenna 834
(Tr. *De Consuetudine*, Sect. 1, no. 15). His sole reply is to appeal to

Innocent.

Bartolus.

those points of doctrine concerning the prescription of incorporeal rights, which are treated by Innocent [IV] (on *Decretals*, Bk. I, tit. v, chap. iii, and other places), and by Bartolus and others. All these writers have in mind prescription properly so-called, in which it is easier to discern whether a usage is one of law or simply one of permission, in which, in case of doubt, the party using the prescription is presumed to intend possessing the right of ownership, or of the servitude, or the like. But this does not hold in the matter at present in question—for the reason we have already given.

We must note also that the authors cited treat especially of the proof of a custom in the external forum; we, however, are dealing with

the forum of conscience. In that forum a judgment on a prescription and on its usage is more easily arrived at. The reason is as follows: the one who establishes a prescriptive right is either a private individual, in which case he will be the witness of his own intention, or else some community, in which case the judgment of the conscience rests not upon the community as such, but upon individual members thereof; however, the individuals, in turn, can and ought, in conscience, to presume the right on behalf of the community, as is clear from the reasons we have already given. A legal custom, however, always depends upon the intention of the people as a whole, and individuals are, therefore, not bound to presume an intention of establishing a legal precept; and this because such a precept is not favourable, but burdensome to the community.

A distinction to be noted.

13. I say, then, that it is not easy to judge of the obligation of a precept established through a custom, and that in a case of doubt, other things being equal, it is wiser to incline to the judgment that the custom is observed rather out of devotion, or rectitude, or perfection, than for the purpose of establishing a legal obligation. It is a general rule that, in a case of doubt, no one is presumed as willing to be bound, as I have noted in the treatise on the matter of vows.[1] Again, it is not expedient that precepts be multiplied where they are not morally certain, or at least not highly probable.

When there is a doubt, a custom should be regarded as one of devotion, or of rectitude, rather than as a legally binding rule.

I note further that judgment as to the manner of introduction of a custom, and the intention with which it has been introduced, must be left to the discretion of prudent minds; and that no more definite rule can be laid down here, since the law makes no disposition in this matter, and the subject is in itself elusive and obscure, as the difficulty we have just discussed shows.

The mode and intention with which a custom has been established is to be left to the judgment of a prudent man.

However, in any inquiry as to the intention with which a custom is established, the following criteria will be of assistance.

First criterion.

First, if the custom is of long standing, and has to do with matters onerous and difficult, and if, finally, the custom is observed by the major part of the people—since the people do not commonly agree in the performance of acts of this sort save when they feel an obligation to do so—we have sound evidence that the people then are led [to act as they do] from a sense of obligation that is already established or is being established by it.

Second criterion.

Secondly, if prudent and conscientious men think ill of those who do not observe the custom, or if the people generally are scandalized at non-observance of it, we have

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

another strong indication of an intention on the part of the people to introduce consuetudinary law.

Third criterion.

Thirdly, if the prelates or the governors of the realm gravely censure and punish those who do not follow the custom, that also is no slight indication.

Fourth criterion.

Fourthly, if the subject-matter of the custom is evidently of itself of such advantage to the state that it may be prudently held that the binding force of the custom is highly expedient for the general welfare, the presumption is admissible, in a case of doubt, that the custom has been deliberately introduced.

CHAPTER XVI

CONCERNING THE CAUSES AND EFFECTS OF UNWRITTEN LAW INTRODUCED THROUGH CUSTOM

1. Reference to the principles that we have already set forth in our discussion of written human laws makes lengthy treatment of our present question unnecessary. For it is clear from what we said there that, generally speaking, everything which has been set forth concerning the causes and effects of human law, holds, in due proportion, for law introduced through custom, with the exception of such assertions as touch upon the material or sensible form of the law, and its promulgation. The reason for this qualification is evident, since this consuetudinary law of which we are speaking is not essentially different from written law, and is so only in the kind of outward expression by which in it the will of the legislator is manifested—which expression I call the sensible form of that law. For in law, strictly so called, the will of the legislator is given outward expression in some form of writing, or, at least in an express statement made by him; in consuetudinary law, however, neither a written nor an oral expression of that sort has place, rather it is manifested in the form of external acts, as has been explained.

It is for this reason that in the case of law [strictly so called] in addition to the enactment of the law by the legislator, its promulgation is required; for the enactment of the law is not in itself a public expression unless knowledge of it is spread abroad. A custom, on the other hand, is itself an outward expression, of its very nature public,

Custom, as a public token, is its own promulgation.

and known to the people observing it; and hence it does not need any other promulgation. The reason is, as I shall point out more fully in a moment, that a custom binds only a people which makes use of it, and so there is no necessity for any other promulgation or publication. For in order that a custom be extended to other peoples, it is necessary that they

adopt and copy it; and thus, this imitation will effect among them the introduction of a like custom and promulgation. If, however, one people adopt the custom of another people, not through a custom of its own creation, but through a statute directing the observance among them of a custom practised elsewhere, their law will then be not consuetudinary, but written law, and will, as such, require its own form and promulgation.

But in the other causes [that are essential for law], when due proportion has been observed, there is no difference between these laws [, i.e. written and consuetudinary], since, as I have said, their subject-matter should be morally good, adapted to the public weal, and finally, reasonable. And thus it is clear that reason is (as it were) the soul of both kinds of law, and that both are chiefly dependent upon the will of the prince who possesses the power of legislation; a power which is, in the case of each kind of law, the true efficient cause, as the will [of the prince] is (so to speak) the substantial form.[1]

2. In the same way, we can deal with the effects [of consuetudinary

The effects of custom may be inferred from the foregoing discussion.

law]. For custom is, of its own virtue, binding in conscience, since it is true law (*Decretum*, Pt. I, dist. XI, can. vii). This is the common teaching of the Doctors, as may be seen in Felinus (on *Decretals*, Bk. IV, tit. I, chap. i [, no. 18]) and in Rochus (*De Consuetudine*, Sect. I, nos. 12 and 13), who cites other authorities. So also the obligation of the law of custom will be serious or light according to the character of the subject-matter, unless the will of the people to the contrary is manifest on this point; for, in this respect, all the principles that have been set forth on the obligation of human law in written form can be applied as well to legal custom, since they have—with due proportion—the same bearing upon it.

Felinus. Rochus.

3. But the question may here be asked, whether consuetudinary

Custom can establish penal law.

law can be binding under a penal sanction, that is, whether it is possible for a custom to establish a penal law. This question can be briefly answered in the affirmative, since what holds true of law in general, holds true of a penal law as well. For what absurdity in reason can be shown in the possibility of a custom binding under a [physical] penalty as well as under [the moral one of] guilt? Indeed, by the very fact that it binds under penalty, it makes the transgressor of the custom liable to penalty; for this liability follows naturally from the guilt. So, for a like reason, determination of the punishment might be established by the same custom; as, for example, that whoever should violate the custom in question could be punished in a certain manner. Thus, the penalty would be just, being fixed (as it were) by the law of custom.

[1] [That by which a thing is what it is.—Tr.]

Innocent. Abbas.

An example in point is at hand in the *Decretals* (Bk. IV, tit. XI, chap. iii), and in the commentaries of Innocent, Abbas [, i.e. Panormitanus], and others on that Chapter. They are there discussing a custom in which one or another non-essential usage in the ritual of the Sacrament of matrimony is observed, and according to which those who have been married otherwise [i.e., without fulfilling the rite] are to be separated for a time as a punishment for their previous departure from the customary rite. These authorities hold that this custom is in both respects a just one, and therefore to be observed.

Likewise, a custom may, not less than the written law, fix the price of some article of merchandise; hence, it may also fix a penalty for a crime. This is the general teaching of writers on penal custom, as may be seen in Rochus (*De Consuetudine*, Sect. 4, nos. 20 *et seq.*), where he cites many others.

A custom can establish a purely penal law.

Again, it is my opinion that custom can establish a law of a purely penal character (as it were) by reason of which anyone not observing it may be subject to some punishment, even if no guilt is contracted from his act. On this point, the same reasoning holds for custom as for written law. In that case, however, this sort of custom would seem to be a kind of prescription rather than a law; it would seem, that is, to be rather a kind of tribute which the state or the prince has, through custom, acquired the right to demand under certain conditions.

It could, finally, be established by a custom that whoever did not observe it should be bound in conscience to make reparation, even though no punishment followed, and thus the true character of legal custom would be preserved. Such customs, however, rarely or never occur.

Sánchez.

4. The question is also raised frequently, whether consuetudinary law can extend to the effect of invalidating a certain act or contract, or of rendering individuals incompetent for the performance of such acts. This question is usually treated more explicitly in connexion with the matter of matrimony, as Sánchez shows at length ([*De Sancto Matrimonii Sacramento*,] Bk. VII, disp. iv). The principles, however, there given are nearly the same as those that apply to other forms of contract, as Felinus points out (on *Decretals*, Bk. IV, tit. I, chap. i, nos. 2 and 3).

What is the force of custom in respect of the validity of a contract?

Hence, we assert that a custom forbidding certain actions or giving [legal] form thereto, can be introduced with the intention and will that acts done otherwise shall not be valid, and that such a custom, if it be reasonable and be secured by prescription or have the express or tacit approval of the prince, shall have the effect of voiding such a contrary act.

This is the teaching of many Doctors, to whom Felinus and Sánchez refer in the passages above cited, and it is founded upon the *Decretals* (Bk. IV, tit. XI, chap. iii), where (according to the plain
836 context and the truer interpretation) it is assumed that an ecclesiastical custom can introduce a diriment[1] matrimonial impediment, and that those who have contracted a marriage in defiance of the custom are on all accounts to be separated. The same inference is to be drawn from Chapter One of the same Title where [for this effect of a diriment impediment] a custom is specially postulated that would cause scandal, that is to say, the violation of which would cause scandal, and this additional [characteristic] is particularly noted and required by the canonists. But, if the custom be of the sort that introduces a diriment impediment to a marriage, the violation of it cannot but give rise to scandal, and thus scandal is invoked as an indication that such a custom obtains.

An opinion of the canonists is rejected.

I disapprove, therefore, of the assertion of certain canonists, that in the foregoing and in similar cases this effect arises more from the necessity of avoiding scandal than from [the legal force of] the custom. For true marriages are not dissolved in order to avoid scandal, nor could the circumstance of scandal void a marriage, unless an impediment were assumed, or a voiding law had been introduced by custom.

Gloss. Gloss.

5. A similar inference can be drawn from the *Decretals* (Bk. III, tit. III, chap. vi), together with the Gloss on the word *repugnet* which notes from the text of the law that a person otherwise eligible[2] might through custom become ineligible. Thus also the Gloss (on *Authentica*, XLVIII, collection v, tit. 3, chap. i, no. 1, word *auctore* [on *Novels*, XLVII, chap. i, no. 1]) states that by that law the custom can establish what is to be the essential form of the contract, so that its non-observance invalidates the contract. This opinion is followed by other writers, who are mentioned by Felinus (referred to above) and also by Rochus (*De Consuetudine*, Chap. xi, sect. 1, no. 10). Other passages are cited by Antonio Gabrieli ([*Communes Conclusiones*,] Bk. VI, tit. *De Consuetudine*, Concl. 3, especially to no. 4 [no. 8]).

Felinus. Rochus. Antonio Gabrieli.

The proof from reason for this assertion is that a custom which is reasonable and prescriptive has all those other effects which human law can have. Therefore, it has this effect also; since no probable reason can be brought forward why custom should not be able to have this effect when it can have the others. For just as the will of the prince verbally expressed can produce this effect, so also can his will tacitly expressed through custom, as is clear from the reason given in

[1] [A diriment matrimonial impediment in the canon law is one which makes an attempted marriage wholly void.—Tr.]
[2] [For *aliquam* read *aliquem*.—Reviser.]

the *Digest* (I. iii. 32). In like manner, we can apply here all the laws that speak in a general way of the force of custom and compare it with written law; as does the law referred to above (*Decretals*, Bk. I, tit. IV, chap. xi) in an especially clear manner, as Sánchez rightly proves in the passage cited above. For a fuller discussion of the details of this point, Sánchez's work may be consulted. There remains, then, no difficulty of any weight which demands our attention here.

Sánchez.

6. Furthermore, custom is assimilated to law in its effect in respect of the persons whom it can bind by its rule: for just as a law is binding upon those subject to it, so also is custom; and just as a law is not in force outside the territory for which it was enacted, so neither is custom [binding except on those for whom it was introduced]. Whence, if a custom is a universal one of the whole Church, it binds all Christians without distinction; if a custom is that of a single realm or diocese, all dwelling there are bound by it; if it is that of a city, all the citizens, and they alone, are held to its observance: the same is true in due measure of other communities. For it is a general rule that a custom of one community is not binding upon another distinct from it, for the reason that one community has not the power to give law to another, nor does the sovereign give consent thereto.

In what way a custom is to be assimilated to law.

So true is this, that even a custom of the city or of the diocese of Rome, regarded as Roman, that is, the custom of a particular diocese, is not binding upon other churches, because, as such, the Roman diocese does not act as their superior, except when the Pope commands that the [Roman] custom in question be elsewhere observed. This is also evident from usage, and is noted by Panormitanus (on *Decretals*, Bk. II, tit. IX, chap. v, at the end), and by Torquemada (on *Decretum*, Pt. I, dist. XI, can. iii), and by Rochus (*De Consuetudine*, Sect. 4, no. 18), who cites other examples.

Panormitanus. Torquemada. Rochus.

7. An objection can, however, be advanced against our thesis from the words of *Decretals*, Bk. IV, tit. XI, chap. iii, in which a certain bishop is ordered, 'to make inquiry about a custom of his metropolitan church, and of other churches in his neighbourhood, and diligently to imitate the same.' It might be concluded from these words that a custom of one diocese is binding in another, and especially that the custom of the metropolitan church is binding in suffragan sees. The reason given in the law is that it is a serious matter to contemn an ancient custom of the churches of a locality.

An objection.

My reply is that this law involves two questions. One is, whether the custom of the metropolitan church must be observed in suffragan churches. On this question it is certain, in the first place, that if a contrary custom is in force in a certain diocese, then that custom is to prevail, as all agree, since it

Solution.

prevails also over the common law, as we shall point out in the following Chapter.

The other is that if a particular diocese follows no custom of its own, then the evident conclusion from the above-cited law is that the custom of the metropolitan see should be observed in that diocese. And this conclusion can be based upon another principle, one accepted by many canonists, namely, that a custom of a city is binding upon
837 subject towns that lie within its territories, if those towns have no customs of their own. This is the opinion of Bartolus (on *Code*, VIII. lii. 2, in *Repetit.* 2, qu. 36, no. 41), of Antonio de Butrio (*De Consuetudine*, Chap. xi)[1] and of Rochus (*ibid.*, Sect. 4, no. 17), who cites the authority of numerous other writers.

Bartolus. Antonio de Butrio.

8.[2] But this may perhaps be the rule, in the case where a city can bind by its own municipal statutes neighbouring towns which are under its immediate jurisdiction. However, there is no parity between the relation of such a city and town and that of a metropolitan and suffragan church, for a relation of such subordination and immediate jurisdiction does not prevail between the latter.

Whence, just as the statutes enacted by the archbishop for his own diocese are not binding in the sees of his suffragans, so neither does the custom [of the metropolitan see] bind those of the suffragan bishops. It is my opinion, therefore, that the law is to be held as applying to a custom that has been in observance throughout a province, but is not known in a particular diocese of it, for the reason, possibly, that no case has come up to bring to light a practice either in conformity with or contrary to that custom. For it is in such a case, the Pope says, that it is necessary to consult the bishops of the neighbouring dioceses, and especially the metropolitan, and to follow their custom—when, that is, they observe the custom as a general one of the whole province, and not as one that is followed as peculiar to their respective dioceses.

Just as the special statutes of an archbishop do not bind the suffragan bishops, so neither do the customs of the archiepiscopal see.

9. From these observations are to be drawn the answers to the questions treated at length by Bartolus (on *Code*, VIII. lii. 2, *in Repetit.*, last qu.) and Rochus (*De Consuetudine*, Sects. 8 and 9), concerning the persons who fall under the obligation of custom: whether, for instance, it binds a prince or a sovereign senate; or, whether the custom of the city or of the territory binds strangers; or, whether a custom of a state is binding upon its citizens outside its territory. But in these and similar questions, the same rule prevails as holds good in the case of written laws and statutes, on account of the fundamental reason adduced, namely, that the custom with which

Bartolus. Rochus.

What persons are bound by a custom.

[1] [For *de Const.* read *de Consuetudine*.—Tr.]
[2] [In the Latin text there is an error in the numbering of the sections for the rest of this Chapter.—Tr.]

we are dealing is true law, emanating from the same authority and jurisdiction, differing from law only in its form, which does not change the binding character of custom in any of these cases. So all the principles which we have laid down with respect to human law on all these points are to be held as applying to custom also. The reader who wishes to inquire into these matters in greater detail may consult the authorities referred to above, and Gregory López ([on *Las Siete Partidas*,] Pt. I, tit. i, law 16, gloss 1 [*glossa* b]), Antonio Gabrieli ([*Communes Conclusiones*,] tr. *De Consuetudine*, Bk. VI, concls. 1 and 2), and others to whom those writers refer. I, also, have dealt with this matter in my work *De Religione* (Tom. I, tract. II, bk. II, chaps. xiii and xiv).[1]

Gregory López. Gloss. Antonio Gabrieli.

10. I shall mention, only briefly, a certain question discussed by every writer on this subject, namely, whether a custom of the laity is binding upon clerics. I shall not rehearse the various opinions of the writers on this point. The opinion commonly held by the canonists is that a custom followed solely among the laity is not binding upon clerics. The reason is that the two form distinct bodies and the clerical is the more eminent community. Again, the clergy are entirely exempt from the authority of laymen.

A custom of laymen does not bind clerics.

In the case, however, of a mixed custom, one observed both by clerics and laymen, it will be binding upon the clergy, since they have themselves given consent to the custom: they are bound, therefore, not by a lay custom, but by one of their own. This doctrine Rochus sets forth at some length (*De Consuetudine*, Chap. xi, sect. 8, nos. 54 and 65), where he proposes various extensions and limitations of this principle, and introduces many examples of it. Felinus touches upon this matter in two passages (on *Decretals*, Bk. I, tit. II, chap. x, nos. 100 *et seq.*, and Bk. II, tit. xix, chap. xii, no. 3), and Abbas [, i.e. Panormitanus] (on *Decretals*, *ibid.*, no. 3 [no. 1]) and Alberico de Rosate (tr. *De Statutis*, Pt. II, qu. ix) have also treated of it.

A mixed custom is one that is binding both upon the clergy and upon the laity.

Rochus.

Felinus.

11. It must be noted, however, that since custom chiefly emanates as law not from the people who observe it, but from the prince who gives his consent to it, it is more important to inquire by what power it has been confirmed and stabilized in its legal character, than to inquire into the position of the persons observing it. For the will of the prince or the prelate is the essential cause, that of the people is a motivating cause: the means of effecting and the petition for the consuetudinary law. The answer to the question whether a custom is binding upon clerics, will, therefore, depend very much upon whether it has been confirmed by a prelate of the Church, or by a secular prince. From which authority the custom came into being, can best be determined by a scrutiny

We must observe whose will it is that introduces custom.

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

of the subject-matter and purpose of the custom, as we have said before. The subject-matter, therefore, of the custom must be examined to determine whether it is spiritual or temporal, and whether it promotes the salvation of souls and the worship of God, or the ends of secular government. The answer to our present question will, I think, be drawn more successfully from a consideration of the authority from which the custom emanates, of its subject-matter, and of its purpose, than from any inquiry as to the persons who make use of the custom; although this latter consideration may be of some assistance also.

12. I conclude, then, that if the subject-matter is civil or political, and if it derives its force from the consent of a temporal prince, it is not, strictly speaking, binding upon the clergy; unless, that is, its character is such as not to be opposed to the liberties of the Church, and it relates to the common association of the citizens as such. Under those circumstances, the same opinion is to be adopted on the obligation of the custom as that which we said in an earlier passage would hold of a written civil law. For this assertion is based upon the principles set forth in that earlier passage[1] in which we discussed [the status of the clergy in] civil law: such a custom is, in a word, a civil one, and establishes civil law. The first part of this assertion needs no proof, since a lay prince cannot bind clerics through the exercise of his express will: he cannot, therefore, do so by his tacit will. Again, the clerics themselves cannot give a consent in opposition to their own immunity; and a prelate of the Church is not considered to give such consent. The truth of the second part of this assertion is evident from our earlier discussion of the written law: for the reasoning that is valid on that point is applicable to a custom by which clerics are affected not as clerics, but only as citizens. Such a custom is to be regarded in the same way as a written law would be.

First conclusion.

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But if the subject-matter of the custom is of a mixed character, that is, if it pertains to both the civil and the ecclesiastical politics, and if the custom is observed in common by the members of each status or body, then there will prevail two customs (so to speak) and in reality two laws: one civil, having its force from the consent of the lay prince; the other ecclesiastical, having its force from the consent of the prelate of the Church; and each will be binding upon its own subjects, and one can be revoked independently of the other.

Finally, if the subject-matter of the custom is spiritual, and tends to the welfare of souls, as fasting, &c., it will be really a single custom, and will be binding upon both clerics and laymen, since it depends wholly upon the authority and consent of the prelate of the Church. In this case, the subjects of the

When a custom is binding upon clerics.

[1] [*Vide* Chap. xxxiv of Bk. III, *De Legibus*, not included in these *Selections*.—Tr.]

custom are considered not as clerics or laymen, but as Christians, without respect to status.

