PART XV. HUMANISTS: THE SEARCH FOR THE TRUE ANTIQUITY

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A. PIERRE PITHOU, DEDICATORY EPISTLE TO THE *MOSAYCARUM ET ROMANORUM LEGUM COLLATIO* (1572)

in Pierre Pithou, *Opera ... miscellanea* (Paris 1609) 75–6 [Trans. CD[1]]

To the most famous and most generous man, Christofle de Thou *Caelius*,[2] knight, first president of the court of the kingdom,[3] and senator of the sacred consistory,[4] Pierre Pithou[5] greeting!

There is no single reason why I offer these remains of old authors of the law to you, most generous president, but this one seems particularly just: that it was fitting that these [remains] (which to some may perhaps seem to be brought forth against the interdict of the prince Justinian), be defended by some more holy[6] name against the calumnies and foolishness of most ungracious men, who either pretend [not to know] or in fact do not know that whereas he prohibited comparison and reading aloud in court among his people, we in truth keep the majesty of the Roman laws so courteously that we nonetheless allow them to have no license[7] among us except what we concede to their reason and equity, not to their authority and sanction. Whose name, in truth, could be chosen that would be more noble for this defense than yours? Since, finally, under your presidency this purer jurisprudence has been received for the court's use, and since you so hold and so guide the rudder of our law in that highest tribunal of Gaul, that like that very great man of old, you can not unworthily be called the *soma*[8] of the Senate[9] and, indeed, in some sense, the *empsychos nomos*.[10] And also that you can claim by a certain right that is yours a share[11] in our works, of all of which you are the chief patron, or rather father, when your highest humanity clearly persuades you that the name of goodness[12] is more pleasing to you than the name of power. A further reason is the recollection that of the respect my father once felt toward you, by which I have recently sensed you are deeply affected, when you would take up a piece of the history of our country[13] with such an expression as if you seemed to recognize, not unwillingly[14] in the child the mouth, eyes, face, and finally that similitude of nature of an acquaintance or even a friend once dear to you.[15] All these things, to confess the truth, so enkindled my spirit, that from that time I always hoped to be given an occasion on which I could respond in at least some way to your benignity and testify by some sort of service that that inheritance of reverance for you that came to me from my father had not so much increased, as that I myself had retained it[16] by a certain continuance of spirit. May you therefore receive this gift from a man most dedicated to your virtues, not any great thing, but one nonetheless that may at this time benefit you and through you the public utility, you who will perhaps some time in the future be even more distinguished as a man to whom God has given the spirit of a good citizen,

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[1] With considerable help from Prof. E.A.R. Brown.

[2] *Christopherus Thuanus Celius*. Tyler Mayo, a student in this class, suggests that Pithou is giving de Thou the name 'Caelius', to correspond to M. Caelius Rufus, a Roman orator, and correspondent of Cicero's.

[3] De Thou was *premier président* of the parlement of Paris, 1562–1582.

[4] Perhaps a reference to de Thou's position as *conseiller* of the Conseil privé.

[5] *Petrus Pithoeus*.

[6] I.e., respected.

[7] I.e., authority.

[8] Body. The reference to the 'very great man of old' is obscure, perhaps Cicero, perhaps some earlier senator of the Republic, like Cato.

[9] I.e., parlement.

[10] The law in spirit.

[11] *Virilis portio*.

[12] *Pietatis*.

[13] Pithou must be referring here to some edition he published of work of French history. E.A.R.B.

[14] Perhaps the meaning is "not without pleasure."

[15] Pithou's father is unknown to us; must be checked.

[16] I.e., the reverance.

and whom He confirms, increases, instructs, aids, protects out of His singular clemency in every way he can. Fare you well, most generous man. Paris, the Kalends of October, MDLXXII.[17]

[17] 1 October, 1572. The St. Bartholomew's Day Massacre took place on the preceding 24 August.

B. MOSAICARUM ET ROMANORUM LEGUM COLLATIO

Tit. 9. *De familiari testimonio non admittendo* in A. Schulting ed., *Jurisprudentia Vetus Antejustineanea* (Leipzig 1737) 766–71

[This is a genuinely pre-Justinianic work, probably of the fourth century, first edited by Pithou in the volume, the dedicatory epistle of which is translated above. Although Schulting's edition is by no means the best, it is quite competent, and he offers both Pithou's notes and his own, the longer of which are translated below. CD trans. throughout.]