13. It may, again, be asked whether by a similar spiritual custom (so to speak), a usage of the laity only can establish a custom which is also binding upon the clergy. For, according to a rule of the above-cited jurists, the answer must be in the negative; and among the theologians, de la Palu ([on the *Sentences*,] Bk. IV, dist. xv, qu. 4, art. 3) repeats this denial. They base it first upon the ground that clerics follow their own rule of life, as, for example, their own practices with regard to abstinence; and again, upon the ground that clerics have a status similar (as it were) to senators, who are not bound by decrees of the commonalty unless they assent to such decrees; and finally, upon the ground that the monks are not bound by the customs of the secular clergy—notwithstanding that the customs of the latter are holy and religious—and as monks are to the secular clergy, so are the secular clerics to the laymen.

de la Palu.

But these reasons are not convincing to me, because the law resulting from a custom of this kind is episcopal law, since it derives its force from the tacit consent of a prelate, and its subject-matter is, of its nature, common both to the clergy and to the laity. Thus, in public fasts, and in the keeping of feasts, the secular clergy do not follow any special legal observances. This fact destroys the force of the first argument given above. The second also lacks force, because no analogy can properly be drawn between such a custom and a decree of the commonalty, for the latter emanates from the people, through their own tribunals, but the law of such custom as we are discussing proceeds from a prelate who is the common superior of both clerics and laymen. The third reason also is not valid, because the secular clergy are not exempt from the jurisdiction of the bishops, as are the religious orders. And with respect to such orders, the question [of their obligation] may be raised, a question which, as it is derived from their exemption, presents the same difficulty in the case of custom, as it does in the case of synodal decrees, which we have already treated.

14. Therefore, I conclude that the obligation arising from a custom of this sort can be extended to the clergy, and that in fact it is so extended, if it is the bishop's will, either tacit or explicit, to establish it as an episcopal law for his diocese. This, without doubt, is within the power of the bishop; and he is to be presumed to have done so when the subject-matter of the custom is, of its nature, common to all, and so equally useful and easy for all concerned that it would be impossible to impose the obligation upon part of the community, and not upon the whole of it, without creating scandal. This is especially true when this obligation is imposed at the request of the entire body of the laity, who, in relation to this custom,

Second conclusion.

are considered, as I have said, not as laymen, but as Christians; and accordingly, they can outnumber the clergy, and, with the bishop's consent, they can bring in a custom that is binding on the clergy, as well as on themselves.

Sometimes, however, a custom may be more properly that of the laity [than of the clergy], either because of the means by which it has been introduced—as, for example, by a special vow made by them, or because of the character of the subject-matter, which is fitted more for them than for the clergy—and in that case the custom will easily be obligatory on them without being such for the clergy, and can also, as such, receive the approval of superiors. And this is to be discerned from the usage itself and from the circumstances.

15. Another question which is treated by the aforesaid jurists relates to the effect of custom; namely, whether this obligation of custom is capable of extension from one case to another, on account of the similarity of the reasons involved. The jurists declare almost generally that an extension of this sort is to be allowed, although later they multiply various explanations and limitations, as may be seen in Rochus Curtius (*De Consuetudine*, Sect. 4, near the beginning), and in Burgos de Paz (Law 1, *Tauri.*, no. 51). Nevertheless, this extension is, in my
839 opinion, of rare occurrence. In the first place, a wider extension is not possible with a legal custom than with a law, since the force of a legal custom with respect to the obligation it establishes is not greater than that of written law—the peculiarities of both kinds of law having been taken into account—as is clear from the previous discussion. I may add, further, that an extension is more difficult of accomplishment in the case of a custom than in that of a written law. This is so because, in the first place, a law is extended for the most part by broadening the effect of its language, according to the meaning and usage which its words have in legal application generally in relation to such and such subject-matter. Whence, since words are lacking to a custom, this mode of extension can have no place, and therefore consuetudinary law cannot be extended in this fashion as written law can be. In the second place, I have, in previous Chapters, observed that this kind of extension is rarely to be admitted, even in the case of written law, unless there is very solid legal ground for so doing. I can only add the further note that in the case of custom it is much more difficult, and for that reason it is of rarest occurrence. For a legal obligation deriving its force from custom alone can be determined only with the greatest difficulty in respect of the locality, of the people concerned, or of the particular subject-matter with which it deals; in what way, then, is it to be easily extended to new localities, persons, subject-matters, except where these are so similar to the old

Of the extension of custom from one case to another, similar one.

Rochus.

Burgos de Paz.

as to be practically identical, or when the extension is made by law; or unless it is reasonably judged that the new is *a fortiori* included in the old, or, as it were, the part is included in the whole? Thus, in the *Code* (VIII. lii (liii). 1), it is stated that 'the governor of a province, having attested by inquiries those practices which have been commonly followed in the city in the same kind of legal controversies, is, having heard the case, to decide . . . &c.' For I consider that that phrase 'in the same' (*in eodem*) signifies 'in identical', and accordingly, I assert that there should be so great a similarity [in the second case to the first,] as to make the two practically identical. Other observations on this point, can be seen in Chapter Two of the preceding Book.[1]

CHAPTER XVII

CAN CUSTOM INTERPRET LAW?

1. This interpretation is the second principal effect which the laws grant to custom. It is, however, an effect of that custom which is in accordance with law; for custom which is outside law does not assume the existence of a law to be interpreted; and custom which is opposed to law, rather derogates therefrom. Hence only a custom which is in accordance with law can interpret it.

The reason for this effect is as follows: for the interpretation of a law already in existence, no authority of greater force or clearer expression of intention is requisite, than that which is needed for the introduction of a new law. All the reasons given in the preceding Chapter apply, therefore, with still greater force to this present effect. The laws are clear on this point (*Decretals*, Bk. I, tit. IV, chap. viii; *Digest*, I. iii. 23, 37).

First mode in which custom can interpret law.

2. In order, however, that this assertion may be amplified and be confirmed with reasons, I observe that a custom can avail for the interpretation of law in two ways; in one way, as a sign or witness thereof, since, so used, a custom in regard to the observance of law testifies that the custom expresses the mind of the lawmaker, and that it has been received as such, and in no other way, since laws are composed of customary usage, according to Isidore as cited in the *Decretum* (Pt. I, dist. I, chap. i). Isidore.

In this character, however, a custom cannot furnish a certain and infallible interpretation, since interpretation by custom is no more than human conjecture; but it affords a high probability, and so it is of much assistance in theoretical interpretation; and the more widely spread the custom is and the longer it has endured, the more probable will be the conjecture it furnishes. However, no certain criterion can

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

be fixed for assisting judgment in these matters; decision must be left to the discretion of a prudent mind.

We may add, however, that not only the custom which is concerned with the observance of a law itself after its enactment, but also that which existed prior to its enactment, may be of great assistance in understanding the meaning of that law. Hence, what is stated in the above-cited law (*Digest*, I. iii. 37), namely: 'If there is a question concerning the interpretation of a written law, the first point to be examined is what general rule of law the city formerly applied in cases of this character', can be properly understood as having reference not only to a custom which is subsequent to the law in question, but also to one preceding it. Since, as Isidore holds, and this is cited in *Decretum*, Pt. I, dist. IV, chap. ii, law ought to be framed in harmony with the custom of the country, we can, by referring to the ancient customs of a city, arrive at a probable conjecture as to the sense of the law at the time of its enactment. It is, then, in this sense that the Doctors frequently speak when they say that a law is to be interpreted according to the custom of the locality, even though such interpretation should necessitate some forcing of the strict meaning of the words of the law, because the law must be adapted to the customs of the men [who are bound by it]. This doctrine is stated at length in the Gloss (on *Decretals*, Bk. I, tit. III, chap. xxviii), by Bartolus (on *Digest*, I. i. 9), and also by Panormitanus (on *Decretals*, Bk. III, tit. XXVIII, chap. ix, no. 2).

3. Custom can interpret law in another way—as a cause both of
840 the introduction and settling of such interpretation, and also of the binding force of the law as thus interpreted. The Doctors, cited above, frequently lay down this doctrine, as do others also, to whom Mascardi refers (*De Probationibus*, Vol. II, concl. 1045 in its entirety), and whom he follows. The same is clearly set forth in the *Digest*, I. iii. 38: 'In ambiguities which develop out of existing laws, custom or the attestation of matters which have always been adjudicated in a similar way shall have the force of law.' Hence, just as we have said in an earlier passage that an interpretation made by a law is an authentic one by reason of the efficacy of such law in establishing that interpretation, so the same [in like circumstances] is to be said of custom which has developed to the point at which it obtains the force of law. This is, then, the true reason for that assertion, namely, that since a custom is effective in securing the establishment of law, it can also, for that reason, interpret a law efficaciously, and can do so in the way in which other laws do. Whatever, then, is necessary that a custom may have legal force, is equally necessary that it may interpret law in this way. What we have said above concerning these matters is, therefore, sufficient. Mascardi.

4. At this point, I shall merely note that the Gloss (on *Digest*, I. iii. 38, word *perpetuo*), concludes from the word *perpetua* in the law,

that a period of ten years must elapse, in order that a custom may possess the efficacy of which we have been speaking. The attentive reader will, however, note that the law just cited contains two members. One is 'custom'; the other is 'decisions of judges': and the word *perpetuo* is not attached to the first member—the word 'custom' is used without qualification; but the word *perpetuo* is attached to the second member, in order to make it clear that not simply any decisions will have this force, but only such as have always been concordant. For this reason, no note as to time is set down in the law for the first member; by the general rules [of interpretation] we are to understand the law as referring to custom validated by legal prescription. The word *perpetuo* attached to the second phrase does not signify a number of years, but a perpetual agreement in decisions; that is, that there has been in the decisions handed down on that matter no mutual variation or contradiction; this is the plain meaning of these words in common usage.

An observation of the Gloss.

What number of such decisions is enough, is not stated in the law, but it can be gathered from what has been said on this point in earlier passages. In principle, the decisions have this efficacy to the extent that they are able to establish custom. So that, if there has been but one, or a smaller number than is sufficient to establish a legitimate custom, then they might establish a probable argument [in favour of the interpretation], but one lacking legal force. Hence, I have often said that a judicial interpretation (so to speak) is reducible to a customary one, that is, to custom. For the decisions handed down by the courts are most of all effectual in that they are received and approved by the common consent of the people. This has been noted by Bartolus and other writers in passages which are frequently cited.

5. In the light of these considerations, we must understand the opinion of many writers, expounded as follows: custom is of such moment in the interpretation of law, that, even though it may not be clear from the words or the subject-matter of a law, whether or not the law contains a precept binding under pain of mortal sin, and should therefore, *per se*, be given the more favourable interpretation; nevertheless, if it is clear that a custom [growing out of the observance of the law] has been received as binding under grave obligation, the law is to be held as binding under pain of mortal sin. This is the opinion of Sylvester (word *praeceptum*, no. 2, at end), and that held by Cajetan (on II.-II, qu. 186, art. 9, ad 2, and qu. 147, art. 3, ad 2) in a passage treating in particular of the precept of fasting. Navarrus lays down the same doctrine in [*Enchiridion*,] Chap. xxi, no. 11.

The force of custom in the interpretation of law.

Sylvester. Cajetan. Navarrus.

On the same principle, a custom can interpret the word *praecipiendi* (commanding), a term under which a law is enacted, as signifying a serious obligation. Sylvester and Cajetan, in the passages just cited, call attention to this doctrine from the *Constitutions* of Clement (Bk. V, tit. xi, chap. i, § *Item ordo*). The Gloss on that passage makes the same observation.

Clement. Gloss.

The reason is that the lawmaker is presumed to employ words according to their common usage. Consequently, I hold conversely that, even though the words and subject-matter of the precept may seem to be such as to make it binding under pain of mortal sin, yet if the custom has interpreted the law otherwise, then it is binding only under pain of venial sin—as Cajetan also has observed. The underlying principle is the same in both these cases. For just as custom is able to introduce law, so it is also able to derogate from law, and this the more so, since the words and the matter of the law can scarcely be [always] so clear as not to leave some ambiguity and room for interpretation. This interpretation, therefore, custom can establish in both ways, namely, in a rigorous or in a gentle sense; but in order to do this efficaciously, it must, as has been said, possess the conditions necessary for the introduction or abrogation of law.

6. I add also that it is possible for a custom to interpret not only human law, but divine and natural law as well, as all the Doctors cited above teach. Nevertheless, with these latter kinds of law, the interpretation is effected in a different manner, since custom can interpret human law by restricting or enlarging its scope—as is clear from our remarks in the previous Chapter, and as will be clear from those which
841 will follow in the succeeding Chapters. Custom interprets divine law, however, only by indicating the intention of the lawgiver; and so, for this interpretation to be certain, the custom must be one that is observed as a tradition of the Universal Church, or one that has had the approval of the Popes.

Custom can interpret not only human law, but also divine and natural law.

Finally, it may be added that a custom can interpret not only written law, but itself also, as is clear from what has been said. The custom can do so because it also manifests the intention of those making use of it, although the custom itself is also to be interpreted by reason, as Rochus notes (*De Consuetudine*, Sect. 4, no. 23) from Baldus (on *Code*, VI. xxviii. 4, at the beginning); and this is evident in the nature of things.

Custom can also be self-interpreting.

Rochus. Baldus.

CHAPTER XVIII

CAN CUSTOM ABROGATE HUMAN LAW?

1. The reason for doubting that custom can abrogate civil law is based upon the rule laid down by the *Digest* (XLVII. xii. 3, § 5); namely,

that a municipal statute which has been enacted subsequent to a civil law, and contrary thereto, does not derogate from it. From this it is concluded that the same must be said of a custom, because the two are judged by identical standards.

On the abrogation of law through custom.

Again, an argument of the same tenor might be drawn from the *Code* (VIII. lii (liii). 2), where it is explicitly stated that, although the authority of custom is great, yet it is not such as 'to overcome either reason or law'. It is clear that the jurist must necessarily be speaking here of human law, for natural law is referred to in the first member of the phrase, wherein it is said that custom does not prevail over reason. The same doctrine is also found in the *Decretum* (Pt. I, dist. xi, can. iv), where there are many similar decrees. It is in accord also with that set forth in the *Decretals* (Bk. II, tit. xxvii, chap. viii), which states that, 'although the authority of usage or custom is of no small moment, yet it is never prejudicial to the truth or to law.'

The third and principal reason for doubting the power of custom to abrogate law is that a custom can have no force unless it is reasonable, as is stated in the *Decretals* (Bk. I, tit. iv, chap. xi), and as we have demonstrated above. But a custom, in opposition to law, cannot be reasonable: both because, by the very fact that it is contrary to law, it is against reason; and again because the actions done in pursuance of that custom deviate from right order and cannot work to the favour of those who offend, nor liberate them from the yoke of the law. For these reasons, Hostiensis (on *Decretals*, Bk. I, tit. xxxiv, chap. i [, rubric iv, no. 11])[1] held that a true preceptive law cannot be abrogated by desuetude. But in holding this opinion he stands alone; and he himself departs from it at times.

Hostiensis.

2. Notwithstanding the above arguments, the rule is certain that human law, whether canonical or civil, can be abrogated by custom. On this point, all the Doctors are agreed: the theologians, including St. Thomas (I.–II, qu. 97, art. 3); the canonists in their notes on (*De Consuetudine*, Chap. xi)—among them Hostiensis (in *Summa* on that same Chapter); the jurists (on *Digest*, I. iii. 32, and on *Code*, VIII. lii. 1 and 2); and the summists (word *consuetudo*).

Human law, whether canonical or civil, can be abrogated by custom.

St. Thomas.

Hostiensis.

With regard to the point [whether canon law can be abrogated by custom the rule] is expressly stated in the *Decretals* (Bk. I, tit. iv, chap. xi). Together with the other general principles there set forth, it is laid down that an ancient custom is to be observed, which rule I cited in a preceding Chapter. The same is expressed in the case of civil law in the *Digest* (I. iii. 32, at the end): 'it is most correctly

[1] [The reference to the Rubric *De Treuga et Pace* should be to the Rubric *De Consuetudine* (*Decretals*, Bk. I, tit. iv).—Reviser.]

admitted that not only by the decision of the lawmaker, but by the tacit consent of all, laws may be abrogated through desuetude.' The same principle is embodied in the law of our kingdom (in *Las Siete Partidas*, Pt. I, tit. ii, laws 3 and 5).

The proof of our assertion drawn from reason is the same as that which we developed in proof of an assertion in a preceding Chapter, touching another effect of custom. It is this, that the people do not lack the power to effect the abrogation of law, if the power is explained as it ought to be, and if their will is sufficiently made known by means of the custom itself; hence, nothing is lacking to custom for bringing about this effect.

3. And first of all, as to the power of the people to effect such abrogation, no difficulty arises with respect to the civil laws of democratic peoples who recognize no superior. This is clear from the principles demonstrated in Chapter xvi; for they apply in our present question also.

A difficulty arises, however, with respect to the civil laws of sovereign princes, and to the canon laws. This difficulty may be met in two ways. First, by saying that these laws are enacted not unconditionally, but with the tacit proviso that the people wish to retain them in force. Such a condition may be understood as present in these laws, either because the prince lacks the power to coerce his people beyond this point by means of his own laws—as some writers hold, at least concerning those legislators who are the source of civil laws; or for the reason that out of his benignity the sovereign has not the will to bind his subjects save under such a limitation—as some believe to be the case even with the canon laws. Consequently, according to this view, we must say that a renewed tacit consent of the prince is not necessary for this sort of abrogation, but that it is provided for in the very framing of the law. But we have already (Book III, chap. xviii, Book IV, chap. xvi)[1] rejected this solution, for the reason that, as a matter of fact, the power
842 to bind their subjects unconditionally is not lacking even to temporal princes; nor is the will to do so, even lacking to the prelates of the Church.

Two solutions to the difficulty.

What we demonstrated in the passages just referred to, both from reason and from usage, as to the acceptance of law, is even more certainly true with respect to the abrogation of law already accepted and confirmed by usage: otherwise it would always rest with the will of the people to rid itself without blame of the law of its superior: for such power will rest with the people if the [tacit] condition [of which these writers speak] is included in the law. If this were so, even a subject community could expressly and designedly revoke a law of its prince or prelate, which is absurd.

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

Hence, we must regard it as certain that this power must be explained as resulting from a union of the people with their prince and lawmaker. The reason is that this power to put aside a law, as it exists in the people taken alone, is rather a factual than a legal one; on the part of the prince, however, it is also a power to tolerate and give consent to the popular will. Thus, the authority to abolish law is complete in the combination of these two powers: because, in the last resort, its annulment is brought about by the same power that brought it into being—and that this can be done, I have shown in the previous Book.[1]

What power must reside in the people in order that custom may be introduced.

4. It is, therefore, evident that the principle laid down above has a most important application in respect of this result: namely, that it is not necessary [for these effects] that there exist in the people, viewed separately, the *active* power of making or of repealing law; but that it is sufficient that they have a capacity for receiving law, and that custom be introduced by those to whom the law applies. The reason is that this act of repudiating a law by custom is not one of jurisdiction, or of public authority, but is rather one that proceeds from those under a duty of obedience to the law. Accordingly, these acts [of repudiating law] are (as it were) contrary to the acts of making law, and, therefore, both are concerned about the same thing. And thus, a lay community has the power to establish a custom abrogating an ecclesiastical law. Indeed, even a community of women can have this power as regards a law addressed to them alone, as in the case of the law in *Sext*, Bk. III, tit. xvi, only chapter which—as authorities in this matter point out—enjoins the enclosure of nuns. The reason here is that such a custom does not, on the part of the subjects, abolish the law actively (as it were); it does so only to the extent that it demands from the superior that he abolish the law. That power is, as I have said, in the possession of the superior. It remains for us to take up next a discussion of such questions as touch upon the operations of the will [of the people and of the prince] in this matter.

A twofold will is required for the establishment of the custom [abrogating law].

5. For the introduction of a custom abrogating law, a twofold will is needed, the one of the people, the other of the prince. The first offers but little difficulty; for a custom is evidence of the general will [of the people]. It is clear from the above discussion that this custom should be public, and introduced or accepted by a majority of the people. This character of custom is, then, sufficient evidence of voluntary agreement, as is clear from what we have said in another place.[2] Indeed, with respect to the kind of custom we are here discussing, the reasons there given take on an additional force; for the will here

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

[2] [Cf. Chap. xii, § 1, *supra*, p. 545—Tr.]

indicated to abrogate a law is not a will to bind oneself or to take on a burden, but rather to set one aside. In this kind of custom, no intention to establish a new consuetudinary law is required; there is called for only an intention not to have or retain the law in question, and to resume the earlier status of freedom from legal obligation in this matter. Such an intention is sufficiently manifest by the frequency of the acts, and the agreement and constancy of the people in actions to that end.

A difficulty.

6. The only difficulty that is likely to be urged here relates to the canon laws made for the whole Church: for it will be necessary that a custom sufficient to derogate from a law of this sort be introduced and accepted by a major part of the Church; such an expectation, however, it is not easy to entertain, and such an agreement of the Church could hardly be manifested.

The reply.

My reply is, that if a general law for the whole Church is to be abrogated, nothing less than a custom, universal in the sense we have defined, will suffice; since otherwise it will not carry with it the general agreement of the Church, as such. This mode of abrogation is, therefore, very rare. Yet it is not impossible, since a knowledge of the custom can be effected within the space of forty years, through adequate report and public communication, by means of letters and through notification. Still we must add that, according to the usual practice of the Church and the canonical institutes, it is not to be expected that this abrogation will be accomplished at one and the same time for the entire Church, and by a universal custom; rather, it might be effected by the customs of the different portions thereof, in provinces, dioceses, and other communities which can be governed by their own laws. For if a custom in opposition to a general law prevails among a majority of some one of these communities, then there is a derogation from that law, which is valid for that community, even if the general law remain intact for the rest of the Church. Thus the whole difficulty disappears. This doctrine can be applied in due proportion to other common laws, both civil and canonical. This is the teaching of the Gloss (on *Institutes*, I. ii, § 9, word *imitantur*).

For this effect, a privative custom is sufficient.

7. And therefore, it is not always necessary for this effect [of abrogation] that there be a true custom of fact, that is, a positive custom, one which results from a frequency of actions. A privative custom—which is called
843 desuetude—is sufficient, one, that is, which arises from a repeated omission of an act, and which, of itself, is sufficient against affirmative precepts; for the reason that the very repetition of an omission to act sufficiently indicates a will not to accept such a precept. But it is necessary that the omission be a true [, i.e. formal] one, that is, one in opposition to a legal obligation; it must, also, occur at the time for

which the precept commanded the action, since the omission of an action when no action was obligatory is no indication of a will to disregard a law, or refuse to accept it, as is self-evident. This is the doctrine of Panormitanus (on *Decretals*, Bk. III, tit. III, chap. vii [, no. 9]), of Sylvester (word *consuetudine*, Qu. 8) and of Rochus (*De Consuetudine*, Chap. xi, sect. 4, nos. 76 *et seq.*), who deals with this point at great length, as well as of Navarrus (*Consilia*, Bk. II [Bk. I], *De Consuetudine*). We shall discuss this more fully later, in Book VIII,[1] in connexion with the loss of a privilege through non-usage.

Panormitanus. Sylvester. Rochus. Navarrus.

8. From the above, a further conclusion is drawn, namely, that such omissions to act must necessarily be sinful, at least at the beginning; since if the omissions are based on some reasonable excuse—for instance, upon the warrant of some special necessity—they cannot give evidence of a will in opposition to the law. In such a case we shall have not desuetude, but a mere non-usage, which, by universal agreement, is insufficient. The same would be true if the element of ignorance of the law were to intervene, or the element of great fear, and for the same reason. Although, indeed, the fear be not great enough to excuse from fault, it may be sufficient nevertheless to prevent creation of a true custom or a desuetude. An act of this kind is not so much an act of the free will as one done under compulsion, and hence it cannot be sufficient indication of a purpose in opposition to law, nor of an absolute will to set the law aside, but only whilst such fear is imminent. And so it would seem to be a sufficiently probable view that in such a case the law is not completely abrogated, but rather that there is, at most, a derogation therefrom: namely, that it is to cease to be of obligation in the presence of so grave an inconvenience and a like imminent danger.

For desuetude, the first omissions are necessarily illicit.

This point is to be especially noted, for a custom of non-observance of a law can often be brought in upon the occasion of such a contingency or necessity, which, of itself, would not be sufficient for excusing from the obligation of the law; but by reason of this custom, assuming the fulfilment of the other requisite conditions, it can be established that the law shall not be binding upon similar occasions, and yet no absolute derogation from the law takes place. Examples of the situation described above are easily supplied in the observance of feasts and of fasts, and similar matters.

9. We take up now the question of the will of the prince, a matter to which the doctrine of the preceding Chapter is to be completely applied. In this matter also, the consent of the prince can be understood either as granted through the law itself, or, as personal, and (as it were) given afresh, though tacitly. Either mode is a valid one.

A twofold will of the prince is required.

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

The aforesaid Chap. xi of *Decretals*, Bk. I, tit. IV, has reference to consent of the first sort. The custom must fulfil two conditions to verify consent of that kind, namely, that it be reasonable and prescriptive; these same conditions are set down in the aforesaid laws [3 and 5 of Pt. I, tit. II of *Las Siete Partidas*]. Since no others are postulated, these are sufficient; in the absence of either the law established by the custom would be imperfect and incomplete. Some explanation of these two conditions is necessary to make their nature clear.

We have discussed at length the first condition in Chapters Six and Seven of this Book, where we explained what is called an unreasonable custom. At this point, however, two other observations must be specially added: one, that a reason of less force is needed in the custom for producing this effect [, i.e. the abrogation of law], than is required for introducing a law.

Two notes.

First note.

The reason is that the abolition of a law is a matter of lesser moment than the creation of one. For in the annulment of a law no special utility or rectitude in the subject-matter itself is called for; it is enough that the annulment of the obligation in question be not contrary to the public advantage, since, although some advantage is taken away, there is a corresponding compensation, either in the removal of an occasion of a greater evil, or in conciliating the minds of subjects to a milder government.

10. Whence I add another observation on this point; namely, that it is necessary that in some way or other the custom, or rather the abrogation of law in consequence of custom, should be supported by a reason of some sort. Accordingly, the express repeal of a just law cannot be effected without some upright cause, as has been proved in the preceding book;[1] neither, therefore, can a tacit repeal, such as is made by custom, be effected without a cause of the same character. In like manner, therefore, for the custom to be reasonable, it is insufficient that it be not opposed to natural reason, or to divine law, or that it has not been reprobated by law; but it is necessary that the will to be without such law be justifiable on the part of the subjects for a good reason, such as also justifies the consent of the prince to the abrogation of the law. This is the ground and the necessity of this condition: for unless the custom is in some way reasonable, the prince is not presumed to yield to the desire of his subjects, for he cannot be presumed to have a will to abolish the law without just cause and adequate reason, since he cannot do this without fault, nor should he actually do so. Further remarks on this condition would seem to be unnecessary, though we shall have something more to say on this point when we come to answer the second difficulty that is brought against our assertion.

Second note.

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

11. The second condition, namely, that this custom be prescriptive, has also been explained in former chapters. We shall, therefore, at this point, touch only on the question of the time required for this prescription. 844

Second condition.

We assume that it is not necessary for it to be immemorial, as some writers have asserted without a basis in truth, as I have observed in the preceding Chapter. Hence it must be certain that a period of a definite length is called for. Yet we must note a difference between the canon and the civil laws with respect to this matter—one that is taught by all the writers cited above.

A distinction to be noted between canonical and civil laws.

For in the case of civil laws, the same time is required for the abrogation of law as for its introduction, namely, ten years. The reason is that the civil law makes no distinction on this point, but requires for both, without distinction, a long time, as is clear from the aforesaid law 32 [*Digest*, I. iii. 32].

In civil law a custom of ten years' standing suffices for the establishment or abrogation of law.

But a long time is defined in that law as ten years, as we have noted above. The same definition is more expressly laid down in the *Institutes* (II. vi, § 1 [II. vi, Pref.]). Nor does the law here make any distinction as to the length of the observance necessary by reason of the absence or presence [of the prince]—whatever Sylvester and others may hold—and this, for the reason set forth above. Now it is essential to this prescription that the ignorance of the custom on the part of the prince is supposed; since, if the prince has knowledge of the custom, the prescription is not necessary for this effect of which we are speaking, as I shall immediately prove. But with respect to a prince who is ignorant of the custom, any consideration of his absence or presence is irrelevant; and hence, the law requires the same length of time in both cases without distinction.

Sylvester.

The authorities on law generally fix the length of time for this custom at ten rather than twenty years, although this term is not defined in the laws; and the ignorance of the prince may be regarded as a kind of absence—for the reasons we have rehearsed in an earlier passage.[1] Another reason is that in law of this kind the favour of the prince enters as an element, and this is extended when a shorter period for the validation of the custom is fixed. Again, the burden placed upon the people where the revocation of the law is put off for a long time is an element to be taken into account also; and this burden is lessened by fixing a shorter period. Thus, on either ground, our opinion is in harmony with the law and with the rule of law which says, 'in obscure matters, the course which imposes the least burden is to be followed.'

12. With respect to the laws of the Church on this point, there is

[1] [Cf. Chap. xv, §§ 5 *et seq.*, *supra*, pp. 568 *et seq.*—Tr.]

a diversity of opinion. For some authorities hold that the same ten-year period is sufficient for these, as in the civil laws. In support of this opinion are quoted Azo (in *Summa*, tit. *De Consuetudine*), Calderinus and others (on *Decretals*, Bk. I, tit. xxxiv, chap. i). These writers are, however, speaking of a law not yet accepted, a point with which I have dealt in Books Three[1] and Four.[2] Though, indeed, there is probably no difference in the prescriptions in either case, since either custom would be counter to the canon law.

Concerning laws of the Church, there is a diversity of opinion.

Now the true opinion and the general one is that a period of forty years is required for a custom to be held prescriptive against canon laws.

That a space of forty years is required for a custom to be prescriptive against canon law.

This is the view of Innocent, on *Decretals*, Bk. I, tit. iv, chap. viii; of Panormitanus (*De Consuetudine*, Chap. xi, no. 11, and on *Decretals*, Bk. I, tit. xxxiv, chap. i, no. 4); of Felinus also (on *Decretals*, *ibid.*, no. 13); and of Rochus (*De Consuetudine*, Sect. 3, no. 35). It is that set forth by Torquemada (on *Decretum*, Pt. I, dist. 1, can. v, qu. 2, and Pt. I, dist. 1, can. iv, qu. 4); by Bartolus on *Digest*, I. iii. 32, (in *Repetit.* qu. 2, at the beginning, subquestion 3, no. 14), where in the scholia others are cited; by Jason (on *Digest*, I. iii. 32, col. 11, no. 43); by Antoninus ([*Summa*,] Pt. I, tit. xvi, § 4); by Sylvester (word *consuetudo*, qu. 4); by Angelus de Clavasio ([*Summa*, word *consuetudo*,] no. 8), and by other summists there cited. It is that also defended by Navarrus (*Consilia*, Bk. II, *De Consuetudine*), Corduba ([*Quaestiones*,] Bk. I, qu. xii, ad 4), and Gregory López (on *Las Siete Partidas*, Pt. I, tit. ii, law 5, gloss 4 [*glossa* g]).

Innocent. Panormitanus. Felinus. Rochus. Torquemada. Bartolus. Jason. Antoninus. Sylvester. Angelus de Clavasio. Navarrus. Corduba. Gregory López.

The proof of this opinion is usually derived from the aforesaid *Decretals*, Bk. I, tit. iv, chap. xi, since it demands [, for abrogation,] a custom validated by a prescription in accordance with law; and in canon law only a custom of forty years' standing is termed such. This is the view of Rochus (*De Consuetudine*, Sect. 3, no. 4), drawn from the Gloss, together with the text of *Sext*, Bk. III, tit. iv, chap. v.

But I do not think that this proof is satisfactory, because the phrase 'validated by a prescription in accordance with law', is a general qualification, and means no more than that the custom must endure for the time and under the conditions prescribed by the law. These words could, then, according as the matter to which they referred varied, indicate equally a prescription of ten or of forty years. Hence, a custom 'validated by prescription in accordance with law', may also be demanded for the introduction of a law outside of, but not opposed to, the common law, in a case where the prince is ignorant of the custom. Because of the unsatisfactory nature of this phrase, the aforesaid

[1] [Only Chapters i–iv and xxxii–xxxiii of Book III are included in these *Selections*.—Tr.]
[2] [Not included in these *Selections*.—Tr.]

writers add that for a legitimate prescription against the Church, a custom of forty years is necessary, according to the *Decretals* (Bk. II, tit. XXVI, chaps. iv and vi), together with other chapters that deal with prescriptions. But a custom opposed to the canons can rightly be said to be against the Church, since it is against the laws of the Church: therefore, a legitimate prescription in such a matter ought to be one of forty years' running.

13. Some writers even add that not only is a period of this length necessary when the custom is contrary to the canon law, but also when it is contrary to the reason of a canon, as is noted by the Gloss (on *Sext*, Bk. I, tit. XVI, chap. v, word *statuimus*) and also by Geminiano on the same Chapter; and he is followed by Peter of Ravenna (Tract. *De* 845 *Consuetudine*, Sect. I, no. 20). The same view is held by Felinus (on *Decretals*, Bk. II, tit. XXIV, chap. xi, no. 3, and Bk. I, tit. XXXIII, chap. xv, no. 3), where he explains that this assertion is to be understood as referring to a custom contrary to the reason expressed in the law. I add, however, the further note that the reason here referred to must be one so intrinsic and essential to the law that when it ceases to exist the law also must be held as ceasing to exist. This assertion, in the sense of Felinus's qualification of it, is, in that case, a well-grounded one; for a custom opposed to the reason of a law is virtually opposed to the law itself, and therefore derogates from it. But if the reason of the law is not such as I have noted, but one which can cease to be whilst the law still continues in force, I do not see why a custom opposed to the reason alone of the law should be held to be contrary to the law itself, or why so long a time should be required [for its effect].

Gloss. Geminiano. Peter Ravenna. Felinus.

Finally, these authors add that because of the character of its subject-matter, a custom may have to be an immemorial one, as when a custom is contrary to the special laws of the prince, and even so a period of forty years will be necessary for the establishment of a custom which is outside the canons, if it should derogate from the law of some particular church.

But even though these observations may be true, they are not properly applicable to the legal custom of which we are speaking, except in so far as a custom of that sort may be bound up with a prescription properly so called on some matter which would require a longer duration.

An abrogation of law is sometimes effected by custom even when the prince is ignorant of the same.

14. Hence, also, we conclude that a custom fulfilling these two conditions, if it is opposed to an existing law, abrogates that law, even if the custom does not come to the knowledge of the prince. This is the teaching of nearly all the Doctors cited above, and of Covarruvias (on *Decretals*, Bk. IV, *De Matrimoniis*, Pt. II, chap. vi, § 10, nos. 18 and 19 [nos. 35 and 36]), of Dominicus de Sancto

Geminiano (on *Decretum*, Pt. I, dist. IV, in § *Leges*, after can. iii, with Gloss), of Archidiaconus (on *Decretum*, *ibid.*), and others. Felinus in his observations on this point cites these writers. Reference may be made also to all of those whom I have cited in a preceding Chapter.

15. For the same principle applies here. Assuming the existence of a law giving this efficacy to a reasonable and prescriptive custom, there is present by reason thereof a sufficient consent of the prince—by his tacit legal will, so to speak—to the abrogation of the law opposed by the custom. For the operation of such a will, no new knowledge [of the custom], such as is necessary for an expression of his personal will, is required; nor can we add this condition contrary to what the said law lays down. The reason is that for juridical effects no more conditions are to be required than the laws demand; and here the law sets forth these two conditions as sufficient for this effect; and each condition can be fulfilled without the knowledge of the prince.

The truth of this assertion with respect to the first condition [, i.e. reasonableness,] is self-evident: for a custom is not reasonable merely because it is known to the prince: since any other kind of custom can be equally known or not known by him; and a custom must be postulated of such a reasonable character that it can truly be known as such.

Concerning the second also, the truth of our assertion is clear; for a prescription does not require in the person against whom the prescriptive right is acquired any advertence to the prescription. Furthermore, the nature of human law in a certain way demands this; for it should be adapted to human conduct. Therefore, it is highly expedient that when a people has persevered for a sufficiently long time with a stubborn purpose in a course of conduct opposed to a law, the prince should not urge the law, but should rather cease from enforcing it. Hence, it is justly provided that a prescriptive custom repeals a law [in opposition thereto], irrespective of the knowledge or ignorance of the prince. This matter offers no further difficulty.

What is the force of non-prescriptive custom [with respect to the abrogation of law]?

16. On the other hand, the question may be raised as to whether a non-prescriptive custom can at times effect the repeal of a law, at least in cases where the prince has knowledge of the custom. For Panormitanus (*De Consuetudine*, Chap. xi, no. 13) is very clearly of the opinion[1] that the fact that the prince has knowledge of the custom is not sufficient to effect a derogation from the law within a shorter time than that required for a prescription. Support for his thesis may be found, first, in the doctrine of the same last chapter of the Title *De Consuetudine* [*Decretals*, Bk. I, tit. IV, chap. xi], which unconditionally demands the fulfilment of the two conditions we have mentioned, in

Panormitanus.

[1] [The author refutes these arguments of Panormitanus in later paragraphs. *Vide* pp. 600 *et seq.*, *infra*.—Tr.]

order that a custom may have this effect; therefore, a custom in which one or the other of these conditions is lacking cannot produce this effect, even if the prince have knowledge of the custom. A confirmation of this argument is that if the custom is not reasonable, the fact that the prince knows of it in no way enables such custom to repeal the law, according to the most common opinion: therefore, if the custom is non-prescriptive, it will be insufficient, even though it has been brought to the prince's attention. The logical nexus of this argument is evident, because these two conditions are demanded as of equal necessity. A second confirmatory argument offered by Panormitanus is that the most that can be inferred from the fact of the prince's knowledge is that he tolerates the custom, but this, according to the *Decretals* (Bk. III, tit. v, chap. xviii), does not establish consent. It is for this reason that the said author adds that then only should the prince be held to abolish the law when he not only has knowledge of the custom, but follows it himself; for by so doing he gives (as it were) his express consent to it. Finally, I add this further argument: this custom is valid as a kind of prescription; but the time necessary for a prescription is not shortened because of the knowledge of the prescription on the part of the person against whom it is being established. Therefore, . . .

17. Nevertheless, I hold that the contrary[1] is true. I assert, then, that a non-prescriptive custom is at times sufficient to derogate from a law, provided the prince has knowledge of the custom, and provided the custom itself is of such a nature, and of such duration as practically 846 to be an indication of his consent to its effect. This seems to be the teaching of St. Thomas (I.-II, qu. 97, art. 3, ad 3) where he demands not a prescription of the custom for this effect, but a sufficient expression of consent by the prince. Soto holds the same opinion (*De Iustitia*, Bk. I, qu. vii, art. 2), as do Bartholomew Medina (on I.–II, qu. 97, art. 3) and Gerson (in the aforesaid treatise *De Vita Spirituali*).

A non-prescriptive custom is sufficient at times for the abrogation of a law.

St. Thomas.

Soto.

B. Medina.

Gerson.

This would also seem to have been the view of Antonio de Butrio (*De Consuetudine*, Chap. xi), for he says that if the Pope has knowledge of a custom in opposition to a law, a period of ten years is sufficient. This statement is approved by Sylvester (word *consuetudo*, Qu. 4), and by Angelus de Clavasio (*Summa*, word *consuetudo*, no. 8). The same is held by the canonists generally with respect to cases where a custom opposes a canon law which has not yet been accepted, as Felinus records at length [on *Decretals*, Bk. II, tit. xxiv, chap. xi, no. 3 and Bk. I, tit. xxxiii, chap. xv, no. 3].

Antonio de Butrio.

Sylvester.

Angelus de Clavasio.

Felinus.

The same reasoning holds, as I have already pointed out, for a custom [resisting a law of this status, as holds for a custom contrary to a law that has been accepted by those to whom it applies]: and this,

[1] [Contrary to the position just urged by Panormitanus.—Tr.]

both for the reason that such a custom is like the other in that it is in opposition to the Church and her law; and again, because, as I explained above, the observance of a law for a certain period does not increase its legal effect, as such, but is said to confirm it only in fact. Therefore, in respect of their force as law, the principle is the same in both of these cases.

Another proof is that there is no ground for holding that the reason validating the establishment of law should be greater than what is necessary for the abrogation of law. But a non-prescriptive custom of which the prince has knowledge suffices for the introduction of law—as we have demonstrated earlier. Therefore, such a custom is sufficient for the abrogation of law.

The proof of the major premiss and of the logical nexus of this argumentation rests upon the fact that the whole basis of either of these effects lies in the tacit will of the prince; and this will, specific and personal (as it were), can be known not less clearly from a non-prescriptive custom contrary to law, but known to and tolerated by the prince, than from a custom that is outside the law. Therefore, the former custom is no less sufficient for derogation of law than is the latter for the introduction of law. Indeed, there is even more reason for presuming the consent of the prince for the accomplishment of this effect than for the introduction of new law; and this, both for the reason that such abrogation is urgently needed in order to remove from his subjects an occasion of offending against the law which still prevails, and also, because the custom itself brings about such a change in the subjects themselves that through it they have become in a certain fashion unfitted for the observance of the law in question, for the observance of the law ought to be easy and adapted to their general conduct.

Finally, this opinion is confirmed by usage, since many of the laws of the Church are held to have suffered derogation within periods shorter [than forty years], for the reason that the Popes, though not ignorant of the usages, did not manifest their wishes [in favour of the law].

18. On the question of the time required for this effect when the prince has no knowledge of the custom, I think that the opinion that fixes ten years as necessary—although it is defended by Antonio de Butrio and other authorities —is advanced without good reason. For this assertion of Antonio de Butrio cannot have application to the civil laws, because in the case of such laws, even when the prince has no knowledge of the custom, a period longer than ten years is not, as we have said, required for this effect; our assertion, on the other hand, holds true even of civil law, for the reason that when the prince has

Of the time required for the abrogation of a law through a custom when the prince is ignorant of the same.

such knowledge of the custom, the full prescriptive period of ten years fixed by the civil law is not required. And if the words of these writers are to be taken as referring to the canon laws only, they should fix the length of time which should be demanded for this effect [with due proportion] for civil laws. But they cannot, on any good grounds, assign any fixed period as required for such civil laws; hence, neither can the term necessary for this effect in the case of canon laws be fixed, on sound reason, at ten years.

Moreover, there is this general argument [against their position]: the period of duration for this kind of custom has not been determined by any law; therefore, any fixed definition of its necessary duration is unfounded.