1. (Again Moses:) Thou shalt not bear false witness against thy neighbor.[1]

2. (Ulpian in the 8th book on the office of the proconsul at the *lex Julia* about public and private force:) By the same law[2] certain people are entirely interdicted from testimony and certain from testimony if they are unwilling, in chapters 87 and 88. [In chapter 88] in these words for these men: "By this law let there not be permitted to speak testimony against the defendant anyone who being a freedman freed himself from him, his parent, the freedman of either of them, or who is under the age of puberty, or who [has been condemned in a public judgment who] has not been restored to whole [*qui eorum in integrum restitutus non est*], or who is in chains and public custody, or who has pledged himself for fighting,[3] or who has hired or hires himself out for fighting with beasts, except someone who has been or is sent to the city to fight with javelins,[4] or who has publicly made or makes gain with the body, or who has been adjudged to have taken money to give testimony." And none of these gives testimony against the defendant according to this law even willingly. In chapter 87 in these: "Unwilling[5] let them not speak testimony against the defendant who is cousin to the defendant or joined by closer relation, or who is his father-in-law, son-in-law,[6] stepfather, or stepson." And the rest.

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[1] Exodus 22. Pith. [At the first biblical quotation (Coll. 1.1, p. 727) P. notes: "Which translation of the holy books the collector used here is not yet apparent to me. Many exist, even today, in the older archives, of which, to use the words of Augustine, the variety is infinite."]

[2] By the *lex Julia* of public trials there were enumerated persons who could not be denounced for testimony if they were unwilling, or rather those things which excuse even those who are willing from giving testimony. [D.22.5.4] That law seems to have provided nothing about those who in every way were rejected from testifying. But many other laws had provisions each about its own question, such as the lex Julia about force, and about bribery, and about peculation. [D.22.5.5, 13] And here indeed two chapters of the one about force are proposed, of which the first I think can be restored from Callistratus [D.22.5.3.5, quoted above Part ID]. Nor does he distinguish in vain the one who has pledged himself from the one who has hired himself out to fight the beasts, as does also Paul in the single book on adultery. For the one simply hires out his labor disgracefully, the other totally adjudges himself to servitude. And rightly Acron and Porphyry write that those are called pledged who sell themselves to the game. And Manilius, I think, also writes about them in Book 4 of his astronomy: "Now they sell their lives to death, their corpse to the arena,/ and each one prepares an enemy for himself." ... [Further quotations from Petronius and Tibullus omitted.] Pith.

[3] Callistratus does not have this phrase. Did Tribonian erase it on account of l. un. C. de gladiatoribus penit. tollend.? Concerning those pledged something was done also in tit. 5 n. 3. Schulting.

[4] [P. first restores the text to what we have.] Javelin-throwers are said to be those who work at putting lions and other wild animals in the circus such as were first sent by Bocchus when L. Sylla set lions loose in the circus. Seneca says this in *liber de brevitate vitae*. Further from this place it appears clear enough that the Roman laws did not conform to what Hermenopolis hands down from the Praxis of the Master in book 1 of Prochiri: that no attention was paid to the mores or quality of life in witnesses about force. Pith.

[5] Therefore where it says in [D.22.5.5] "in the laws," that is, not only in the lex Julia about public trials but also in the lex Julia about force &c. Pithou.

[6] Jacques Godefroi thinks that this was also a provision in the lex Julia and Papia, ad cap. 6 leg. Jul. In truth it cannot be gathered from [D.22.5.5; D.50.16.146] of which the first, from what it gathers, only teaches that an espoused is included in the phrase "son-in-law" and the father of an espoused woman in the phrase "father-in-law" in those laws in which it is provided that these people cannot be compelled to give testimony unwillingly, and it does not follow from this that that law also provided the same thing; indeed those laws are cited as providing something different from the lex Julia and Papia. Schulting.

3. (Paul in the fifth book of opinions under the title concerning witnesses and torture [*quaestionibus*]:[7]) It has been decided that witnesses who are suspected [of partiality],[8] and especially such as the accuser produces from his own household, or whose low station in life renders them of bad repute, should not be interrogated; for in the case of witnesses, their social position, as well as their dignity, should be considered. Witnesses cannot be examined with reference to anyone if they are[9] related to them by either marriage or blood.[10] Neither parents, children, [patrons,] nor freedmen[11] should be admitted to testify against one another, if they are unwilling to do so; for the near relationship of persons generally destroys the truth of evidence. Pith.