A more complete explanation of this point is found in the very fact that since a prescriptive custom is not demanded here, the effect of the custom is dependent not upon the dispositions of a law but upon the prince's consent as judged from the natural [, to be distinguished from the legal] significance of his actions. But with respect to the duration of observance necessary here, judgment finds no guidance in the dispositions of the law or in the nature of things, since the term of observance of such a custom will vary according to circumstances, as I have explained above.

The time here required must be left to the judgment of a prudent mind.

Therefore, it is useless to speak of the period as one of ten years. The same assertion holds true of this point, as was made in a like passage on the introduction of a law: the matter must be left to the judgment of a prudent mind. This is the view of Soto, B. Medina, and others.

Soto.
B. Medina.

19. In fact, some canonists have inferred from this conclusion, that when an entire city, or community acts in opposition to some statute made by that community, one act in opposition to the statute will be sufficient to revoke it. The reason is that by this one act the will of the maker of the statute to repeal that statute is sufficiently manifested, since the will that acts against the statute is the same [as that which brought it into being]. This is not the case with law enacted by the will of the prince.

Panormitanus.
Giovanni d'Andrea.

This is the doctrine of Panormitanus (on *Decretals*, Bk. III, tit. IV, chap. XV, no. 9), and of Giovanni d'Andrea (on *Decretals*, Bk. III, tit. V, chap. XXII, and Bk. I, tit. II, chap. VIII). The same doctrine is taught by other writers on these laws. But we shall discuss this point, as well as the meaning of the words of these texts, in our discussion on privileges; for under that head the texts are dealt with. Respecting statutes, properly so called, I do not think that sign [of a single act contrary to the statute] is sufficient evidence [of the will of the community to revoke it], unless it is obvious from other circumstances that the community did not perform the action by way of a

temporary dispensation from that statute, but rather[1] as an abrogation thereof. It is to be added that a custom [and not merely a single act] is essential also, as I have said, for the abrogation of statutes that require for their validity the confirmation of the prince.

847 20. My reply to the argument[2] based upon the *Decretals* (Bk. I, tit. IV, chap. XI) is that the custom there referred to is one which can, even without the sovereign's knowledge, effect the abrogation of a law; that is, a custom which has that power by reason of its special character and the force and virtue it possesses through the law. But the passage [*Decretals, ibid.*] does not exclude that custom which only serves as a sign [of the general will] and an indication of the will of the sovereign to abrogate a law. For in this sense, not only a custom, but any act of the prince which sufficiently manifests his will, can abrogate law, as is clear from the aforesaid law 32 [*Digest*, I. iii. 32]. It is evident in reason, also; because that power resides in the will of the prince, and differences in the manner of its outward expression are purely incidental.

Explanation of *Decretals*, Bk. I, tit. IV, chap. XI.

In answer to the first[3] confirmation we deny, at the outset, the equivalence of the examples given: for the condition that a custom be reasonable is necessary from the very nature of the case; but the condition demanding a prescription comes from the law alone, and hence the former condition is the more essential, and holds in every case, since the will of the prince should at all times be and should be presumed to be reasonable, both when it is given expression in a particular case, and when it is manifested in a general way by the disposition of law.

Again, it is maintained that if the will of the prince is sufficiently manifest, even if the custom has no rational basis, so long as it is not contrary to reason, and contains nothing evil, the abrogation would be valid; even though it may have been illicitly made. This doctrine has been set forth in an earlier passage with respect to an express abrogation, but the same is true if we assume that the abrogation is tacit. But such will in the prince is most rarely or never to be admitted when the custom is so much lacking in reason that it would be illicit to yield thereto, and to abrogate the law on account of it, even when it is well known to the prince, since an evil will is not to be presumed in the prince. The contrary, however, would be true if from the very obduracy—even from an unreasonable obduracy—of the people towards the custom, there is given to the prince a moral cause and reason to judge the revocation of the custom would be prudent. For then, even

[1] [Read, *sed illud abrogando*.—Reviser.] [2] [Cf. Sect. 16 of this Chapter, *supra*, p. 599.—Tr.]
[3] [This refers to the confirmation of the argument of Panormitanus, stated in Sect. 16, *supra*, p. 600.—Tr.]

if the prince knows that the people's custom is an unreasonable one, his connivance at the abrogation [of the law] in tacitly tolerating the custom is to be presumed, since under these circumstances the abrogation is just.

Whence to the second confirmatory argument,[1] my reply has already been made in an earlier passage: namely, that in itself the sovereign's toleration is not enough to indicate his consent, but that when other circumstances are present there can then exist a prudent and correct indication of his consent, and that in the present case, there would be an excellent sign of the will of the prince [to abrogate the law], when, though the prince is conscious of the popular resistance to it, he connives at this resistance: for his doing so whilst the law is in force would be unreasonable and harmful to the people, and hence his permitting the custom to be observed—unless the contrary were made clear—would be presumed to spring from an intention to abrogate the law. The same principle applies as often as the situation is such that abrogation of the law must be deemed the prudent course: in such a situation the knowledge and toleration of the custom by the prince is properly taken as consent.

In reply to the last confirmatory argument,[1] we deny the assumption: for it has already been shown that, in the case mentioned, the custom exerts its effect not as a form of prescription, but as evidence of the consent [of the prince] drawn from his knowledge and tolerance of the custom.

21. My reply to the first difficulty, found at the opening of the Chapter, which has been taken from Section 5 [*Digest*, XLVII. xii. 3, § 5], is that the words of that law have many interpretations, which we cannot here discuss. Many, however, understand the passage to refer to a situation in which the statute or custom has existed first, and the law is enacted subsequently, and thus it has reference not to our present matter, but to the question to be treated in Chapter XX.

The answer to the first difficulty.

Others construe it to refer to a situation in which a general law exists first, and is followed by a municipal statute. This seems closer to its literal meaning, and it is also a denial of the opinion that the statute remains valid as against the law, which seems to be most probable. For, although Panormitanus, in discussing *De Consuetudine*, Chap. xi, makes the distinction between statutes of the laity and statutes of the clerics to reside in the fact that particular churches cannot enact statutes opposed to the canons, but that cities can enact laws contrary to general law, I do not see the basis for this distinction. Hence, *Digest*, I. i. 9, proves nothing on this point, and the contrary is demonstrated from the aforesaid Section 5 [*Digest*, XLVII. xii. 3, § 5].

Panormitanus.

[1] [In Sect. 16, *supra*, p. 600.—Tr.]

This is also clear from what was said *supra* in Book III [of this work][1] on the power to make civil laws. I therefore deny that the same reason applies to statute and to custom, as Panormitanus himself admits [*ibid.*] with regard to statutes and customs of clerics.

The reason here would seem to be—even though various reasons are given by the canonists, as by Panormitanus [*ibid.*], and more fully by Rochus (*De Consuetudine*, Sect. 3, no. 7)—that human laws ought to be adapted to the general conduct of the people for whom they are made, and that therefore lawmakers ought, in this matter, to respect a reasonable custom of their subjects. This reason and necessity cease to hold in the case of statutes of custom; for they have been made by inferior powers, which ought to be subordinated to those that are superior; and hence these statutes cannot, by the ordinary law, prevail
848 against the laws of superiors, except by special concession.

22.[2] In answer to the second difficulty, which is taken from the *Code* (VIII. lii (liii). 2), I note, first, that this law also has been variously explained, as is clear from the Gloss (on *Decretum*, Pt. I, dist. xi, can. iv). The most general and probable reply is that this law must be construed as referring to a custom not having the conditions laid down in the *Decretals* (Bk. I, tit. iv, chap. xi). This is the reading of it given by Jason (in addit. to Gloss, on *Institutes*, I. ii, § 9, word *imitantur*), where the Gloss advances a different explanation. The true meaning of the passage is that a custom is not of so great authority as to prevail in opposition to the will of the prince; and this meaning is indicated by the words of the same law, where it says: '[The authority of custom is not slight, but] it will not prevail by its own force [so as to overcome right reason or positive law]'; that is, by its own force and authority. This assertion is in perfect harmony with the fact that custom may be such as to show that the will of the prince has been changed and this, either by the evidence that it gives of such change, or by virtue of some law [in which the conditions, under which his consent is to be presumed, are laid down].

Answer to the second difficulty.

23. In reply to the third difficulty, St. Thomas says (I.-II, qu. 97, art. 3, ad 2), that a custom contrary to a law can be established by means of actions which are morally good, and that the custom will, therefore, be a reasonable one. His reason is that a human law can be disobeyed without fault when necessity arises in some particular cases. Whence, if such occasions are frequent, a custom is established through actions contrary to that law, which proves that the law is not advantageous to the community and, consequently, abrogates the law. This reply is

The answer to the third difficulty.

[1] [*Supra*, Bk. III, chaps. ii and iii, pp. 372 *et seq.*—Tr.]

[2] [This Section and the two following are incorrectly numbered in the Latin text.—Tr.]

Panormitanus. Archidiaconus.

also suggested by Panormitanus (on *Decretals*, Bk. I, tit. xxxiv, chap. i, no. 4); and his opinion follows that of Archidiaconus (on *Decretals*, *ibid.*).

But this reply does not meet the difficulty. The reason is that those actions are not permitted except by way of *epieikeia* because of a present urgent necessity. But such acts do not establish a custom contrary to law, since they are not contrary thereto, nor do they evince in the people a state of mind in opposition to the law, as has been explained above; nor, again, can an action done in virtue of a custom arising from such acts alone be regarded as licit; it will be such, only upon a similar occasion of need, in which case its justification is provided for by *epieikeia*. But if those occasions occur so frequently as to prove the law to be useless, the law is abrogated, not by reason of the custom, but because it has been proved to be burdensome and of no effect in itself; or else it will cease because the end for which it was enacted ceases to avail generally.[1] So St. Thomas himself says [I.-II, qu. 97, art. 3, ad 2] that: 'Such a custom shows that the law is no longer useful.'

St. Thomas.

Secondly, St. Thomas replies [*ibid.*] that the law is set aside through custom when the latter has been so firmly established that the law no longer seems possible to observe in accordance with the custom of the country. However, should the matter reach this point, there would be not a real abrogation of law, but rather a cessation of the law through a change in the subject-matter. So great a change, however, is not always necessary for the abrogation of a law. For a law is often abrogated if there is a concurrence of the circumstances described above, and this, even if the law might be otherwise justly binding, provided the sovereign's will has not tacitly intervened in one or other of the ways we have mentioned.

St. Thomas, therefore, in the solution he has given, apparently wishes only to indicate the ways in which the cessation of a law can take place through custom; and this, without relation to the consent of the prince, but from the nature of the case, as it were. But such a process is, however, not a true abrogation, but a cessation of law. But in the solution that he gives in the passage (I.-II, qu. 97, art. 3, ad 2) he is rather speaking of abrogation properly so called.

24. I shall, then, frame my reply to this objection from the principle laid down in Chapter IV of this Book, namely, that a custom may have its inception through actions which are bad because they are forbidden by law, and yet may establish a custom in derogation of law. This is admitted by Cajetan (on I.-II, qu. 97, art. 3, ad 2),

It is possible for a custom begun by actions which are bad, because forbidden to derogate from law.

Cajetan.

[1] [Generally: the teaching of canonists is that if the end or purpose of a law ceases to avail for the people generally, the law ceases; not so if it ceases to avail only in particular cases.—Reviser.]

as it is by all other writers. Indeed, it is clear from what we have said that in order to effect this sort of abrogation, the customary actions will inevitably be bad at the outset because they are in opposition to a law which is binding, and this, apart from any excuse or plea of ignorance. The reason why these acts are sufficient for abrogation is that, during the development of the custom, they concur not as a cause, but rather as an indication of the will of the prince or of the law; for they can be an evidence of his will even if they are bad. Again, the final result of such a custom is not evil, namely, that actions of the same sort may be done without fault after the abolition of the law; and it is to this that the prince consents when he abrogates the law. And so this custom, even though it is unreasonable in its mode [of introduction] and initiation, is not essentially such (since these acts can become licit) either in the issue effected or in the results that flow from it. The reasons are that the prince can, on the ground of such custom, prudently and reasonably abrogate the law; that when the custom has matured these acts are licit; and finally that the right to do these actions freely thereafter is a just one—for there arises, as it were, an absence of the law, or rather of the prohibition, which prohibition could be reasonably abolished.

Cajetan. Panormitanus.

It is added by Cajetan (*ibid.*) and Panormitanus (*ibid.*) that although at the beginning those who act against the law commit a fault, yet their successors can presume that the law has ceased to be
849 observed for some reasonable cause. This certainly seems to be generally probable, especially when the abrogation takes place by means of a long-continued prescription. But I maintain that such a presumption as that is not necessary; for even though all the actions were bad, as being done counter to the law before the completion of the time necessary for prescription, or before there has been a sufficient presumption of a tacit will of the prince, nevertheless, when the prescriptive period has elapsed, or a sufficient manifestation of the prince's will made, the law (*lex*) would be abrogated by force of law (*ius*) in general, or the tacit will of the prince. This tacit will of the prince is just, though the acts of the subjects were bad, as has been stated. It is to be noted that such a custom is not, on the ground that it brings about this effect in this way, to be regarded as equivalent to a prescription—as I have shown in the First Chapter.

25. Some will urge, however, that the law [that was abolished] was reasonable (for this follows from the nature of law, and it is assumed that, in this case in question, the law is a true and valid one), and that hence the opposing custom will be unreasonable, and this not only because it has been introduced by acts that are bad, but because it tended to abolish a reasonable law. This would, then, seem to be a procedure contrary to reason; and since

An objection.

the two are direct contradictories, if one is reasonable, the other must be unreasonable.

My reply is that the same argument was used previously against the express abrogation of a law, and it was then clear that such could be reasonable and just: hence the solution given there will serve for this objection also. Therefore, I maintain that the law [that is abrogated] is not reasonable in the sense that it is necessary, but only in the sense that it was adapted to bringing about certain effects: but notwithstanding these, the abolition of the law and the custom effecting that abolition may be reasonable under other aspects, which are also good and fitting. It is the usual case of two contrary probabilities: because one may have the advantage of a greater probability, the other is not therefore unreasonable: and this is especially so, because a comparison [between contrary probabilities] usually leaves the matter in doubt.

The solution.

CHAPTER XIX

DOES THE ABROGATION OF A LAW THROUGH CUSTOM ADMIT OF ANY EXCEPTION OR EXTENSION?

1. For the better understanding of the rule laid down in the preceding Chapter, we must discuss some exceptions to it which are frequently advanced; and towards the end of the Chapter we shall see whether the rule admits of any extension.

The first exception demanding attention has to do with penal laws by which the penalty is imposed by the fact of transgression. Thus, some writers have held that a law of this kind cannot be abrogated by a prescriptive custom, even when it is a reasonable one, since any action counter to such a law is condemned as soon as it is done and incurs the penalty of the law.

First exception.

Giovanni d'Andrea. Panormitanus.

This opinion is noticed by Giovanni d'Andrea and Panormitanus (on *Decretals*, Bk. I, tit. xxxiv, chap. i). Yet this exception has no legal basis; it is contrary to reason, and therefore the above-cited authorities have rightly rejected it. They do so because even a custom opposed to such a law can be reasonable, as is self-evident; and it may, further, serve as a sufficient indication of a tacit will of the legislator to abrogate that law. For this abrogation may be not less expedient for the common good in the case of a penal law than in that of any other legal rule whatever, when it is not adapted to the general conduct of the people, or when experience has shown that it is not profitable to them. Likewise, the words and reasoning of *Decretals*, Bk. I, tit. iv, chap. xi, apply as equally to this kind of law as to others.

Exception rejected.

Finally, a confirmation of our argument can be drawn from the

example of the law (*Extravagantes Communes*, Bk. V, tit. 1, chap. i) which prohibits under censure any remuneration accepted for entrance into religious life; and yet through usage this prohibition has, according to a probable opinion, as we have elsewhere said, been wholly abrogated. This is also the view of Navarrus ([in *Enchiridion*,] Chap. xxvii, no. 106), who gives other examples of this sort.

Navarrus.

The reasoning in support of the contrary opinion is of no weight; since, notwithstanding the legal condemnation of the action, and the fact that while the law persists, the penalty is incurred by the transgression, it has actually been possible to nullify the force of the law through usage, either by a prescriptive and reasonable custom, or by the tacit consent of the prince. And when the custom has been thus validated, the act is no longer condemned by the law or liable to penalty.

2. It is seriously doubted whether a custom can derogate from the penalty of a law, while leaving it still binding in conscience. Some writers, in discussing this point, distinguish between a law that imposes its penalty due to actual transgression, and one that merely provides that punishment must be inflicted; and they assert of this latter sort, that there may be a derogation from that part of the law which deals with the penalty. This opinion is certain and generally accepted. The reason here is one peculiar to this kind of law: the penal section of such a law instructs the judge, and is binding upon him; therefore, just as derogation from other laws is possible, so it is possible from this, in so far as it is a precept addressed to the judge.

A doubt and a distinction on the above exception that must be noted.

Alfonso de Castro (*De Potestate Legis Poenalis*, Bk. II, chap. xii), however, denies that this holds true of a law which directly inflicts a penalty or a censure *ipso facto*; and he cites the authority of Hostiensis (on *Decretals*, Bk. I, tit.[1] xxxiv [, no. 1][2] and Tiraqueau in support of his opinion. The latter, however, is speaking of another matter, as I shall prove shortly. Castro's reason may be that if such a law is not itself abrogated, a fault is always committed in violating it; and that, therefore, the penalty is always incurred. Thus, if excommunication is the penalty [attached to a breach of the law], of necessity it follows the violation of the law, since contumacy against the law precedes its violation.[3] The same is true of the other penal effects that are inflicted by the law itself; and hence there can never be a derogation from the law in respect of these effects alone; nor, therefore, can there ever be a derogation from it in respect of the penalty alone. A confirmatory proof [of Castro's assertion] might be drawn from the consideration that such

Castro. Hostiensis. Tiraqueau.

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[1] [Read 'tit' for 'cap' in Latin text.—Tr.]

[2] [Hostiensis says nothing about this matter in his comment on *De Treuga et Pace* (*Decretals*, I. xxxiv).—Reviser.]

[3] [*Contumacia* in canon law is not really expressed by the word 'contumacy'. The Latin word means violation of law that is fully deliberate.—Reviser.]

a custom would be unreasonable, since its tendency would be to allow offences to go unpunished.

Panormitanus. Felinus. Navarrus.

A penal law, even when imposing a penalty *ipso facto*, may be abrogated through custom.

3. Nevertheless, we must assert the contrary opinion, in agreement with Panormitanus, Felinus, and commentators generally (on *Decretals*, Bk. I, tit. xxxiv, chap. i). It is that also of Navarrus (*De Regularibus*, Commentary III, no. 55 [consilium 55], and in *Enchiridion*, Chap. xxvii, no. 106).

The first proof of our assertion is inductive. In earlier times the sons of men of the clerical order were made serfs at birth by the law itself, as a punishment for the incontinence of the father (*Decretum*, Pt. II, causa xv, qu. viii, can. iii); but this penalty was abrogated by desuetude, while the same guilt continues to attach to the offence, as the Gloss on that canon notes. Likewise in *Extravagantes Communes* (Bk. III, tit. iv, only chapter) penalties are imposed for actual transgression, which have disappeared through non-usage, even though the law has continued in force, as may be seen in Navarrus (*Enchiridion*, Chap. xxvii, no. 150), where other examples of this kind of abrogation are to be found. We ourselves daily observe the revocation of the penalties of law without the revocation of the laws themselves—as was recently done by Clement VIII [on the *Constitution* of Pope Sixtus V],[1] concerning that regulating the mode of receiving novices into religious institutes. And since derogation can be effected through the laws, it can be effected through custom, as is clear from principles already laid down.

Gloss. Navarrus.

The reason finally is that derogation from a law is possible without the abrogation of the law. This is in accord with the words of the Gloss (on *Digest*, L. xvi. 102): 'For derogation occurs when a part [of the law] is removed; but abrogation, when the whole is annulled.' There can, then, be derogation from the law through custom, although there is no abrogation, as Navarrus rightly concludes (*Consilia*, Bk. I, *De Consuetudine*). The reason is that there is a parity between the force of law and that of custom. Therefore, when, for any reason, the various parts of the law are separable, derogation can be made from one portion, while the other is left unaffected. But the penalty of the law can be separated from the guilt incurred by its violation. Custom can, therefore, derogate from the law respecting the imposition of a penalty, and can leave the guilt incurred by its violation intact. The reason is that the penalty in question is not essentially annexed to the transgression, but proceeds from the will of the prince; and his will may be changed with respect to one part of his law, whilst unchanged with respect to

[1] [The *Constitution* of Pope Sixtus V, *Cum de Omnibus*, regulated the reception of novices into Religious Orders (1587). This *Constitution* was modified by Pope Clement VIII, in his *Constitution in Suprema* (1603). Cf. Bullarum RP. PP. collected, Rome, 1747, Tom. IX, p. 370, Tom. XI, p. 409.—Reviser.]

another, as is self-evident, and as is proved by usage. And the prince is bound by the law, as to its directive force, even though he is not bound as to its penalty. The Gloss (on *Decretum*, Pt. I, dist. iv, can. vi, word *consuetudine*) is to this effect also, when it states that even though custom can sometimes release [the sinner] from the temporal punishment due to his sin, it cannot release him from the punishment of hell.[1]

Refutation of the basis of the contrary argument.

4. I reply, then, to the argument of those who hold the opposite thesis, that so long as the custom has not been validated by prescription, or has not prevailed in opposition to the penalty, then it is true that the latter is incurred by a transgression of the law. Nevertheless, it can happen that even though the penalty is incurred, it is never upheld, and that such non-observance might continue during the running of the time required for prescription, or for the period needed to indicate the will of the prince, who knows of and tolerates the non-observance or non-execution of the penalty; and this is, in a way, sufficient for the abrogation of the penalty—even though no custom opposed to the observance of the law had been established.

In reply to the confirmatory proof [for the contrary assertion] given above,[2] it is to be said that the only effect of such a custom is that the punishment fixed by the law is not at once incurred; but not that the superiors lacked power so to punish offenders and ought not to do so: it does not, therefore, follow that the custom is unreasonable. It is the same case as that in which the penalty of the law is not one incurred by actual transgression, but is to be imposed by the judge, where, even though there has been a derogation from the existing law to the effect that the judge is not bound to impose the penalty fixed by that law, nevertheless, the new rule does not restrain him from imposing some other punishment, if he deems it expedient. Otherwise, the custom of which we are speaking would be an unreasonable one.

In what sense the aforesaid distinction is true.

5. Still, the above opinion, or distinction, applies in a certain sense to an unreasonable custom opposed to a law, a matter concerning which many jurists say that even though a custom of that kind cannot abrogate the law, it can, nevertheless, remit its penalty.

Gloss. Rochus.

This is the opinion expressed in three Glosses (on *Decretals*, Bk. I, tit. iv, chap. vii; on *ibid.*, Tit. xi, chap. ii, word *antiqua*, first reply; and on *ibid.*, Bk. II, tit. xxv, chap. i). It is also that given by Rochus (*De Consuetudine*, Chap. xi, no. 33, to no. 8 of Section 1),[3] where he treats this point at length.

[1] [Release from temporal penalty by custom must refer to a penalty inflicted by some human authority.—Reviser.]

[2] [At the end of Sect. 2 of this Chapter, *supra*, p. 609.—Tr.]

[3] [This reference will be clear if the reader consults *Tractatus Illustrium* (Venice, 1584), Vol. II, pp. 348 *et seq.*, in which this work of Rochus Curtius is contained.—Reviser.]

Therefore, I maintain that the distinction between a law which imposes a penalty for actual transgression and one which provides that the penalty may be imposed by a judge, is relevant and useful here.[1] For when a penalty is imposed by the law itself, no abrogation of the penalty nor any derogation therefrom is possible through an unreasonable custom alone; for the consent of the prince to remit the entire 851
punishment cannot be indicated by means of such a custom. Nor, again, can such a custom avail to diminish the penalty of a law, if it is unreasonable in respect of that part of the law—for the same reasoning applies here, as I shall make clear immediately. However, when the penalty is one that is to be imposed by a judge, the custom may afford him an excuse, at least, for the reduction of the penalty, for this is within his authority.

6. Nevertheless, it is to be noted, in connexion with this thesis, that an unreasonable custom of a community is one thing, but a private custom of offence by an individual is quite another.

Observations.

The first observation.

For the last-named custom cannot, of itself, have the effect of remitting the penalty, even in the forum of human law, but it rather increases it, because it aggravates the guilt, and is a form of violation which is especially detrimental to the common good. The above-cited authorities [, in setting up their thesis,] are thinking not of a private, but of a public custom.

With respect to the latter custom, two other considerations can be urged. The first is that it can be understood as exempting from the penalty, or as diminishing it, in two ways: in one, through the abrogation of the law or by some derogation therefrom, at least as to that part of it which deals with the penalty; in the second, by reason of the circumstances of the customary actions, that is, because of the number of those offending against the law and of the frequency with which the law is violated, there comes into being a proper reason for the reduction or remission of the penalty, even if no derogation is made from the law itself.

The second observation.

The second consideration to be urged is, that a custom opposed to a penal law can be unreasonable in two ways. First, by its transgression of the law as a whole; that is, both by the commission of a fault against the provisions of the law itself, and by the remission or non-execution of the penalty provided in the law. Secondly, the custom can be unreasonable in so far as it is a transgression of the law, but not in so far as it fails to carry out the punishment annexed to the law—as might be the case where, even though the malice of the transgression is admitted, the penalty is felt to be too

The third observation.

[1] [This is the well-known distinction between penalties *latae sententiae* and *ferendae sententiae*.—Reviser.]

harsh, or too little in accord with the people's ways, or is one that gives occasion to more serious transgressions for some other such reason.

7. I say, then, that a custom which is unreasonable in its disregard of the penal section of a law cannot establish a legal immunity from that penalty by the abrogation of the law.

What force an unreasonable custom may have [in the abrogation of a penal law].

The proof is that it is impossible for an unreasonable custom to abrogate a law (*Decretals*, Bk. I, tit. iv, chap. xi). No custom can, therefore, in any wise, in so far as it is unreasonable, derogate from a law in respect of any part of that law to which it is contrary; for what is true of such custom in relation to a law as a whole, is true of it with respect to parts of a law. Therefore a custom, unreasonable in its non-execution of a penalty, or in its failure to impose the penalty which is fixed by law, can never derogate from the law in question, even in respect of the law as it imposes a penalty. This assertion is applicable as much to a law which provides that the penalty is to be imposed by a judge (*poena ferenda*), as to one which imposes the penalty for actual transgression, as is clear from the proof given above.

I add, however, that even though a custom is unreasonable in so far as it involves a breach of the law, it can, if there is good ground for a disregard of the penalty, derogate from that portion of the law which deals with the penalty—and this, both in respect of the part of a law which imposes its penalty for actual transgression, and of one providing that the penalty be imposed by a judge.

A custom unreasonable as a whole, but which is grounded in reason in respect of the disregard of the penalty of the law, can derogate from the penal portion of the law.

We shall demonstrate our assertion by argument from contraries. Every custom, in so far as it is reasonable, can prevail against that part of the law against which the custom stands in opposition, according to the *Decretals* (*ibid.*). Therefore, a custom which is reasonable in disregarding the penalty of the law will be able to derogate from the portion thereof that fixes the penalty; and this, even though it does not remove completely the obligation of the law, since in the latter regard the custom is, in our assumption, unreasonable.

This inference is logically valid, both because the principle on which the argument rests is, with due proportion, applicable here, and because the useful portion of the law is not impaired by that part of it which is of no value when the two are separable. But in the case of the law we are considering, the penalty is separable from the transgression, as has been explained. Then, finally, the prince may justly give his consent to the remission of the penalty, even though the directive force of the law remains unimpaired; hence, he is to be presumed to do so when there exists a reasonable and prescriptive custom to that effect, or one that has been tolerated for a sufficient length of time.

In what way a custom which is unreasonable, in respect of both parts of the law, may afford some excuse for the non-observance of it.

8. I observe, finally, that even if the custom is wholly unreasonable as to both portions of the law, it may afford some excuse for the non-observance of it as a modifying circumstance—that is, when the law is not one in which the penalty is incurred by actual transgression, but one which provides that the penalty is to be imposed by a judge. And this, I think, is the sense in which the language of the jurists is to be interpreted. And this becomes clear, first, with respect to individual offenders, from the fact that from a public custom made up of actions in violation of law, especially from such a custom when it is tolerated, there results some ignorance of the law whereby the offence comes to be regarded as less serious; or, if not ignorance of the law, such an insensitiveness to the unlawfulness of the act as to lessen the gravity of the fault and, consequently, the liability to punishment.

Secondly, the example of the violation of the law by great numbers of people presents a very strong temptation (as it were) drawing the transgressor on as by an object of vehement passion; and this fact must usually be accounted as a mitigating circumstance in individual violations of the law. It is this kind of mitigation of the penalty that is discussed by the Gloss (on *Decretals*, Bk. I, tit. IV, chap. vii), as well as by Panormitanus in his comment on the same Chapter (no. 5), and is treated with some fullness by Rochus (*De Consuetudine*, Chap. xi, no. 33).

Panormitanus.
Rochus.

Again, with respect to the community in general, the multitude of offenders gives rise to the occasion for a failure in executing the penalty, for the reason that it is not easy to punish a whole multitude without scandal, or without causing great disorder and greater harm to the community. Neither is it expedient to punish some, but not others, since this also would give rise to scandal on the ground of favouritism. Even when punishment can, for a particular reason, be visited upon some persons, these are usually few in number, and immunity would then result to the community as a whole. 852

These two modes of release from the penalty of a law are suggested in the *Decretals* (Bk. I, tit. XI, chap. ii). The latter—in respect of the community as a whole—is set forth by Gregory I (in *Decretum*, Pt. I, dist. IV, can. vi) and is suggested by Augustine, in *Letters*, 1 [= clxxxv, chap. x, no. 45, Migne ed.], cited in *Decretum*, Pt. I, dist. I, can. xxv, more clearly in *Letters*, lxiv [= xxii, chap. i, no. 3, Migne ed.], cited in *Decretum*, Pt. I, dist. XLIV, chap. i. It does not, however, apply in the case of a law which imposes its penalty for actual transgression, for a law of that kind makes no distinction of circumstances, and in all cases rules to the same effect.

Gregory.
Augustine.

9. Finally, a doubt may be raised in this context as to whether it is

possible for a custom to cause a relaxation of the direct obligation of a penal law while leaving the obligation of the penalty intact, thus transforming (so to speak) a mixed law into one wholly penal in character. This point was touched upon by Tiraqueau, in commenting on L. *Si unquam*, word *revertatur*,[1] where, in the twenty-fourth note on the distinction between a *poena lata* and a *poena ferenda* (no. 350), he rehearses the distinction applied by a certain Matthieu in the Preface to the *Constitutions* of Clement [*Universitati*]. For when a law imposes its penalty automatically, Matthieu holds that even though the law itself falls into desuetude, the penalty for its violation is incurred. And in support of his opinion, he [i.e. Tiraqueau,] cites *Decretum* (Pt. I, dist. XI, can. viii, *Sext*, Bk. I, tit. II, chap. ii)[2] and *Decretals* (Bk. III, tit. XVIII) without specific explanation. But I find nothing either in the laws cited or in the whole title that has to do with this question. Matthieu holds, however, that when the law is one which provides that the penalty be imposed by a judge, if the law falls into desuetude, the penalty is also abrogated. In support of this distinction he cites a passage from *Decretum*, Pt. I, dist. IV, can. iii—which also proves nothing. Tiraqueau does not comment upon this opinion, but sends the reader to other writers whose names he gives.

A doubt.

Tiraqueau.

Matthieu.

10. I can see no truth whatever in this opinion. For the custom to which the thesis [of Matthieu] has reference must be either one that is inchoate and [therefore] insufficient for the abrogation of a law; or it must be one that is perfect and complete. The first kind of custom cannot, of itself, derogate from a law in respect of its primary obligation, as is evident from the principles that we have established in earlier Chapters, and from *Decretals*, Bk. I, tit. IV, chap. xi. Consequently, such a custom has no bearing on the present point, nor can it have any effect on the abrogation of the direct obligation of a law, nor can it do away with the obligation to pay the penalty of the law, whether that is imposed by the law for actual transgression, or is to be imposed by a judge. It cannot do so, because it has not the force to make actions done in violation of the law guiltless, nor is it of itself sufficient for the abrogation of the penalty of the law.

The above reason is rejected.

If, however, Matthieu is here speaking of a matured custom, we must ask another question, namely, whether the distinction he lays down in his assertion with respect to the effect of customs abrogating the direct obligation of the two kinds of penal law, is to be understood as being an actual and necessary, or only a possible one. It is neither: for—to test its necessity—it does not necessarily follow that when the abrogation of the direct obligation of the law has been achieved, a

[1] [The reference is to Tiraqueau's commentary on a law (*Si unquam*) issued by the Emperors Constantius and Constans to Orphitus (P. V.), and it is found in the *Code* of Justinian, VIII. lvi. 8, and also in the *Theodosian Code*, VIII. xiii. 3—REVISER.]

[2] [There is, however, nothing in this law on desuetude; it refers to ignorance of penalties.—REVISER.]

penalty imposed by the law itself is incurred through an action done in observance of a custom opposed to the law. Indeed, the contrary is the more probable consequence; for, with the cessation of the guilt, the penalty then should also lapse—and this seems more frequently to be the actual result. Nor, on the other hand, is it a necessary consequence that when the direct obligation of the law has been abrogated, a penalty to be imposed by a judge should lapse; for the custom can be such that it releases the subject from obedience to the law under the pain of guilt, without, however, releasing him from the obligation to pay a penalty for its violation—as I shall prove immediately. The distinction in question is, therefore, one without foundation.

11. The difficulty, therefore, [set down at the beginning of Section 9,] can be raised with respect to both kinds of penal law without distinction, and this, on the ground we have just stated, namely, that when the adequate cause has ceased to exist, its effect ceases to exist: therefore, if the guilt due to the breach of the law is removed through custom, the penalty which follows that guilt is removed also, whether it be a penalty incurred or a penalty to be imposed; for, in the case of both, guilt is the adequate cause of the penalty. A custom established with any other intention would be unreasonable.

It is possible that derogation may occur from a law respecting the obligation of guilt, while the penalty remains unimpaired.

Nevertheless, I hold that it is possible for a custom to derogate from a law with respect to the obligation of incurring guilt, whilst the debt of the penalty remains in some cases, that is, where the penalty does not essentially presuppose the presence of guilt. This, I infer, is the position taken on this point by Navarrus (*Commentaria De Lege Poenali in Cap. Fraternitas, Decretum*, Pt. II, causa XII, qu. ii, chap. xi), as is shown by the tenor of his discourse as a whole and especially by that of the last number (consideration 3), which, even though it is imperfectly stated, gives sufficiently clear evidence for this reading.

Navarrus.

The proof for this thesis is that derogation from the law is possible, even though it is not abrogated; and there can, therefore, be derogation from any portion thereof which is separable from the other, while the latter remains in full force. But the imposition of a penalty, or a threat of the same, is independent of the obligation of incurring guilt, as is evident from our earlier discussion of the nature of a penal law. Therefore, a law of a mixed character can be derogated from, in respect of its direct and absolute obligation, in such wise that it remains one of a purely penal nature. Nor is such an effect in itself unjust, since, even though a penalty, taken in its strict meaning, has reference only to guilt; nevertheless, considering it in a broad sense as a burden, or a civil penalty, that is, derived from human sources, it is sufficient that it should be related to a [juridical] cause, and (so to speak) to a juridical

culpability. Nor is a custom causing such derogation unreasonable, because there may be good reason for mitigating the obligation.

12. Thus, it is possible that many civil laws—imposing fines, pro-
853 hibiting freedom of the hunt,[1] or the cutting of timber, or the carrying of certain articles out of the country—although in the beginning they may have been directive in nature, can later, through usage, have become merely penal, and thus have changed their character. The reason is that they were treated as such in practice and it was only in that way [, namely, by non-observance] that prescriptive customs were established against them.

I added in my assertion, the qualifying note, 'where the penalty does not essentially presuppose the presence of guilt', in order to exclude from this class of laws those to which censures are attached. For derogation is not possible from the obligation of laws which prohibit under pain of censure incurred by actual transgression, unless there is also a derogation from the censure. This is so because a censure intrinsically presupposes guilt and disobedience, but such presupposition is not implied in every penalty taken in a wide sense. Such laws, however, can be abrogated, either absolutely or merely in respect of the censure, as Navarrus holds in his comments on the *Extravagantes Communes* (Bk. III, tit. IV, only chapter) in the aforesaid *Enchiridion* (Chap. xxvii, no. 150).

For the argument in support of the opposite view is of no weight, since, even though the action stands condemned by reason of the law, and the penalty is immediately incurred by those who offended against the law in the beginning, nevertheless, both the obligation and the punishment, or one of them, can be abrogated by reason of a custom and the tacit consent of the prince.

13. A second [alleged] exception relates to invalidating[2] laws. For many hold that these cannot be abrogated by custom. This conclusion would seem to be supported by the *Decretals* (Bk. IV, tit. XIV, chap. v), inasmuch as it is there stated that custom cannot abrogate the law of the Church forbidding marriage between blood relations.[3] The same is signified in the *Decretals* (*ibid.*, tit. xi, chap. iii), respecting the custom[4] prohibiting marriages between persons who are spiritually related. No other reason, it would seem, can be assigned for that rule except that the law in question is an invalidating one. This seems to be the opinion of Covarruvias (on

The second exception.

Covarruvias.

[1] [Read *venari* for *veneri*.—REVISER.]
[2] [Invalidating laws render an act null and void from the beginning, as in the case of certain contracts; disqualifying laws render the person incapable of certain legal acts, as in the case of marriage.—REVISER.]
[3] [Such laws were really disqualifying.—REVISER.]
[4] [*Consuetudinem* also appears in the 1619 edition, and we must suppose that Suárez was referring to the impediment of spiritual relationship arising in the first instance from custom, just as marriage between Jew and Gentile was forbidden at first, by custom.—REVISER.]

Driedo. Sánchez.

Decretals, Bk. IV [*De Matrimoniis*], pt. II, chap. vi, § 10, no. 18),[1] and he cites [in no. 35] Driedo (*De Libertate Christiana*, Bk. X, chap. xi [Bk. I, chap. xi]) in support of it. Sánchez [*De Sancto Matrimonii Sacramento*] refers to many others who favour it also.

These writers, although they are apparently speaking specifically on the subject of matrimony, do, however, infer from that matter a general principle, namely, that a custom cannot qualify a person whom the law has disqualified; but every law invalidating a human action disqualifies persons for that action, or for entering upon the contract referred to, as was affirmed by the Council of Trent (Session XXIV, in the decree *De Matrimonio*), and as we have noted above in Book V.[2] Therefore, if a custom cannot qualify a person who is disqualified, so it will be unable to abrogate a law with this invalidating effect; for by abrogating such a law it would qualify the person. In confirmation of this proof, it may be said that an invalidating law renders a person incapable of performing the act with which the rule of the law is concerned; and a custom cannot cancel such an incapacity of a person. This is the common opinion among jurists. It is also that of Felinus (on *Decretals*, Bk. II, tit. xxvi, chap. xi), of Decio (on *Decretals*, Bk. II, tit. i, chap. xiii, no. 12 [Bk. II, tit. ii, chap. xiii, no. 13]) and of Aimone Cravetta (*De Antiquitatibus Temporum*, Pt. IV, § 3). And a proof for this opinion might be drawn from experience, that is, from the general practice in regard to irregularities, censures, and other like canonical impediments, which cannot be removed by custom.

Council of Trent.

Felinus. Decio. Aimone Cravetta.

14. Nevertheless, neither is this exception, in my opinion, to be admitted, because the *Decretals* (Bk. I, tit. iv, chap. xi), sets forth a principle of general application when it says that a human law can be abrogated by a custom that fulfils the two conditions there stated. But such a law, even though it makes an action null and void, is still a human law. Therefore, if a custom, contrary to this law, fulfils these two conditions, it abrogates the law; if, however, it does not fulfil these conditions, it will effect no exception to that law. To say that there cannot be a reasonable custom counter to an invalidating law, is arbitrary. For such a law can be abrogated for a just reason and is often so abrogated, as is evident in the ancient law prohibiting marriage between persons related within the fifth degree, which has now been abolished.[3] A custom, therefore, contrary to an invalidating law of this kind can be reasonable on the same basis, and consequently can also be either prescriptive, if it endures for a long time, or it can indicate the tacit consent

This exception also must not be admitted.

[1] [Covarruvias, *Opera*, Antwerp, 1627, Tom. I, pt. II, chap. vii, par. 10, no. 35; reference to Driedo is Bk. I, chap. xi, at end.—Reviser.]

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

[3] [The Church mitigated her prohibition against marriages between blood relations. At present, the prohibition extends to the third collateral degree.—Reviser.]

of the prince, if he has knowledge of it. It can, therefore, abrogate a law.

A confirmatory argument can be drawn from the admitted principle that a custom can establish an invalidating law, as we have shown; therefore, it can abrogate such a law. The validity of the argument is clear from the fact that the principle is the same in both cases, as is admitted by Covarruvias (*ibid.*); for the consent of the prince is manifested by the custom for either effect, and in both it is possible for the subject-matter to be just and reasonable, as has been explained.

Covarruvias.

This opinion is set forth in the Gloss (on *Decretum*, Pt. I, dist. viii, can. vii, word *consuetudinem*), which states that an ineligible person may be made eligible by custom; that is, by the abrogation of the law through which he had been ineligible (*Decretum*, Pt. I, dist. xii, can. viii). The same view is held by Innocent (on *Decretals*, Bk. IV, tit. xi, chap. i, at end), where he is speaking on the subject of matrimony, and of the diriment impediments [thereto], which are those that are chiefly a matter of doubt. This opinion is followed also by Torquemada (on *Decretum*, Pt. I, dist. xxxii, can. xiii, art. 2, [ad 2, no. 10]), by Hostiensis (in Summa on *Decretals*, Bk. IV, tit. xi [rubric, xi, no. 6]), by Gabriel ([on the *Sentences*,] Bk. IV, dist. xlii, qu. 1, art. 3, doubt 6 [sole qu., concl. 9, doubt 6]) and by Sánchez (*De Sancto Matrimonii Sacramento*, Bk. VII, disp. iv, no. 4 [nos. 6 *et seq.*]).

Gloss. Innocent. Torquemada. Hostiensis. Gabriel. Sánchez.

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This also is clearly assumed by the Doctors in their assertion that it is possible for a custom to derogate from a law, which gives not only accidental, but also essential form and solemnity to an action, even in the case where that form and solemnity have been established by positive law. This is also the doctrine of Rochus on this point (*De Consuetudine*, Chap. xi, sect. 2, nos. 34 and 35), where he gives certain other examples on this matter.