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[7] This is title 15 where the words in our codices do not include "and torture." Titles 14 and 16 are concerned with that. [Schulting]

[8] "Received [*susceptos*]" is what it says in the old mss. But who would not admit "suspect?" And so today it is read as written in the Sentences of Paul [5.15], and is added "of partiality." I think the old writing is not rashly to be condemned. The clients whom the paterfamilias so took in his faith so that they are regarded as part of the family are also said to be "received," as in l. 3 D. de usu et & habit; l. 5 D. de his qui dejec. vel effu.; l. 7 D. de capt. et postl.; l. 89 D. de furt.; l. 3 C. de novationib. The remains of this old law are still extant in l. quidam cum filium 132 D. de verb. obl. which my teacher, Jacques Cujas, brought to light from Servius and Salvianus, as he did many other things previously unknown to our men, through which: "The greatest glory of the Roman law awaits him." And this man of great learning, to be compared without envy to the original chorus-leaders of the law, in the number of whose students I count myself—this one thing I would put in the largest part of the praise—would descend even to these things when challenged. For in these things as much as this disturbed writing of ours lacks merit, so much splendor and glory it achieves because of his most learned and sure commentaries. Not without reason therefore is the testimony of those received and of clients not admitted as domestic, l. 24 D. de testib.; l. praesenti, 6, sec. penult. C. de iis qui ad Eccles. conf., in which the word "familiar" is not ill referred to the one received. Clearly Gellius from the speech of Marcus Cato against Lentulus also refers to this among other things: "No one speaks testimony against a client." lib. 5 Noct[es Atticae] c. 13. Julius Severianus also uses the word "received" in the rhetorical precepts, certain fragments of which were recently prostituted under the title of Celsus after the more complete edition of Cornelius. Pith. We defend "suspected" which is in Paul, where we have also noted other things about these words. Schulting.

[9] I would prefer "Witnesses cannot ... to anyone related" as it is in Paul. It is, however, this way in the lex Julia on public trials, as Paul himself hands down in l. 10 de grad. et adfinib., in which, however, we read the word "agnates" put in the place of "cognates." Pith.

[10] In the margin of the Scaliger codex is "relatives by blood or marriage." However, Pithou rightly reads "to anyone related by blood or marriage." And it will be the same thing whether a witness is sought against an affine or a cognate, or whether affines or cognates are sought against others, who, however, are such to them. Schulting.

[11] And the best exemplars have this, and it is not absurdly that the name of "near relationship" is usurped for freedmen, and also for slaves, as in l. 2 C.Th. de testament. There is, as there is with blood, a certain near relationship of friendship and of affinity and of offices, although what Callistratus says, that on account of reverence of persons certain are not admitted to the faith of testimony, better suits all of them.

C. JEAN BODIN, METHODUS AD FACILEM HISTORIARUM COGNITIONEM

I. Bodini Methodus ad facilem historiarum cognitionem (1st ed. Paris, 1566; Amsterdam, 1650, repr. Aalen, 1967), 175–6[1]

And so having compared the arguments of Aristotle, Polybius, Dionysius [of Halicarnassus], and the jurists—with each other and with the universal history of commonwealths—I find the supremacy (*summam*) in a commonwealth consists of five parts. The first and most important is appointing magistrates and assigning each one's duties; another is ordaining and repealing laws; a third is declaring and terminating war; a fourth is the right of hearing appeals from all magistrates in last resort; and the last is the power of life and death where the law itself has made no provision for flexibility or clemency.

[1] The translation is derived from J.H. Franklin, 'Sovereignty and the Mixed Constitution: Bodin and His Critics', in *The Cambridge History of Political Thought: 1450–1700*, ed. J.H. Burns, (Cambridge [Eng], 1991), 302 (based on the edition of P. Mesnard, in *Oeuvres philosophiques de Jean Bodin* (Paris, 1951)). Cf. B. Reynolds (trans), *Method for the Easy Comprehension of History* (New York, 1945), 172–3.

D. JEAN BODIN, SIX LIVRES DE LA RÉPUBLIQUE 3.5

(French ed. of 1576, Latin ed., 1586) [trans. (from both eds.) by Richard Knolles, 1606, reprint ed. 1962, pp. 325–43 (abridged, spelling, punctuation and some phraseology modernized), citations in the notes from the Paris ed. of 1576, repr. 1986][1]

[Book 3, Chapter 5] Of the power and authority of a magistrate over particular and private men, and of his office and duty.