15. My reply to other arguments set forth for the opposite view is, in the first place, that the authorities who hold that the impediments which make marriage invalid cannot be annulled by custom, are not formally in opposition to us. For their arguments are based not upon the general principle that an invalidating law cannot be abrogated by custom, but upon the special condition of such a custom in the matter of matrimony, in which case their opinion is that this custom is, of itself, essentially evil and unreasonable, or, at least, that it has been condemned by the law. The validity of their view thus qualified should be discussed with relation to the subject matter of matrimony; but we shall have something to say in a general way on this point in connexion with the next alleged exception. It is, however, improbable that those writers who maintain the contrary view have thought that every custom opposed to an invalidating

The reply to the opposing arguments.

law is unreasonable; and this, both because such custom is not always found condemned by law—as is evident—and, again, because it cannot be held with any probability to be so merely in the nature of the case, as I have shown.

Two ways considered in which a person may become legally qualified, through custom.

16. We must add that a person legally disqualified may be held to become, through custom, again qualified, in either of two ways. First, through an abrogation of the legal rule by which his disability was brought about; and this, we repeat, can be effected through custom. For if that disqualification be a penalty, it can be removed; just as the penalties imposed directly and *ipso facto* by other penal laws can be abrogated, since the principle involved is the same. If, however, the disability is not a penalty, but is imposed because of something unbefitting, or for some other just cause, then we must determine whether this unbefitting factor or cause continues to exist, or has disappeared. For in the first situation, the custom would be unreasonable, and to that extent ineffective; but in the latter, it would be possible for the custom to derogate from law, and bring it about that such disability should no longer be contracted.

A second view might be held on this point, namely, that a person lacking qualification or capacity can have his disability removed by prescription if he gains by the qualification he lacks, without derogation from a general law. But this mode would seem to be an impossible one. It has, however, no bearing upon the matter we are discussing, since we are concerned not with prescription, but with legal custom properly so called. The argument indeed confirms what we have said earlier about the impossibility of the derogation from a law by the private usage of a single person; for it makes it clear that a prescription cannot be established against the prohibition of such a law.

In what sense the above opinion is to be understood.

17. And taken in this sense, the principle or axiom of the jurists, to which we referred in our discussion of the last exception,[1] is valid, as is clear from the *Decretals* (Bk. I, tit. IV, chap. iv), which they cite in illustration of it. For simple priests cannot, by means of custom of any sort, acquire the right to administer the Sacrament of Penance,[2] since, notwithstanding any prescription or ancient custom whatever, the divine law denying them that right always remains unaffected, and no human custom can prevail against it. The same is true in respect of the positive law; for no disqualified person—for example, no illegitimate person—can, through his own custom, obtain by prescription a removal of his disability. The reason is that the invalidating ecclesiastical law [in that case] always

[1] [*Cf.* Sect. 13 of this Chapter, *supra*, p. 617.—Tr.]

[2] [A simple priest is one who has not received jurisdiction and approbation from his Ordinary to minister the Sacrament of Penance. Attempted administration, outside the danger of death, would have been invalid, because jurisdiction, being a positive grant, cannot be presumed.—Reviser.]

remains in full force, even though a general custom can effect a derogation from such a law. Thus, the argument for the contrary opinion[1] based upon an induction from the fact that custom cannot remove censures and the like, is of no avail against our thesis. For a custom cannot effect the removal of an excommunication without absolution, solely through some usage; but by derogating from the law which established excommunication as a penalty, can bring it about that this penalty is no longer incurred.[2] The same principle holds in respect of similar impediments.

The third exception.

18. The third exception relates to a law which not only enjoins certain actions, but also prohibits and forbids every custom of an opposite nature, and invalidates any such custom, not only past, but future.

The three distinctions to be made.

For the discussion of this exception it will be necessary to distinguish three things, as we did in an earlier chapter, namely, the revocation, the prohibition, and the reprobation of a custom.

What effect is produced by the revocation of a custom.

For it is certain that, in itself, the express revocation of a custom by a clause attached to a human law, does not prevent the possibility of derogation from such a law, by means of a subsequent custom. The reason is that the law does not prohibit a custom in the future, as we proved above. Therefore, notwithstanding the revocation of the past custom, it is possible for a subsequent one to be just and reasonable as being one that has not been forbidden, and is not in its character essentially bad or lacking all reason: to assume that it must be such would be gratuitous.

855 Therefore it can, by running the proper time, be established by prescription, whether the legislator has no knowledge of it, or whether, having knowledge of the custom, he tolerates it in such wise that his tacit consent is made manifest. Thus, such a custom can have the force of abrogating that kind of law. And so, commonly, exception is not made in the case of a law of this sort, as is evident from the previous discussion, and from what is said by Covarruvias (in *Variarum Resolutionum*, Bk. III, chap. xiii, no. 4). Reference may be made also to the discussion of this point by Burgos de Paz (Law 1, *Tauri.*, nos. 464 and 479).

Covarruvias.

Burgos de Paz.

What effect the prohibition of a custom has.

19. But in the case of a law forbidding every custom of a contrary nature, even for the future, it might seem that an exception [to our rule] is highly probable [for the following reasons].

The first argument.

First, because the custom in question, by the very fact that it is specifically prohibited, would seem to be unreasonable.

[1] [At the end of Sect. 13, *supra*, p. 618.—Tr.]

[2] [The absolution or removal of an excommunication is a positive exercise of jurisdiction, and, therefore, no custom could ever take the place of such a positive act.—Reviser.]

Hence, it can never be validated by prescription, and so, can never abrogate the law.

Secondly, because otherwise those words of the law which forbid a future custom would have no meaning. This is clear from the fact that the actions by which the custom could be established or set on foot, quite apart from the clause in which a future custom is prohibited, have been forbidden by the provisions of the law itself; the repetition of such actions is, therefore, obviously forbidden also. Therefore, for the prohibition of a custom of fact, those words were not necessary. They were, therefore, especially intended as forbidding a custom of law, unless we are to regard them as superfluous. Therefore, they either effectively prohibit this custom, so that its establishment in opposition to the law is impossible, and our thesis is established; or they do not produce this effect, and are meaningless, since, in that case, they add no force to the prohibition of the custom, and there is no other moral effect that they can have.

The second argument.

Thirdly, because, in the case of customs of prescription, by the very fact that the law forbids that a certain thing can be claimed by prescription, it is impossible to secure its prescription by any custom whatever (*Digest*, XLI. iii. 24). So, also, by the very fact that the law forbids any custom which is contrary to that law, the effectual result is that no custom can become prescriptive or can prevail.

The third argument.

20. Fourthly, because a custom cannot abrogate a law save by the tacit consent of the prince, as has been said; this consent, however, cannot be presumed where the legislator expressly withholds his consent to a future custom by a prohibition of such custom incorporated in his law. Therefore, . . .

The fourth argument.

Fifthly, because if the prince should declare that a law or a privilege can not be abrogated, unless by his express consent, that law or privilege could not be annulled through his tacit consent. But he does that precisely when he forbids the introduction of any custom contrary to his law. Therefore, . . .

The fifth argument.

Finally, because it is possible for a lawmaker to make void future contracts: therefore, he will be able also to make invalid a future custom; and this is his intention when he forbids such a custom, otherwise the prohibition would be, as we have contended, a useless one. Therefore, . . .

The final argument.

Gloss. This exception[1] is indicated in the Gloss (on *Sext*, Bk. I, tit. II, chap. i); it is also found much more clearly stated in another Gloss (on *Extravagantes*, Tit. I, chap. ii). It would seem to have been defended also by Antonio de Butrio in his comment (*De Consuetudine* Chap. xi), by St. Antoninus ([*Summa*,] Pt. I, tit. xvi, § 6), by Sylvester

Antonio de Butrio. St. Antoninus. Sylvester.

[1] [*Cf.* Sect. 18, *supra*, p. 621.—Tr.]

(word *consuetudo*, Qu. 6), by Angelus de Clavasio ([*Summa*, *Consuetudo*,] no. 9), by Baldus and by Bartolus (in Tract. *De Dotibus*, Pt. VI, privil. ii, nos. 18 and 19)[1] and finally, by Soto (*De Iustitia*, Bk. I, qu. vii, art. 2, words *Hoc ergo memoriae*). The same was apparently the view of Covarruvias (*Variarum Resolutionum*, Bk. III, chap. xiii, no. 4), and of many other authorities to whom he refers.

Angelus. Baldus. Bartolus Soto.

21. Nevertheless, I hold it as the more probable opinion that, if the law does no more than prohibit a future custom, and does not reprobate it, a subsequent custom which has the effect of abrogating the law may be introduced.

A simple prohibition of a future custom by the law does not make impossible the introduction of such a custom.

This is the doctrine of Navarrus (in Comment. *De Alienatione Rerum Ecclesiasticorum ac De Spoliis*, § 14, no. 8), a doctrine which he drew from the Gloss (on the *Constitutions* of Clement, Bk. I, tit. III, chap. viii). Vázquez (on I.–II, Disp. 177, last chap.) holds this opinion also, as does Soto but with some qualification. B. Medina (on I.–II, Qu. 97, art. 3) and Gutiérrez (*Practicarum Quaestionum Civilium*, Bk. III, chap. XXXII [quest. XXXI]) agree with this teaching also. Covarruvias [*Variarum Resolutionum, ibid.*] and others do not oppose it, although they do not state it in so definite a way.

Navarrus. Gloss. Vázquez. Soto. B. Medina. Gutiérrez. Covarruvias.

The reason for our conclusion must be gathered from the foregoing discussion: namely, that, despite a legal prohibition of that kind, it is possible for the subsequent custom not to be an unreasonable one, as we have demonstrated. And since the condition as to the reasonableness of the custom can be thus fulfilled, so also may that which relates to the sufficiency of its length of observance. And this either by prescription, where the prince has no knowledge of the custom, or by an observance sufficient to indicate the tacit consent of the prince in cases where he has knowledge of and tolerates the custom. This principle is obvious, and has been sufficiently proved above.

Such a custom can, therefore, bring about the abrogation of that kind of law in two ways. It can do so, first, when the custom is reasonable and prescriptive, by the operation of the principle laid down in the *Decretals* (Bk. I, tit. IV, chap. xi); for no sound reason can be given for not applying it here, the law in question being a human law, however strictly it may prohibit a future custom. Or again it can, at least, avail for this effect, on grounds of natural [as distinguished from legal] reason, when the prince has had knowledge of it and it has run for a sufficient time to be evidence of his tacit will, for his will has the power to effect the revocation of the earlier law, notwithstanding any prohibition embodied in it. For this very prohibition of a future custom issued solely from the consent of the prince; and so, later, when that
856 sovereign or his successor has come to a knowledge of and tolerated the custom [prohibited by the law], and has tacitly consented to it, he

[1] [*Digest*, Bk. XXIV, chap. iii, in Bartolus, *Prima Super Infortiato*, nos. 18, 19.—Reviser.]

changes his former will, and in so doing abrogates the prohibiting law completely. A confirmation of this proof will follow from the refutation of the arguments[1] offered in support of the contrary opinion.

22. The first [of the six arguments alleged,] we deny, for the fact that a custom is unreasonable is one thing, but that it is forbidden is quite another: a custom can be prohibited even when it is not unreasonable; and again, a mere prohibition taken by itself does not make a custom unreasonable, as I have demonstrated above.

The answer to the first argument.

My reply to the second argument, which is not so easily disposed of, is that the first effect of the legal prohibition is that in the case of doubt—where, that is, the contrary is not clearly evident and established by proof—the custom is presumed to be unreasonable. For since the superior has specifically prohibited the custom, it would seem to be clear that he has done so because he has judged it to be an unreasonable one. This, I have said, is especially true when the matter is doubtful, as can be seen from the arguments offered by Rochus Curtius (*De Consuetudine*, Chap. xi, sect. 7, no. 24). A second possible effect of the prohibition is that the governors and guardians of the laws will be more vigilant, and will not permit the custom in question to be introduced a second time. A third is that the subjects of the law are probably, because of this specific declaration of the superior's will, bound under an especially strict obligation to abstain from the following of that custom. The fourth and chief effect of such prohibition may be this, namely, that the custom will never, or only very rarely, be able to effect a derogation from the law, save after a long period of time and the establishment of a legal prescription, since in a shorter period, the consent of the prince can hardly be presumed, even if he has knowledge of the custom, or, at all events, many more circumstances must be present and a much longer time than ordinarily is necessary for justifying a presumption of the superior's will as favouring a custom in opposition to such a law; the reason being that he has expressly and specifically declared a contrary will in the prohibiting clause of his law. It is in this sense, I believe, that Soto's opinion on this matter is to be understood.

The answer to the second argument.

Rochus.

23. The logical nexus of the demonstration in the third argument [Section 19, at the end] for the opposite view is denied.[2] For in the case of a true, private prescription, the will of the prince is never presumed to have changed; nor is there any legal rule that could give justification for the prescription thus prohibited by the law; but the custom at present under discussion has

The answer to the third argument.

[1] [In Sect. 19, *supra*, p. 621.—Tr.]

[2] [For the reason, apparently, that there is no parity between a prescription properly so called and a custom of the sort here discussed.—Tr.]

always the support of the law which gives validity to a reasonable and prescriptive custom; as well as that of the principle of natural reason [which gives the same effect to a custom sufficient to manifest] the tacit will of the superior to derogate from the law previously in force.

In reply to the fourth argument, I deny the minor premiss. For, even though the prince has expressly prohibited a future custom, he is free to change his will; moreover, he has never withdrawn its force from a prescriptive custom that is reasonable.

The answer to the fourth argument.

The major premiss of the fifth argument is true only if the prince holds firmly to his purpose; but he is free to change his mind [, in which case the argument fails]. Again, just as express derogation from laws carrying a prohibiting clause is made by terms that are (as it were) retroactive, as by derogation from a law by the special clause: 'Even if the law have such and such a clause'; or, again, by derogation in a general formula, as: 'Under whatsoever form of words the law was enacted'; so, too, in custom, all this retroaction and derogation is implicit, inasmuch as the custom manifests the final will of the prince which can prevail in opposition to every former law. The minor premiss also of this argumentation can be denied, for to forbid the introduction of a future custom, and to rule that a law is not to suffer abrogation except by an express act, are not prohibitions of the same force.

The answer to the fifth argument.

With regard to the sixth argument, it can be denied that this prohibition [of a future custom] is equivalent to an invalidation. The reason is that without invalidating the custom, the prohibition can have other effects, as we pointed out in our reply to the second argument.[1] To the objection that at times the word 'invalidate' is used in these clauses—as is to be seen from the above-cited *Extravagantes Communes* (Bk. I, tit. III, chap. ii)—I answer that an invalidation of this kind always depends upon the will of the prince; and that, therefore, since a custom can in the final issue be evidence of a contrary will on the part of the sovereign, a custom can, the invalidating clause notwithstanding, have its effect in that way in this case also—as we have shown in our demonstration that an invalidating law can be abrogated by custom.

The answer to the sixth argument.

24. Coming now to the third principal point[2] of our present inquiry, that is, whether a custom can annul a law that reprobates it, I assert that a contrary custom cannot abrogate a law of this kind unless there has been so great a change in the circumstances that there is certain evidence that this new situation has made the custom one of a different character. An abrogation of this kind is not, therefore, a real exception to the rule that we have laid down.

How a custom reprobated by a law can prevail against that law.

[1] [In Sect. 22, *supra*, p. 624.—Tr.]

[2] [Cf. Sect. 18, *supra*, p. 621.—Tr.]

The first member of our thesis is the common teaching on this point. There is little or no dissent with respect to it, as is evident from the opinion of Panormitanus (on *Decretals*, Bk. II, tit. xix, chap. ii, nos. 7 and 8), and from that of other commentators on that Chapter. It is found also in the Gloss (on *Sext*, Bk. III, tit. iii, only chapter, word *improbantes* taken with the word *receperit*) and others on that chapter. This doctrine is followed by Navarrus and Covarruvias (*supra*, p. 623), and many other writers to whom they refer. Tiraqueau also defends this thesis in *De Utroque Retractu* (in Preface, Nos. 18 and 19).

Panormitanus.

Gloss.

Navarrus. Covarruvias. Tiraqueau.

The basis of this opinion is that such a custom is always unreasonable, as has been proved above; and that it can never, therefore possess the conditions for an effective custom laid down in *Decretals*, Bk. I, tit. iv, chap. xi, nor can it be sufficient evidence of the tacit will of the prince. 857

The second part of our thesis is generally received doctrine, also. Covarruvias gives numerous references to writers who defend this opinion; and Sánchez, many more (*De Sancto Matrimonii Sacramento*, Bk. VII, disp. iv, no. 14).

Covarruvias. Sánchez.

The reason here is also clear: the law does not always reprobate a custom because it is intrinsically evil; it may do so because of some [annexed] danger, or because such condemnation is judged to be expedient under the circumstances in order to preclude certain effects detrimental to the well-being of the commonwealth or of the Church. In matters of this kind, it frequently happens that a custom which at one time is reasonable, is not so at another; and so, a custom unreasonable in one set of circumstances may not be so in another. Therefore, if the latter kind of reversal occurs in the case of a custom reprobated by law, the custom, notwithstanding the condemnation, ceases to be unreasonable: and this, either because at this later time the custom is, practically, not the custom mentioned by the law, or, because the portion of the law containing the condemnation has completely lapsed in its entire application, and so, too, its effect has lapsed. This law can, therefore, now be abrogated by the custom in question.

The third portion of our thesis is, then, easily proved; for the custom derogating from the law is, under these circumstances, always a reasonable one; and a custom is never incapable of producing this effect, except when it is either unreasonable, or has not been validated by legal prescription, or when it is insufficient as an indication of the will of the prince. There is, therefore, in the abrogation of this kind of law, under these conditions, no exception to the rule that we have laid down.

25. A fourth exception to that rule is maintained by many canonists: namely, that no law [of the Church] regarding matters connected with the Sacraments can be abrogated by a prescriptive custom.

The fourth exception.

The first proof in support of this thesis is drawn from the *Decretals* (Bk. I, tit. xi, chap. ii), where a custom allowing the promotion of candidates to Sacred Orders outside Quarter tense[1] is condemned. The second is drawn from the *Decretals* (Bk. IV, tit. xi, chap. iii), where similar customs are reprobated; and the third from (*ibid.*, tit. xiv, chap. v), where another such custom is rejected. The fourth is from the *Constitutions* of Clement (Bk. I, tit. vi, chap. iii), wherein is confirmed a custom touching the age of those who are to be raised to Holy Orders, a custom which had been introduced in opposition to the ancient canons, thus indicating that the custom could not have prevailed unless the Pope himself had confirmed it. Whence Hostiensis (in *Summa*, on *Decretals*, Bk. IV, tit. xxi, no. 2 [no. 3], at end) and some others hold that in these matters no custom can prevail unless there has been a law expressly derogating from the previously existing law. Others prefer the rule which requires at least a knowledge of the custom on the part of the Pope and his tacit consent. This is held by Richard Middleton (on the *Sentences*, Bk. IV, dist. xlii, art. 3, qu. 2) and by the Gloss, together with the comments of the Doctors (on *Decretals*, Bk. IV, tit. xxi, chap. iii). It is defended also by many other writers whose names are given by Sánchez.

Hostiensis.

Richard Middleton. Gloss.

26. Nevertheless, even this exception is not necessary: and this, for the reason that the laws cited give no ground for it. Again the rule of *Decretals*, Bk. I, tit. iv, chap. xi, is of general application; and there would seem to be no sound reason for making an exception in our present case. This is the view of many of the authorities whom I have cited above, and these deny in general the necessity of the prince's knowledge for this effect. De la Palu is especially clear upon this point ([on the *Sentences*,] Bk. IV, dist. xlii, qu. 3, art. 1); and thereon also (*Supplement* to Gabriel on the *Sentences*, *ibid.*, qu. 2, art. 2 [sole qu., doubt 6]). Sánchez holds this opinion and cites for it the authority of many other writers (*De Sancto Matrimonii Sacramento*, Bk. II [Bk. VII], disp. lxxxii, no. 20). Navarrus enlarges on this point (in *Enchiridion*, Chap. xxii, no. 83 [*De Benedictione Nuptiarum*]), where he censures Rochus for his doubt on this point (*De Consuetudine*, Chap. xi, sect. 4, no. 27). Rochus, however, inclines sufficiently to this opinion, and confirms it, but wishes to dissent modestly from the opinion of the ancient Doctors.

The above exception is rejected.

De la Palu.

Gabriel.

Sánchez.

Navarrus.

Navarrus develops his proof of this assertion from the same *Decretals*, Bk. I, tit. xi, chap. ii [*Consilia*, Bk. I, *Consilium de Temporibus Ordinationum*, pp. 94 *et seq.*], which Hostiensis cited for his thesis. He does so, on the ground that the ancient custom spoken of in that law is shown to have been valid up to the time of its revocation

Navarrus.

Hostiensis.

[1] [That is, the *quatuor tempora*, the beginnings of the ecclesiastical seasons, called Ember Weeks, on the Saturdays of which Sacred Orders could be bestowed.—Reviser.]

by the law, by the following words: 'Were it not for the great number [of ordained men] affected, and were it not for an ancient custom of the country, the persons who have been ordained in this manner ought not to be allowed to exercise the ministry, which they have received.' The Gloss here (on word *antiqua*, near the end) understands the word 'ancient' as meaning a reasonable and prescriptive custom, and that [such a custom] had established an excuse from fault, even in that matter. Thus, the first argument for the contrary thesis[1] is answered.

Gloss.