[1][2] We have before said that a magistrate is an officer who has public power to command or to forbid. Now he has power so to command or to forbid who has public power to enforce or constrain those who will not obey that which he enjoins them, or who do contrary to his prohibition, and may also ease the prohibitions by himself made. For albeit that the law says that the force of the laws consists in commanding and forbidding, in suffering and punishing;[3] yet is this power more proper unto the magistrate than unto the law, which is of itself dumb, whereas the magistrate is a living and breathing law, which puts all this to execution, seeing that the law in itself carries or contains nothing but commands or prohibitions which are but mockeries and to no purpose if the magistrate and the punishment were not attendant at the foot of the law ready for him who transgresses the same. Howbeit that to speak properly the law contains nothing but the very prohibition and the threats for not obeying the same, considering that he who commands (inclusively) forbids to transgress his command; and as for sufferance that is no law; for sufferance takes away prohibition and carries with it neither penalty nor threat, without which the law cannot be, considering that the law is no other than the commandment of the sovereign, as we have before declared, and whatsoever threat or penalty is propounded by the law, yet the punishment nevertheless never ensues the breach thereof until it be pronounced by the mouth of the magistrate. Whereby it evidently appears all the force of the law to consist in them which have the command, whether it be the prince, people or magistrate, unto whom so commanding, if the subjects do not yield their obedience, they have power to enforce or punish them, which *Demosthenes* calls the very sinews o f the commonweal.[4]

[2] We have said that the magistrate ought to have public power, to put a difference between this power and the domestic power. We said also that the magistrate should have power to constrain such as would not obey; for the difference from them which have the hearing of matters who may also judge and pronounce sentence and call men before them, but yet have no power to compel or constrain men or to put their sentences or commandments in execution, such as were in ancient times the pontiffs and now our bishops also; such as were also the ancient commissioners, delegates unto the magistrates having power to hear the causes unto them committed, as also to condemn the parties, but yet had no power to constrain them but sent their sentences unto the magistrates to be ratified or reversed, and by them to be put in execution as they saw fit. So might these delegates call men before them, but yet so, as that no man, unless he wished, needed to obey them, unless the magistrates themselves by virtue of their authority so commanded.[5] And therefore he was not in danger of the law, who had by force rescued a private man, as he was to be brought before these private judges or delegates appointed by the magistrates, which he should have incurred had the delegates

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[1] The citations in the notes have been modernized and hence are placed in square brackets. The abridged translation of M. J. Tooley (Oxford, [1955]), 90–6, has been compared, but proved too heavily abbreviated and interpretive to be useable. As the leading modern scholar on Jean Bodin points out, the Knolles translation does not accord with modern scholarly standards because Knolles made composite translation of both the Latin and the French texts (which themselves differ substantially in some places). He also did not use the last French edition that appeared in Bodin's lifetime (1583). Jean Bodin, *On Sovereignty*. J. Franklin, ed. and trans. (Cambridge, 1992), xxxv–xxxviii. Unfortunately, Franklin did not translate the passge that concerns us.

[2] The paragraph numbers are not in the original and are added for convenience of reference. CD.

[3] [D.1.3.7: "*Modestinus, Rules, book 1*: The force of a law [statute] is this: to command, to prohbit, to permit, to punish."]

[4] [Bodin quotes the passage from Demosthenes without giving a reference.]

[5] [D.42.1.15[pr]: "In a rescript the deified Pius directed the magistrates of the Roman people that those who appointed judges or arbitrators should execute their decisions."]

themselves had any power to command.[6] By contrast, now by our laws and customs the delegates have with us power to command and to cause their sentences to be put in execution by sergeants and other public persons by virtue of their decrees which they give out, signed and sealed with their own hands and seals; whereas the bishops with us have not such power to constrain men but send their sentences to be executed by the magistrates. As the cadies [i.e., qadis] and paracadies do in all the east, who have the hearing of all matters, but yet have no power to constrain men, but send their judgments unto the sabbasses, which have the command and power in their hand.

[3] We have before said that the first constraint of all those who had power to command is the seizing and attaching both of men's goods and persons, which the ancients called *prehensio*, or as we say an apprehending or laying on of hands, for it were to no purpose for the magistrate to call a man before him to judge him or to fine him and, when all is done, not to have the power to seize upon their goods nor person of him who shall disobey him. Now as we have before said that some there be who have such power to apprehend and attach men, who yet have no authority or power to call a man before them, neither to examine a matter, neither to rescue a man, neither to enlarge those whom they committed; as we showed of the tribunes of the people, of the eleven magistrates in Athens, of the capital *triumviri* in Rome, of the *avogadours* in Venice, of the king's attorneys and the deputies of those who have power of the common treasure in other realms and commonweals, and of the commissioners of the Châtelet of Paris, who may all imprison men and seize upon them, and yet for all that cannot relieve or enlarge them, which [power] belongs only unto the public magistrate, who have power to condemn and acquire and to judge, some them of men's goods only, other some of men's goods and honor also, and other some of men's goods and honor, with power to inflict corporal punishment also, but not death, and some having power to put to death also, and that some of them such power, as from whom men may appeal, and some others, such as from whom men may not appeal.

[4] But the last and highest degree is of such as have the absolute power of life and death, that is to say, power to condemn to death, and again to give life unto him which has deserved to die, which is the highest mark of sovereignty, above all laws, and above the power and authority of all magistrates, as proper only unto sovereignty, as we have before declared. Whereby it appears that there are two kinds of commanding by public power: the one in sovereignty, which is absolute, infinite and above the laws, the magistrates and all other private persons; the other is lawful command, as subject unto the laws and sovereignty.[7] The sovereign prince next under God knows none greater than himself; the magistrate under God holds his power of his sovereign prince and remains always subject unto him and his laws; the particular man next after God (whom we must always put in the first place) acknowledges the sovereign prince, his laws, and his magistrates, every one of them in his place. Under the name of magistrates I understand also them which jurisdiction annexed unto their fiefs, considering that they hold them also as well of the sovereign prince as do the magistrates in such sort, as that it seems that there are none in the commonweal but the sovereign princes, which may properly use these words, *impero et iubeo* ("I charge and command"), which in ancient times signified, I will and command,[8] seeing that the will of every magistrate and of all others also which have power to command is bound and depends wholly of the sovereign which may alter, change and revoke it at his pleasure. For which cause there is neither any one magistrate nor yet all together who can put in their commissions, "such is our pleasure" or "upon pain of death," for none but the sovereign prince or state can use the same in their edicts or laws.

[5] And hereof arises a notable question, which is not yet well decided, *viz.*: Whether the power of the sword (which the law calls *merum imperium* or mere power) be proper unto the sovereign prince and inseparable from the sovereignty and that the magistrates have not this *merum imperium* or mere power but only execution thereof, or that such power is also common unto the magistrate to whom the prince has

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[6] D.2.7.3.1: "If anyone should remove a person summoned before a subordinate judge (*pedaneus iudex*), the penalty provided by the edict [against removing by force those summoned *in ius*] will not apply."

[7] Tooley here adds (p. 92): "This is proper to the magistrate and those who have extraoridnary powers conferred on them by commission. These persons can exercise the right only until their office is revoked or their commission expires."

[8] [Bodin cites the notes of Aelius Donatus (mid-4th c. A.D.) on Terence's *Andria* (early 1st c. B.C.).]

communicated the same. Which question was disputed between *Lothair* and *Azo*, two of the greatest lawyers of their time. And the emperor Henry the seventh [VI] chosen thereof judge, at such time as he was at Bononia, upon the wager of an horse, which he should pay, which was by the judgment of the emperor upon the aforesaid question condemned. Wherein Lothair indeed carried away the honor, howbeit that the greater part and almost all the rest of the famous lawyers then held the opinion of *Azo*, saying that *Lotharius equum tulerat sed Azo aequum* (*Lothair* had carried away the horse, but *Azo* the right) nevertheless many have since held to the opinion of *Lothair*,[9] so that the question remains yet (as we have said) undecided, which for all that deserves to be well understood, for the consequence it draws after it, for the better understanding of the force and nature of commanding, and the rights of sovereign majesty. But the difficulty thereof is grown, for that *Lothair* and *Azo* neither of them well knew the estate of the Romans, whose laws and ordinances they expounded; neither took regard unto the change in that estate made by the coming in of the emperors. Certain it is, that at the first, after the kings were driven out of the city, none of the Roman magistrates had power of the sword over the citizens; indeed that which much less is, they had not so much power as to condemn any citizen to be whipped or beaten, after the *lex Portia* published at the request of Cato the tribune of the people 454 years after the foundation of the city [198 B.C.; it made scourging subject to *provocatio*].[10] By which law the people took this power, not from the magistrates only, but deprived even itself thereof also, so much as it could, giving the condemned leave for whatsoever fault or offense it were, to void the country and go into exile; and that which more is, there was not any one magistrate which had power to judge a citizen, if once question were but of his honor, or good name, or of any public crime by him committed, for then the hearing thereof was reserved unto the commonalty or common people, but if it concerned the loss of life or of the freedom of a citizen none might then judge thereof but the whole estate of the people in their great assemblies, as was ordained by those laws which they called sacred.[11] ... [A page and half discussing criminal jurisdiction in the Roman Republic is omitted.]