A confirmation of our refutation of Hostiensis's proof is to be found also in the words, 'unless there is a custom of the Church [to the contrary]' (*Decretals*, Bk. IV, tit. xi, chap. i), where the reference is to a matter touching the Sacraments. It is true that the custom there spoken of is one not directly counter to a preceptive law, but one superior to it, or counter to a permissive law. But surely, if it is possible for a custom to introduce a new law and obligation in matters relating to the Sacraments, there is no reason why it cannot abrogate laws relating to such matters.

We have here the principle for the refutation of the second and third arguments, of our opponents. For those laws do not assert that the customs in question could not be valid because they dealt with matters relating to the Sacraments, but because they are either judged to be unreasonable, or are reprobated for causes that were just.

On the other hand, however, the answer to be given to the fourth 858
argument, that drawn from the *Constitutions* of Clement, is that the custom there referred to was confirmed, because the Pope wished to give it his express approbation, and not because it could not have prevailed antecedently against the ancient canons without such approbation.

27. Whence my final conclusion is that the rule we have given suffers no exception; since, besides those we have considered, no other objections that might be valid against our thesis suggest themselves, nor do the Doctors mention any. In any case, the principles we have set forth would seem to apply with like effect against any other such exception that might be brought up. Hence, Navarrus (*Consilia*, Bk. I: *De Maioritate et Obedientia*, cons. iii) rightly observed that, 'every custom of a reasonable and prescriptive character is valid against any human law whatever'. The addition of the words 'every' and 'whatever' sufficiently signify that in his opinion there is no room for an exception. Finally, whenever a custom, even though it is of long standing and general in character, is stated by the law as not prevailing over a law, a reason is always given for this rejection of the custom: as, that it is unreasonable or a corruption of law, or the like. This is proof

The rule stated at the beginning of Chap. XVIII suffers no exception.

Navarrus.

[1] [In Sect. 25, *supra*, pp. 626–7.—Tr.]

that a custom which is reasonable and of a sufficient antiquity lacks nothing for effecting a derogation from a law.

28. It remains now to inquire whether our rule[1] admits of any extension, or enlargement. But on this point the jurists generally, even though they admit extension in the case of a custom outside the law, lay down the rule that a custom contrary to law and abrogating it is not to be extended. This is the view of Abbas [, i.e. Panormitanus,] (on *Decretals*, Bk. I, tit. iv, chap. ii, last no.), as well as that of Innocent on the same law. This opinion is developed at length by Jason also (on *Digest*, I. iii. 32 [, nos. 14, 21]). Rochus gives the question extensive treatment (*De Consuetudine*, Chap. xi, sect. 4, from no. 7 to no. 23), where he sets down nine conditions [under which this rule may hold]. A discussion of these conditions is not necessary here; for, as I have said, the principle which applies here is that which applies in the case of written laws or statutes. And therefore, just as one law revoking another is not regarded in itself and generally speaking to be extended, for the reason that it is held to be irksome and, in a certain sense, a burden—as is clear from the principle that the amendment of laws is to be avoided—so also a custom abrogating a law is held to be irksome and, in a certain sense, a departure from normal ways, and is for this reason restricted as to its legal bearing, and is not to be extended. Should the matter of the custom be, however, of such a nature that the custom can be held to be in every way favourable, it may receive that extension which favourable grants allow, provided such extension does not go beyond the bounds of the custom—which, in Baldus's phrase, is to be observed with perfect exactitude (on *Code*, VI. i. 4, no. 20 [no. 17]). Of this sort of extension, as it is treated by the jurists, nothing further need be said here.

Of the extension of custom.

That a custom contrary to law can be extended is denied by Abbas, Jason, Innocent, and Rochus.

29. There remains, however, the particular question whether a custom contrary to law can not only derogate from law, but introduce new contrary law also. For sometimes a law may be abolished in such a way that it merely ceases to exist; that is, in such a way that it is no longer binding. In this case the acts specified by it are not forbidden, nor, on the other hand, are actions contrary to it prescribed. Again, at times, a law is abolished by (as it were) a contrary disposition; that is, an action that the abolished law forbade is enjoined, or an action that was of obligation under the earlier law is forbidden. I hold that both kinds of derogation can be introduced by legitimate custom.

What effect has a custom contrary to laws?

The proof of this assertion is that both these effects are possible through the agency of written law: they are, therefore,

Solution.

[1] [Set forth at the beginning of Chap. XVIII.—Tr.]

equally so through custom. Likewise, a custom can be established in opposition to an existing law, for any one of the above-named reasons and purposes, and, at the same time, it may be reasonable and validated by an adequate prescription.

In order, however, to clarify our notions concerning this prescription, there remains the further question whether these two effects may be produced simultaneously, and through one and the same custom, or whether they must be brought about only successively. That they can be brought about successively is very obvious. The reason is that the law can be first abrogated in a purely negative way by a legitimate custom, and this, with the sole purpose of removing the obligation; and afterwards the custom may be continued to be observed with the object of establishing a law. This continuance will be, in effect, a wholly new custom, for from the time when the abrogation of the law occurred, the custom has been a custom not contrary to the law, but outside existing law. As such, then, it will have to run for another period in order to establish a law; that period, however, need not be greater than the usual long time which suffices for the introduction of custom outside law.

A difficulty.

30. The point of the question is, then, whether both of these results can be accomplished at the same time, and by the same actions. It would seem that this is not possible, for the reason that so long as the existing law stands in opposition, it is impossible for another to be introduced, since the express consent of the prince cannot be in contradiction to his tacit consent. Therefore, it is necessary that the law previously existing be abrogated, in order that another may be introduced. It is, therefore, set down in *Las Siete Partidas* (Pt. I, tit. ii, law 3) that it is not possible for a usage contrary to law to establish a new legal rule, unless the earlier law be first abolished.

Nevertheless, I maintain that a law may be annulled, and its contrary established at the same time, and by the same custom. The proof is that a custom may be reasonable in both respects, and be observed 859 with the intention of bringing in both at the same time; it can therefore, after it has run a sufficient length of time, be validated either by prescription in respect of both its effects, or be evidence of the tacit consent of the prince with respect to both.

A confirmatory proof of this conclusion is that by one action, expressly making a law contrary to a previously existing one, the first can be abolished, and the other expressly established. The same, therefore, is true of a tacit operation of the same kind; for the reason in each case is the same. Nor does the proof to the contrary hold, since for this effect a priority in the order of nature—to use our common terminology—is sufficient. For it is true that a custom contrary to a

law cannot establish a new law unless the contrary legal rule is first abolished; it is, however, sufficient if the abolition of the earlier law take place at the same time, and that the abrogation of the prior law occur first—in the order of nature according to our mode of conceiving the matter. For, in that order, the abolition of the earlier law is absolutely the earlier effect, because abolition of the law is a necessary disposition for the establishment of the later one; and this disposition is created not proximately and immediately and (as it were) formally, through the introduction of a new law, but through the abrogation of the old one, and this abrogation can, absolutely speaking, be accomplished without the establishment of a new legal rule. And in this sense, the law [of *Las Siete Partidas*] can be sufficiently intelligible, whatever Gregory López, in his comment thereon, may appear to think.

CHAPTER XX

IN WHAT WAYS CUSTOM MAY BE CHANGED

Of the change of custom.

1. Although we have given, in the preceding Book,[1] some general attention to the subject of change in written human law, and while the principles there set forth are for the most part applicable to consuetudinary law, we must, nevertheless, take up here the discussion of certain other points which would seem to be peculiar to that kind of law.

Two modes of change.

Change in the written law can—as we have seen in an earlier book of this treatise[1]—be effected in two ways: in the one, the change is (as it were) intrinsic, that is, brought about by mere cessation due to conflicting circumstances; in the other, the alteration is induced by the contrary action of some external agency. Custom also can be changed in both these ways. With regard to the first of these, we need add nothing to what we have said in the passage referred to, save that a custom may, of itself, cease to exist on the sole ground of a change in the circumstances affecting the rectitude or the general usefulness of its subject-matter, and this, without a revocation by any external agency. That the subject-matter of a custom can change in this way is self-evident: both from experience, and also from the natural condition of things human. That this change in the matter of a custom may be such that the custom of itself ceases to be and loses its binding force, is clear from the principle that the custom must always have a good ground in reason, to be established, and must have been introduced to realize some sufficient purpose: the essential nature of law demands this. If, therefore, the matter is so changed that the reason and purpose of the custom disappear, not only in individual cases, but universally, then the obligation of the custom will lapse also.

[1] [Bk. VI, chap. ix, sections 1, 9, *supra*, pp. 419, 426.—Tr.]

Indeed, should the change in circumstances be such that the purpose for which the custom was introduced does not so much disappear as work harmful effect, then there may be a positive duty not to observe the custom. This would be the case should the custom begin to be a moral occasion of sin,[1] or be otherwise harmful to the general good of the commonwealth. The same will be true, if, in some particular case, the reason for the custom not only ceases to be, but would even be harmful. This principle we have shown to be true of written law, and it is equally applicable to custom.

Finally, it is clear that this is the only way in which custom can, of itself, cease to exist; since it is not dependent upon any other cause as an active principle to preserve it (as it were) in being. For although the custom may depend upon the will of the prince, the fact that he does not revoke it, is enough for its preservation; and the same is true also of the popular will, in so far as the custom is dependent upon it.

The revocation of a custom.

2. We shall, therefore, without further discussion of this kind of change, give our exclusive attention to such revocation of custom as is brought about by the prince through a law, or through an express declaration of his will, or that which is effected by the people through an expression of a contrary will. These two kinds of revocation, with which many laws deal, have been set forth in [*Las Siete Partidas*,] Part I, tit. ii, law 6. And by revocation we mean in this connexion not only the complete abrogation, but also the partial derogation of a legal custom, since the two are of a similar nature. It will not be necessary in this discussion of the law of custom to say anything of dispensation, for the reason that it is included either under partial revocation, or, in so far as it differs from that, either pertains to the matter of privilege—of which we shall speak in the following Book[2]—or will be the same in principle as dispensation in human law, of which we have spoken at length in a previous Book.[3]

A custom is revoked by a subsequent law in opposition thereto.

3. My first assertion, then, is that a custom is revoked by a subsequent law in opposition to it, especially when the legislator has knowledge of the custom. This assertion assumes authority in the prince who has power to make laws that may revoke custom. Such is manifest from *Decretals* (Bk. I, tit. iv, chap. ix), from *Sext* (Bk. I, tit. ii, chap. i), and from 860
Code (VIII. lii (liii). 2). For what is there stated, namely, that custom has not force sufficient to prevail over law, is especially true in one sense of a law enacted subsequent to a custom. The reason is clear, since the custom has no force save through the consent, at least in a tacit form, of him who has the power to make the law; and therefore,

[1] [A moral occasion of sin, that is, observance of the custom, would be an incitement to men to do evil. Its influence would be on the passions or will of men.—Reviser.]
[2] [Not included in these *Selections*.—Tr.] [3] [Book III, *supra*, p. 361.—Tr.]

through his will the custom may be revoked, and lose all its force, and even be forbidden, and its contrary prescribed. For if it is possible for the prince, through a subsequent law, to revoke a prior one made by his express will, why is it not possible for him to revoke, by a later rule of law which has his explicit approval, a custom introduced with his tacit consent? On this point, therefore, there is no controversy nor any reason for doubt—if the clause is added: 'Custom to the contrary notwithstanding'—that, then, a custom is undoubtedly revoked, because the legislator could not express his will more unmistakably.

An objection.

4. An objection may be offered at this point, from the law on *Feuds* [law *De Feudi Cognit.*, Bk. II *Feudorum*, tit. i],[1] which states that, 'The authority of the Roman laws is not of small moment, but it does not extend so far as to override usage and the general customs of the people.'

Gloss.

Objection answered.

My reply, in the first place, is that the Gloss understands this to be true of feudal matters alone, but gives no reason for so doing. Cujas, in his notes on this law, understands it to refer to a custom confirmed by a decision given in a trial when the custom is impugned. But even this kind of custom may be abolished by law. Others interpret the law in question as referring only to places not under the authority of Rome, where the laws of the Romans have not the force of law, save in so far as they have been accepted by the local sovereigns, and the law says that it is in such localities that custom should have preference over the laws of Rome. But, first of all, this reasoning makes the opinion foolish, for what is strange in the fact that a law of another jurisdiction that has no power to bind, should not prevail in the face of a custom which is binding and peculiar to the place? Again, the reasoning there is far from adequate, as Obertus's note on the law makes clear: 'Decisions on feuds are usually said to be contrary to our own legal rules.' Whence Baldus says that the meaning there is that feudal litigation is to be settled by custom, and not through the written laws, whether of Rome or of the Lombards. Baldus is here referring, it is my opinion, to general laws; for if there were in force special written laws, enacted by competent authority, relating to feudal tenures, these would prevail over custom, in accordance with the rule we have laid down. Hence the meaning is that in feudal questions, the customs peculiar to these must be followed, notwithstanding the provisions of general written laws to the contrary. Or at least these words may be held to apply to prescriptive custom, upon which feudal rights are for the most part founded; and the reason is that the Roman laws are not prejudicial to this sort of custom, inasmuch as they do not abolish rights and ownerships acquired by prescriptive custom.

Baldus.

[1] [A collection of Lombard feudal customs was added to the collections of Roman Civil Law, and appears under the title, *Feudorum Libri cum Fragmentis*.—Reviser.]

5. This assertion[1] applies especially to laws which contain the clause 'notwithstanding an existing custom', since no clearer statement of the legislator's will is possible. But when no such clause is added to the law, there is required, first of all, that there be between the law and the custom a contrariety such that the law cannot be obeyed if the custom is observed. For if they can be reconciled in such wise that the law can have its own effect without derogation from the custom—if necessary even by as strict an interpretation as the words of the law will bear, without destroying their proper meaning—the law is to be given an interpretation admitting of such reconciliation. The reason is that the amendment of a law is to be avoided; and much more so that of a custom so far as is possible: and this, both on the ground that a custom becomes (as it were) a second nature, and hence a change in it is not easily made; and again, because the law should be in harmony with the general conduct of the people who observe the laws.

What is required in order that a custom be revoked by a law?

6. In order, then, that a law revoke a custom by its own force and without the aid of an express revoking clause, it is necessary that the two be in every way repugnant and opposed to each other. Further, the consent of the prince is essential, since through that the revocation is accomplished; and since, for his consent, knowledge of the custom is a prerequisite, he must be presumed to have such knowledge. And it was for this reason that this condition—around which are centred all the difficulties of our present question—was set down by the Pope [as necessary for the revocation of custom by a law], in the *Sext* (Bk. I, tit. II, chap. i).

First inference: that a general custom is revoked by a general law.

7. From that text and the condition it lays down, it is inferred, first, that when, for example, a custom is universal—one, that is, which has been observed throughout the entire Church—and a law in opposition to it is enacted for the Universal Church, the custom is wholly annulled by the law, even though the law contain no derogating clause. This is the opinion of Baldus and other commentators (on *Code*, VIII. lii (liii). 2). It is that set forth by Felinus (on *Decretals*, Bk. I, tit. III, chap. xx, no. 8, words *tertia regula*, and on *Code*, VII. lii. 1, no. 4, ampliat. 3). It is to be found in the *Decisions of the Rota* (Decision 2, *De Rescriptis, in novissimis decisionibus*, no. 2), and it is clearly to be drawn from the *Sext* (Bk. I, tit. II, chap. i, in the passage beginning, *Singularium consuetudines*). For by this phrase [the above-cited chapter of the *Sext*] excludes general [customs and laws], as the Gloss thereon also notes.

Baldus. Felinus. *Rota.*

The reason is that a subsequent general law revokes a previous one of the same order, even though it makes no mention of the latter, as is stated in the aforementioned chapter [*Sext*, Bk. I, tit. II, chap. i]. But 861

[1] [*Supra*, p. 632.—Tr.]

a universal custom has the same force as a general law, and has the standing of an unwritten rule of the canons, or of the civil law. Therefore, . . .

Likewise, the prince, who is held to have all laws locked within his own breast (as is stated in *Sext*, Bk. I, tit. II, chap. i and in *Code*, VI. xxiii. 19), is held not to be ignorant of a universal custom; and he is, therefore, assumed to revoke such a custom when he enacts a new law, in the presence of which the custom can no longer persist.

The application of the foregoing rule.

8. And this rule holds true in due proportion for every diocese with respect to the synodal laws and general customs of that diocese. It is likewise true of the civil laws of the various kingdoms with respect to the general customs that obtain in those kingdoms: the principle is the same. For this reason, Abbas [, i.e. Panormitanus,] says (*De Consuetudine*, Chap. xi, last no.) that if a city makes a statute in opposition to one of its own customs, the latter is then revoked, even though the custom is not mentioned. The reason is that the city is presumed to be aware of its own customs, since they are not introduced without the knowledge of the people. But I think that this assertion is to be taken with the proviso that the city in question shall have absolute authority in legislation; or if it shall have the power of legislation only with the permission of the prince and subject to his confirmation, that the people shall inform him that the law which is to be passed revokes the custom (argument of *Decretals*, Bk. I, tit. IV, chap. ix). The reason is that the prince could not otherwise give his consent to revocation of the custom, since he is not presumed to have knowledge of a private custom. Again, he would permit the enactment of such a statute much less readily and only after very careful consideration, if he were to have notice of the existence of the custom. And finally, by the common law it is provided that a change is not to be made in any custom (*Digest*, I. iii. 23)[1]; therefore, in order to enact, with the sovereign's permission, a statute opposed to a custom, the fact of the existence of the custom must be called to his attention.

Abbas.

I note, finally, that the foregoing assertion or conclusion holds true no less in the case of an immemorial custom, than in that of any other custom which has been validated by prescription. For if the law is fully as universal in character as is the custom itself, even though the latter is not expressly mentioned in the law, it is nevertheless revoked by the said law. The reason is that previously given: the custom in question is presumed not to be unknown, and it possesses no more than the force of a positive common law. In fine, the custom here is held to be revoked not in virtue of a universal derogating clause under which it is to be supposed especially to fall, but by the positive knowledge of it on the part of the prince, who, notwithstanding such

[1] [*Digest, loc. cit.*, has: *Minime sunt mutanda quae interpretationem certam semper habuerunt.*—Reviser.]

knowledge,[1] desires to make a law which cannot be valid unless he revokes the custom in question; therefore, [by enacting the law under these circumstances,] he also revokes the custom.

Second inference.

9. The second inference from the same condition and rule is that a universal law framed for the whole Church does not revoke the particular customs of dioceses, cities, or provinces, unless there is added to the law the clause *non obstante* (notwithstanding), revoking them in specific or at least in general terms. This statement holds also, in due proportion, for the laws of kingdoms, or of provinces—in so far, that is, as they are universal in those provinces—in their relation to the customs of particular localities of the kingdom or of the province: in these cases also the same principle applies, and there is the same application of jurisdiction.

Thus, therefore, our statement is expressly set forth in the aforesaid *Sext*, Bk. I, tit. II, chap. i. The basis for it in reason there given is that a universal lawgiver is assumed not to know of the particular facts with respect to which the customs of particular localities are ordered. He is, therefore, held not to will the revocation of such customs by a general law, unless he expressly makes reference to them, or, at least, causes a general revocation of all contrary customs by adding the clause *non obstante* (notwithstanding), &c.

Gloss. Panormitanus. Rochus. Paul de Castro. Jason. Guido. Panormitanus. Azo. Hostiensis. Bartolus. Giovanni d'Andrea.

The Gloss and the Doctors in their observations (on *Sext*, Bk. I, tit. II, chap. i, and on *Decretals*, Bk. I, tit. IV, chap. xi) agree in holding this opinion, as does Panormitanus in his commentaries on those chapters (no. 24); Rochus (*De Consuetudine*, Sect. 7, no. 30) and Paul de Castro, Jason, and others (on *Digest*, I. iii. 32) take the same view. But Bartolus in commenting on the same law 32 [on *Digest*, I. iii. 32, in lect. no. 5], cites Guido to the contrary, and he himself seems to hold the same opinion with respect to the civil law on the ground of *Digest*, XLVII. xii. 3, § 5, although he admits our opinion with respect to the canon law. Panormitanus also takes the same position (*supra*). Azo defends this opinion in his *Summa*. Hostiensis cites Azo and follows his doctrine (*Summa*, on *Decretals*, Bk. I, tit. iv, no. 10).

But, as a matter of fact, Bartolus disapproves of the doctrine of Guido[2] and, accepting the teaching of the canonists, especially that of Giovanni d'Andrea (on *Sext*, Bk. I, tit. II, chap. i), defends the common opinion. That this is his conclusion and doctrine—in principle—is very clear from *Repetitio*, no. 5. He there makes it clear that, even 862 though this rule is not so expressly stated in the civil as it is in the canon law, nevertheless, the principle of *Sext*, Bk. I, tit. II, chap. i, holds true for all law; and that it does not so much set up a legal rule for one order of law only, but rather declares one that has, according to right reason, application in that of every legislator. And with respect

[1] [Reading *qui ea* for *qua*.—Reviser.]

[2] [i.e. Archidiaconus.—Tr.]

to *Digest*, XLVII. xii. 3, § 5, he replies in a word (in his comment thereon) that we must understand it to refer to custom of which the prince had knowledge, or which he expressly willed to abolish, should it be in existence. This reply amounts to the extending of that text from a statute to custom, if the custom be understood to be one existing antecedent to the law in question. But it has other meanings also, as I have said above. In this meaning, the law (*Las Siete Partidas*, Pt. I, tit. ii, law 6) must also, it would seem, be taken, when it says that it is possible for a subsequent law to abolish a contrary custom, even though Gregory López (*ibid.*, in Gloss 6) understands it to hold absolutely and independently of conditions, citing in support of his opinion the authority of the aforesaid section 5 (*Digest*, XLVII. xii. 3, § 5). Gregory López. Gloss.