[6] ... But if the state of the commonweal being changed and the power of judgment and of giving of voices being taken from the people, yet for a certain time this manner and form of judicial proceedings continued, even after that the form of the commonweal was changed from a popular estate into a monarchy, as a man may see in the time of *Papinian* the great lawyer who gave occasion unto *Lothair* and *Azo* to make question of the matter in these words by him set down as a maxim: "Whatsoever it is that is given unto magistrates by decree of the senate, by special law, or by constitution of the princes, that is not in their power to commit unto other persons, and therefore (says he) the magistrates do not well in committing that their charge unto others, if it be not in their absence; which is not so (says he) in them that have power, without the limitation of special laws, but only in virtue of their office, which they may commit unto others, albeit that they themselves be present."[12] And thus much for that which Papinian says, using the words *exercitionem publici iudicii* [roughly, exercise of criminal jurisdiction], as if he should say, that they which have the sovereign majesty have received unto themselves the power of the sword and by special law giving only the execution thereof to magistrates. And this is the opinion of *Lothair*. By which words yet *Azo* understands the right and power of the sword itself to have been translated and given unto the magistrates. Now there is no doubt but that the opinion of *Lothair* was true, if he had spoken but of the ancient praetors of Rome, and so kept himself within the terms and compass of Papinian's rule, but in that he was deceived

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[9] [Bodin cites Alciatus, *Paradoxa* 2.6; Dumoulin, *In consuetudines Parisiensis* 1.1.5.58.]

[10] [Bodin cites: Livy 10; Cicero, *Pro Rabirio*; Salust, *Catalina*.]

[11] [Bodin cites: Cicero, *Pro Rabirio*; Cicero, *Pro domo sua*.]

[12] [D.1.21.1pr, a very free quotation but accurate in substance. More literally, the text reads: "Any powers specially conferred by statute or *senatus consultum* or imperial enactment are not transferable by delegation of a jurisdiction. But the competence attached to a magistracy as of right is capable of delegation. Accordingly, magistrates are held to be in the worong if they delegate their jurisdiction insofar as they are charged with the conduct of a criminal court [*publici iudicii habeant exercitationem*] under a statute or a *senatus consultum*, such as the *lex julia de adulteriis* and any other like acts. The most powerful proof of this point is that it is expressly envisaged by the *lex Julia de vi* that anyone to whom its enforcemnt belongs may delegate that function if he goes away. Accordingly, he may only delegate after the commencement of his absence, since otherwise there would actually be a delegation by someone present in the city. ..." The puzzling provision in the *lex Julia de vi* may be explained as a special statutory authorization to delegate (which would not exist if the statute had not expressly allowed it) and which is being read narrowly in the light of the general rule.]

that he supposed that the maxim or rule of *Papinian* to extend to all magistrates which have been since or yet are in all commonweals, who yet for the most part have the hearing of murders, robberies, riots, and other such like offenses and so the power of the sword given unto them even by virtue of their offices. For the emperors and law-givers having in the process of time seen the inconvenience and injustice that arise by condemning all murderers unto one and the self same punishment or else quite to absolve them, and so the like in other public crimes also, thought it much better to ordain and appoint certain magistrates who according to their conscience and devotion might increase or diminish the punishment as they saw equity and reason to require. ... [Bodin then outlines the history of imperial delegation of criminal jurisdiction, including to the *praefectus praetorianus* (whom Knoll calls "the great provost"), provincial governors and other magistrates with extraordinary power.] Now it is plain by the maxims of the law that the magistrates which had power extraordinarily to judge might condemn the guilty parties to such punishments as they would; yet so, as they exceed not measures. For so *Ulpian* the lawyer writes, he exceeds measure, who for a small or light offense inflicts capital punishment, or for a cruel murder imposes a fine.[13] Whereof we may then conclude that the great provost and the governors of provinces and generally all such magistrates as have extraordinary authority to judge of capital crimes (whether it be by commission or by virtue of their office) have the power of the sword, that is to say, to judge, to condemn, or acquit, and not the bare execution of the law only, whereunto they are not in this respect bound as are the other magistrates unto whom the law has prescribed what and how they are to judge, leaving unto them the naked execution of the law, without the power of the sword.

[7] And thus much briefly concerning the question between *Lothair* and *Azo*, for the fuller and more plentiful declaration whereof it is needful for us yet to search farther. [The Latin employs terms from Ramist logic, making it clear that Bodin means that Lothair and Azo were disputing a subordinate point which can only be clarified by extending it into a general proposition.] Where it is first to be enquired whether the magistrates' office be proper unto the commonweal or unto the prince or unto the magistrate himself together with the commonweal? Then whether the power granted unto the magistrates be proper unto the magistrates in that they are magistrates or else be proper unto the prince, the execution thereof only belonging unto the magistrates or else be common unto them both together? Now concerning the first question, there is no doubt, but that all estates, magistrates, and offices do in properly belong unto the commonweal (excepting in a lordly monarchy),[14] the bestowing of them resting with them which have the sovereignty (as we have before said) and cannot by inheritance be appropriate unto any particular persons, but by the grant of the sovereign and long and separate consent of the estates, confirmed by a long lawful and just possession. As in this kingdom, the dukes, marquises, counts and such others as have from the prince the government of the castles in sundry provinces, and so the command of them, had the same in ancient time by commission only, to again be revoked at the pleasure of the sovereign prince, but were afterward by little and little granted unto particular men for term of their lives and after that unto their heirs male, and in process of time unto females also, insomuch as that ultimately, through the negligence of princes, sovereign command, jurisdictions, and powers may lawfully be set to sale, as well as may the lands themselves, by way of lawful buying and selling, almost in all the empires and kingdoms of the west, and so are accounted of, as other hereditary goods, which may lawfully be bought and sold. Wherefore this jurisdiction or authority which for that it seems to be annexed unto the territory or land (and yet in truth is not) and is therefore called *praediatoria*, and is proper unto them which are possessed of such lands, whether it be by inheritance or by other lawful right and that as unto right and lawful owners thereof, in giving fealty and homage unto the sovereign prince, or state, from whom all great commands and jurisdictions flow, and in saving also the sovereign rights of the kingdom and the right of last appeal.

[8] Other public officers there be also which have neither jurisdiction nor command but only a certain public and servile charge, as the four offices of wax-choosers[15] in this realm, by right of inheritance

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[13] [D.49.19.13: "*Ulpian, Appeals, Book 1*: Nowadays [a judge] who is hearing a criminal case *extra ordinem* may lawfully pass what sentence he wishes, whether heavier or lighter, provided only that he does not exceed what is reasonable in either direction."]

[14] Tooley (p. 92) translates "despotic monarchy," which probably captures the sense.

[15] *chauffecires*, literally ?candle-lighters.

belonging unto certain men by the grant of King Louis. Divers also have attempted by process or time to prescribe the offices of the constables both of Normandy and Champagne as also the offices of the great chamberlains by right of inheritance to belong unto them although in that their suit has been often times by divers decrees rejected ... . [There follows an excursus on the offices of constable and marshal in France.]

[9] If then the martial magistrates and general have in every commonweal the power of the sword without any limitation or restriction unto the form of proceeding or of the punishment to be by them inflicted, according to the variety of crimes and offenses, all being as it were left unto their own discretion and judgment, a man then cannot truly say them to be but the simple executioners of the law, considering that they have no law whereunto they are in this regard subject, and so consequently we may conclude that the power of the sword is transferred into their persons, that power now not remaining in the prince alone. Whereby it also follows[16] that they being present may commit unto others so much of that power and authority which they have by virtue of their place and office as they please and retain thereof unto themselves what shall seem unto them good, which they could in no wise do if by special law they were constrained and bound to hear and determine of matters themselves and from word to word to follow the solemnity and pains set down in the laws. And this is it for which the law says that the praetor of the city being himself present might commit his authority and power to whomsoever he saw good, which the praetors for public causes could not do, for the praetor of the city had the hearing and deciding of all civil and criminal causes (except such as they call public as belonging to the common state) which fell out between the citizens of Rome as had also the praetor established for the hearing of causes between strangers and citizens, who, according to their discretion, condemned or acquitted such as were brought before them, moderating, correcting, or supplying the rigor or lenity of the law as they saw cause, which power of theirs was limited by the will and discretion of praetor so judging and not by the necessity of the law. And yet when as by the law or decree of the senate any particular cause otherwise out of their jurisdiction was committed unto them, albeit that it were referred unto their conscience to judge thereof, yet nonetheless they could not in this case commit the same unto others, as is to be seen by many examples noted by the lawyers.[17] Which point so manifested leads us unto the deciding of another question by us before propounded, *viz.*, that the power and authority granted unto magistrates by virtue of their office is proper unto the office, albeit that the office be not proper unto the person [corrected], for *Papinian*[18] saying that commissioners and lieutenants have nothing proper unto themselves but that they use the power and authority of them which commissioned and deputed them, sufficiently shows that the power is proper unto them which so commissioned and deputed them, whether they be sovereign princes or magistrates having the power so to do. And so in like case the law says that the governor of a country or province has within his government all power and authority next unto his prince, wherefore it is not then only in the prince.