A question raised.

10. The question arises as to what custom this rule is to be held to apply; to a prescriptive custom only, to one, that is, which has already introduced law, or to one of shorter duration, also? For the above-cited Doctors have nothing on this question, and they set forth their opinion in general terms without explicit reference to these differences in the kind of custom. They would, then, seem to have had in mind legal custom—that is, custom which has introduced a rule of law—and furthermore, custom validated by prescription: for they are speaking of a custom of which the prince is presumed to have no knowledge, and custom of that kind cannot establish a legal rule, unless it be validated by prescription. Again, I find the word *praescripta* added to the Gloss (on *Sext*, Bk. I, tit. II, chap. i, word *facti*). Gloss.

The same conclusion may be drawn from the *Sext* (Bk. I, tit. II, chap. i), where we find the word *derogandi* used; for there can be no derogation in the strict sense of the term except from an earlier law[, in this case, that of a custom validated by prescription]. Conversely, a special custom is held to derogate from a general law for the reason that a special law derogates from a general law; and this, even if the special law was in existence before the general one came into being. This is true, first, as a rule of law; and again, because it is based on the principle that the prince is not presumed to derogate from a special law of which he has no knowledge. Therefore, the custom in question is to be assumed to be such as shall have introduced law. A final argument here is that this rule [of *Sext*, Bk. I, tit. II, chap. i] must have reference to a custom validated by prescription, for no other custom can be designated which, of its nature, should subsist in the face of a later general law.

Certain necessary considerations on the aforesaid chapter of the *Sext*.

11. Nevertheless, I must call attention to the fact that in the aforesaid chap. i [*Sext*, *ibid.*], which rules that particular customs are not revoked by an absolute law framed in general terms,[1] it sets down only one

[1] [The actual words are: *ipsis, dum tamen sint rationabilia, per constitutionem a se noviter editam, nisi expresse caveatur in ipsa, non intelligitur in aliquo derogare.*—Reviser.]

condition with respect to the customs in question, namely, 'provided they are reasonable'; and does not add the condition, 'provided they are validated by prescription.' It is, therefore, not to be added by us. Hence, when the Pope wished validation by prescription to be an essential condition, he never failed to include it, as is clear from the *Decretals* (Bk. I, tit. IV, chap. xi).

Likewise, the reason there given is that the custom [stands in the face of a contrary general law because it] is something in the sphere of fact. I conclude, therefore, that even though it has not developed to the point of establishing law, the basis of that law exists in it, in respect of the prince's having no knowledge of it, and he is, therefore, presumed not to revoke it.

An objection.

One may object that the custom is in that passage termed a custom 'of fact', inasmuch as it is distinguished from a common law, just as a statute is said to be one 'of fact', not because it is not law, both general and particular, but because its enactment has been brought about by special facts. And so this passage is to be taken as referring to prescriptive custom; for, granting that the same reasoning holds true of non-prescriptive as of prescriptive custom, with respect to the ignorance of the prince with regard to the custom, it does not hold true in this respect, that the prince is presumed not to have willed to set up by his law an obligation in opposition to such an inchoate custom of fact. And this, for the reason that, since such custom has not established law, the question of derogation from it—a question which *is* relevant in the case of a custom which has established law—would be without meaning. [The law has, therefore, reference to an established custom 'of fact', in the sense that we defined those words, and not to one that has not yet established law, that is, which is still an inchoate custom of fact.]

The objection is refuted.

Granting the difference between the two kinds of custom, I still hold that my inference stands, since in respect of [the principle involved in] the reason laid down by the law—that the prince is not presumed to will the enactment of law inharmonious with the customs of those whom it is to bind—the two are to be regarded in much the same way. And this reasoning holds for any custom which is firmly rooted in observance, even though it has not yet been validated by prescription. This conclusion is further strengthened by the rule of law that a general enactment does not regard what is particular, which the legislator would probably not have wished to affect by his legislation had he been aware of it; and by the fact that the forcing of the people to change a custom which is contrary to a general law, especially a custom which the prince would have taken into very serious account in the framing of his law had he known of it, is attended by difficulties beyond the ordinary. Therefore, it is very improbable that this law intended the revocation of custom of this kind.

12. For the foregoing reasons, I think that the rule stated in the aforesaid chap. i [*Sext*, Bk. I, tit. II, chap. i] is not to be restricted to a prescriptive custom, but must be understood to extend to any reasonable and just custom which has been confirmed, both by public usage and observance, through a period which would be sufficient for the introduction of a legal rule, if the prince had knowledge of the custom, and if it would appear very probable to a prudent mind that the prince would have given his approval of the custom, provided it had come to his knowledge. Under these conditions, it is most improbable that he would wish to legislate against the custom by a general law, or that he would wish to abolish it—since he has no knowledge of it—without declaring his will in express terms to that effect.

In what way the rule of that text receives a broader interpretation.

For to this sort of custom, both the words and the principle of the aforesaid chap. i [*Sext*, *ibid.*] apply exactly. Therefore, the phrase 'to derogate' is rightly used in connexion with this kind of custom also. The reason is, first, that the phrase is commonly used in connexion with
863 other laws of justice which are not truly written laws—for example, when we say that the prince, in conceding a privilege, does not wish to derogate from the [established] rights of a third person; secondly that, such a custom would of its own virtue be sufficient for the establishment of a legal rule, were not this prevented by the sovereign's ignorance of the custom; and finally, that the people already possess a certain right not to be forced to change such a custom, from which the prince is not to be understood as wishing to derogate, unless he gives clear manifestation of such an intention. This, then, is our reply to the argument given against our position.

The answer to the question.[1]

13. And to the last reason advanced in support of the opinion, I reply that it is true that no fixed period of observance can be set down as marking the custom referred to by that rule; but it can be said, that that period is sufficient which a prudent judgment will regard as such. In principle, the manner of determining a sufficient duration of the custom here in question will be that which we indicated in our discussion of non-prescriptive custom with respect to its establishing law in cases where the prince has knowledge of it. In such cases the sufficient period of observance is not [always] of the same length, or a fixed one for all customs of that kind; it is, rather, to be determined by a prudent judgment which takes into account the circumstances of the custom. A like duration determined in the same way, is, we hold, sufficient for the custom we are here discussing. All those, certainly, who teach that custom never

[1] [i.e. the 'final argument' at the end of Sect. 10, *supra*, p. 637.—Tr.]

establishes law, except when the prince has knowledge of it, hold our opinion in principle; for they cannot deny the rule laid down in the aforesaid chap. i [*Sext*, Bk. I, tit II, chap. i.], namely, that a general law does not abrogate a particular custom of which the prince has no knowledge, although, according to their teaching, it has not yet established law.

Finally, it would seem to be accepted usage that in the defence of a particular custom against a general law, the 'long time' necessary for validation by prescription is not to be rigorously considered or urged, but that, rather, the rectitude of the custom and the fact that in the opinion of prudent men it is sufficiently established, are to be urged.

14. A second difficulty with respect to that rule may be raised, namely, whether a particular law enacted without conditions by the Pope, or by some other prince of universal authority, for a certain locality—diocese, &c.—effects a derogation from a particular custom of that locality in opposition to the law in question. The reason for the question is that the law derogates from an antecedent custom, provided the two are (so to speak) properly comparable; as, a general law with a general custom; a particular law with a particular custom. We have already dealt with this question in respect of a general law and a general custom in our discussion of the rule touching that point; and there would seem to be an analogous relation between a particular law and a particular custom. It was for this reason that in setting forth the rule on that point, we stated that a private custom is revoked by a local statute enacted by the community concerned if it has the power to make statutes, even if the custom is not mentioned in the statute. Therefore, the same holds true *a fortiori* of a statute enacted by a superior prince, since his authority is much greater.

A second difficulty.

15. Nevertheless, it would seem that we must assert that the custom is not immediately revoked by a law of this kind, save with the previous consent of the people, or where it is evident by petition or information, or in some other way, that the law was enacted by the prince with full knowledge of the custom in question. The reason is that the rule of the aforesaid chap. i [*Sext*, *ibid.*] applies no less in the case of a law of this kind, than in that of a general law; because it is not to be presumed with less reason that the prince is ignorant of the private custom in his making of one law, than in his making of another; nor, supposing that he has no knowledge of the custom, is he to be presumed willing to derogate from it, unless he expresses a will to do so.

A particular custom is not revoked by a particular law made by the Pope, except under certain conditions.

Here we have a marked difference between a universal sovereign and a particular and local one, when they exercise legislative authority:

in the prince, such ignorance of the local custom is assumed to exist; but in a particular community or governor it is not to be so assumed. Thus the words of the aforesaid chap. i [*Sext*, *ibid.*] hold generally for every 'constitution newly published by the Pope'. The inference is sound; for, since doubt or obscurity on the point is possible, it is to be held that if the prince had wished that his particular law should prevail, notwithstanding a contrary custom, he would have made known his intention. For this is what is done in most generally accepted usage, and it is in conformity with the law. Hence, when he does not add a clause expressing such an intention, he must be presumed not to have willed to revoke the custom.

This principle must, in practice, be kept in mind with regard to many laws, which are particular with respect to the authority from which they emanate, and also with respect to the community to which that authority is extended, but which are enacted as general for some diocese or congregation, the customs of which, even though they are general for that diocese or congregation, are particular from the standpoint of the prince; they are, therefore, held not to suffer derogation by laws of this kind, unless a derogating clause is incorporated in the law. And so a custom is held not to suffer derogation through a privilege granted by the prince, except when the privilege carries a derogating clause—as will be made clear later in its proper place.

16. An objection may be drawn from the reason set down by the Gloss (on *Sext*, Bk. I, tit. II, chap. i, word *singularium*); namely, that such a law would be useless and superfluous, since it would have no effect in any place. For a general law, even though it may not abolish a custom in one place, is not useless, for the reason that it would be binding upon the remainder of the whole community. But a law made for a special place or congregation, if it is there obstructed by a particular custom of a contrary nature, will be useless. Likewise, to persist in the observance of that particular custom in contempt of his law would seem to be opposed to the obedience due to the superior prince.

An objection from the Gloss.

But the reply can be made, that this law is, of itself, useful and efficacious; but accidentally, by reason, that is, of the prince's lack of knowledge of the custom, it is of no effect. Nor is this [nullification of the law] contrary to the obedience and reverence due to a superior; for it is held to be in accord with his will, as manifested in the common law.

The reply.

I note, further, that the law in this case is not useless, nor is it wholly lacking in effect; for it obliges the subjects reverently to accept the law, and to have recourse to the superior, calling his attention to their custom, and presenting the reason for it, with the intention of obeying the law, if, notwithstanding his present knowledge of the

custom, the superior still wishes that the law should be observed. Meanwhile, however, they are not bound to act against the custom. These reasons are excellently borne out by a parallelism found in the *Decretals* (Bk. I, tit. III, chap. v), and by the observations that are there set down.

17. Finally, we must make clear what words are to be added to a general law, or a law of the prince, for it to be held as abrogating custom. For in the aforesaid chap. i [*Sext*, Bk. I, tit. II, chap. i] we find the words, 'unless express provision is made in the law'. On this, the only point calling for observation is that, in these cases, the derogation is usually effected through the words, 'notwithstanding a contrary custom', or by others of the same or like import, or a clause of virtually the same meaning. I shall explicitly discuss these clauses in Book VIII,[1] in connexion with the revocation of privileges.

What words must be added to a general law, in order that the custom may be held to be abrogated?

Enough has been said in earlier books of this treatise as to when clauses of this kind do no more than revoke a past custom and when they prohibit, or even reprobate, a future custom. The only question that remains for us in this matter, is whether an immemorial custom also is to be held abrogated by clauses of this kind expressed in absolute terms; or whether this is true only of customs of whose beginnings we have definite knowledge.

Three opinions as to when an immemorial custom is held to be abrogated.

On this point, there are three opinions. The first one affirms absolutely that by means of the clause, 'notwithstanding custom to the contrary', every custom, even an immemorial one, is revoked, even when to that clause the distributive 'whatever', or one similar to it, is not added. This is the doctrine of the Cardinal.[2] The reason that can be given for this opinion is that the negation is sufficiently distributive in itself, since it removes *all* contrary customs.

The first opinion.

The Cardinal.

The second opinion is that, with the addition of the distributive 'whatever', immemorial customs are included in the revocation; but that they are not so included when that word is not used. This opinion is defended by many canonists, and it is to be found in the Glosses cited by Covarruvias. The reason for the exemption of immemorial custom in the first case may be its special character; the ground for holding it revoked in the latter will, then, be that the duplication (as it were) of the distributive is intended to overcome the exemptive character of such custom.

The second opinion.

Glosses. Covarruvias.

18. The third opinion is that, even with the addition of the distributive 'whatever', an immemorial custom is not revoked, unless in the revoking clause the words, 'even if it is immemorial', or their equivalent, are included.

The third opinion.

This opinion is held by many jurists. They are referred to by Covarruvias and Tiraqueau, who follow their doctrine; the former does so in *Variarum Resolutionum* (Bk. III, chap. xiii, no. 5); the latter in *De Utroque Retractu* (Tract. II, § 1, gloss 2, no. 25); and it is suggested in Gloss on *Authentica ut de caetero*, chap. i, word *praescriptione* [*Novels*, LV, chap. i, word *praescriptione*]. For, when that law uses the words, 'notwithstanding any prescription, &c.', the Gloss adds, 'Except one of a hundred years', for one of that length is held to be immemorial; indeed, it adds, 'or one of forty years', which is considerable. The import of these words is that whenever a custom is revoked by a law, or a prescription is rejected, the law is to be understood as referring to an ordinary custom, or to a prescription that has run for a 'long time', but not to one that has been observed for the 'very long time', much less to one that is immemorial. Thus also, the civil laws say that discontinuous servitudes cannot be acquired by prescription (*Digest*, VIII. i. 14); nevertheless, this rule does not hold in the case of immemorial prescriptions—and this, without taking into account *Digest*, XLIII. xx. 3, § 4. That law provides us with a basis for proving our assertion almost as strong [as that just cited]. The reasoning here is that, since nothing is known of the beginning of the custom there referred to, so neither is it known whether that right was established by usage alone, or whether it owes its origin to some other cause, such as a privilege, a constitution, or the like. And it is to be noted, for this reason, that a custom of that sort is not abrogated by a law referring in a general way to 'custom'; for the custom of which we treat has a certain superiority of character.

Covarruvias. Tiraqueau.

Gloss.

It is to be added, that it is for this reason that an immemorial custom has a very special status in law, and carries with it many special privileges; and is, therefore, in accordance with another well-attested interpretation not affected by a general [revocating] clause. Therefore, this opinion can be adopted in practice. Certain conditions, which have to do with the matter of prescription, are commonly set down for the validity of this rule; these, however, we need not rehearse here. They are to be found in the passage of Tiraqueau, cited earlier [*De Utroque Retractu*, Preface, nos. 19 *et seq*].

The first conclusion approving this third opinion.

Tiraqueau.

19. Our second main conclusion must be that an ancient custom may be abrogated by a subsequent one, when due proportion is observed; that is, a universal custom by a universal one; and a particular custom by a particular one of the same locality—for customs of different

The second conclusion: an ancient custom may in due proportion be abrogated by a subsequent one.

[1] [Not included in these *Selections*.—Tr.]
[2] [i.e. Gratian.—Reviser.]

places are not contrary, the one to the other. There may be a derogation, however, from a universal custom by a particular custom of a certain place; and, finally, a custom universal within a certain locality can derogate from a particular one. These conclusions are almost the same as those defended by Hostiensis (in *Summa*, Bk. I, rubric iv, no. 10) and all other writers on this question.

Hostiensis.

The general proof for this thesis is that in this way customs are compared with one another, just as laws and[1] customs are compared, respect being paid to due proportion between the cases. Thus, in the *Institutes* (I. ii, § 11), we find it stated that, 'The laws which are made by a state are wont often to be altered either by the tacit consent of the people, or by the enactment of a subsequent law.' And just as this is true of rules established by written law, so is it *a fortiori* true of those introduced by unwritten law; for it would seem that a tacit consent 865 is more likely to be changed by a contrary tacit consent, than that an express consent should be changed by a tacit one: yet such can be the case, as we have proved. Therefore, . . .

It is, therefore, most important that the customs be truly contrary to each other; for if they can be brought into harmony, they are, as Hostiensis says, both to be followed. Once we assume their mutual opposition, however, then all parts of our assertion are evident.

Hostiensis.

Touching the last assertion in our thesis, it is to be noted that there can be no derogating clause attached to a custom, because customs consist of actions, not of words; and that it is for this reason necessary that a universal custom, in order to derogate from a particular one, must be extended to the locality where the latter formerly prevailed. When that takes place, the fact of the derogation is then clear; for contradictory opposition (so to speak) is then perfected, and the people themselves have given their consent. The custom will not have this effect if it remains general only in the other portions of the province or kingdom; for in that case a universal custom cannot be prejudicial to a particular custom to which the people strongly cling, any more than a universal law can derogate from such a custom.

20. It may be asked, what duration is necessary and what number of acts is called for that a subsequent custom may derogate from an earlier one. Our reply must be that neither one nor many contrary actions are sufficient, but that a custom validated by prescription is necessary, or one such as is sufficient for the revocation of a written law. Thus the Gloss 2 (on *Digest*, L. xvii. 171, 166[54]) is to this effect. This is the doctrine also of Hostiensis (on *Decretals*, Bk. I, tit. iv, no. 5, § *qualiter*, words *sed numquid*); of Panormitanus (*De Consuetudine*, Chap. xi, no. 19); of Rochus (*De Consuetudine*, Sect. 4, nos. 69 *et seq.*

Of the time and the actions required for the revocation of a custom.

Gloss. Hostiensis. Panormitanus. Rochus.

[1] [Omitting *vel* in the text.—Reviser.]

[nos. 74 *et seq.*]); and of Felinus (on *Decretals*, Bk. I, tit. ii, chap. viii, no. 30, at end), where in a scholion the names of many other authorities are given.

Felinus.

The reason here is that no custom can establish new law, unless it is itself validated by prescription, or has the approbation of the prince's consent; and consequently, no custom can abrogate a previous custom, unless it have the same consent of the prince. Therefore, a period of at least ten years is required for abrogation, if the prince has no knowledge of the custom; or a period to be fixed by the judgment of prudent men, if the prince has knowledge of the new custom.

21. It may also be asked, whether a period of forty years is required in ecclesiastical customs in order to effect the revocation of earlier customs. Panormitanus states without reference to a distinction of customs that an observance of ten years is sufficient; and Felinus follows his doctrine. The latter gives as his reason that the later custom is not one contrary to law. This assertion he proves as follows: because either the first custom was contrary to law, and the subsequent one is according to the older law, which had been revoked by the first, and thus a reversion to the more ancient law is facilitated; or, the first custom was outside the law, and so the subsequent custom will be a custom of the same kind: and therefore a period of ten years will always be sufficient for the subsequent custom. Rochus does not approve of this argument (*ibid.*), nor does Barbatia [*Repertorium*, *De Consuetudine*], and I, also, find it difficult to accept, because it does not take into account at all the character of unwritten law.

Rochus. Barbatia.

My opinion, therefore, is, briefly, that if the prior custom was not contrary to the law, but was outside the law, then the subsequent custom will be in absolute opposition to the law, and will therefore demand an observance of the length of time necessary for a canonical prescription. The proof is that the former custom established a legal rule to which the later custom is opposed, nor is it in conformity with any existing law. Likewise, if the prior custom was universal, and the later one was particular, then the truth of my assertion is the more evident, since a universal custom establishes general law. The same thing seems to be true if the earlier custom were a particular custom of that locality, and not in opposition to the general law. For a custom contrary to statutes of the character described above would be in opposition to the law, and would require an observance of the length of time necessary for a canonical prescription. Therefore, the same is true of a custom, for the principle is the same in both cases.

The time required in the case of a canonical prescription, and likewise where one custom derogates from another.

When the period of ten years is sufficient.

If, however, the prior custom was opposed to general law, which was not completely abolished by that earlier custom—for the reason that the custom that derogated from it was not a universal, but a particular one—then it is probable that a subsequent prescriptive custom, of ten years' standing, is sufficient. The reason for this is that this prescriptive custom is not of its essence opposed to the law, since the general law, to which a return is made by this custom, always stands. In that case the argument of Felinus stands [on *Decretals*, Bk. I, tit. II, chap. viii, no. 30].

Felinus.

When forty years are required.

I could not approve it, however, if the prior custom were universal, and had completely annulled the universal law previously existing; for in that case, I think that a canonical prescription of forty years is necessary against such a custom, because the subsequent custom is then completely contrary to the general law established by the previous custom. For any other law more ancient than either custom is as if it had not existed before the other two, because it has been entirely abolished. Let this suffice for our treatment of custom.

[*The Title-Page of the Edition of 1613*]

A DEFENCE OF THE
CATHOLIC AND APOSTOLIC FAITH
IN REFUTATION OF THE ERRORS OF THE ANGLICAN SECT
WITH A REPLY
To the APOLOGIE FOR THE OATH OF ALLEGIANCE
and to the admonitory Preface of
His Most Serene Majesty James, King of England
By
FATHER FRANCISCO SUÁREZ
of Granada, Member of the Society of Jesus
Primary Professor of Sacred Theology at the celebrated Academy of Coimbra
Dedicated to Their Most Serene Majesties
the Catholic Kings and Princes of all Christendom

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