[10] But the difficulty of the question depends principally on this distinction (whereunto the interpreters of the law have had no regard) as namely, that it is great difference to say that the power or authority is proper unto the magistrate in the quality of a magistrate or in the quality of a particular person, for it follows not, that if the authority or jurisdiction be proper unto the praetorship that therefore the praetorship should be proper unto the person, but to the contrary the law says that he has it in trust and that he is but the keeper thereof.[19] So we call the provost of Paris the keeper of the provostship of that city, which is to speak properly and to show that the estates and offices rest and remain in the possession and property of the commonweal as a thing put in trust unto the magistrate. And for that cause the bailiffs of cities and towns are so called of the word (*bail*), that is to say guardians or keepers. So also the Florentines called the ten men deputed to the keeping of their state and sovereignty by the name of bailiffs. And that is it for which

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[16] [D.2.1.16; D.2.1.5; D.48.16.1.14 (?); D.50.1.15; D.50.16.244; D.48.3.4; C.3 q.7 c.4 (on the qualities of a canonic judge); Antonius de Butrio, Johannes ab Imola, Panormitanus, Felinus Sandeus, Philippus Decius on X 1.29 (on the office of a judge delegate); Baldus in C.2.11.3; Baldus, *Consilium* 443.]

[17] [D.26.5.8; D.2.15.8.18; D.1.21.3.]

[18] [D.1.21.1.1: "One who has undertaken a delegated jurisdiction has no competence of his own but exercises the jurisdiction belonging to the officer who gave him his mandate. ..."]

[19] [D.1.17.un. (One can see how he gets this out of this law, though it does not say so; check the gloss.)]

the court of parlement in the decree concerning the marshals of France (before noted) says that their estate was of the proper demesne of the crown as thereunto properly appertaining and the exercise thereof belonging unto them so long as they lived. And so we may decide the general question and discuss the controversy betwixt *Lothair* and *Azo* who spoke but of the power of the sword only, and conclude, that as often and whensoever the magistrates and commissioners are bound by the laws and decrees to use the power and authority which is given them in such prescript form and manner as is therein set down whether it be in the form of proceeding or concerning the punishments without power for the magistrates to add or diminish anything thereunto or from; in this case they are but mere executors and ministers of the laws and of the princes from whom they have their authority yet not having any power in this point or respect in themselves, whether it be concerning civil police or the administration of justice or the managing of war or treaties to be had between princes or the charges of ambassadors, but in that which is left or committed to the magistrates integrity and discretion, in that case the power and authority lies in themselves.

[11] Now as in every commonweal there are two principal points which the magistrates ought always to have before their eyes, that is to say the law and equity, so say we that there is also the execution of the law, and the duty of the magistrate which the ancients called *legis actionem* and *iudicis officium*,[20] or as we say, the action or execution of the law and the duty of the judge, which is to command, to decree or to put in execution. And as the word *iudicium* or judgment is properly understood of that which is ordained by the magistrate following the strict terms and tenor of the law, so the word *decretum* is likewise properly understood of that which the magistrate ordains or decrees, following equity without the prescript law, the law itself still being referred to strict execution thereof and equity unto the duty of the magistrate. And for this cause all the decrees of the prince are properly called *decreta*[21] not *iudicia*, decrees, I say, not judgments. For why? the sovereign prince is not subject unto the law; wherein they deceive themselves which take a decree to be any thing else than the resolute sentence of the senate in their consultations or the decree of a sovereign prince, or the voluntary ordinance of a magistrate, without being bound to law or custom in the making thereof. Now such proportion as there is of the law unto the execution thereof the like there is of equity unto the office of the judge. And so likewise of magistrates who in case wherein they are not subject to the law resemble arbitrators,[22] but being strictly and wholly bound unto the law are but as judges appointed to understand of the fact only, without any power of themselves to determine the merit of justice of the cause, otherwise than the very strictness of the law appoints. Now of these the one is servile and the other is noble; the one is bound unto the law, the other is not so; the one understands but of the fact, the other of the right; the one is proper unto the magistrate, the other is reserved unto the law; the one is precisely written in the law, the other is without the laws; the one is in the magistrate's power, the other is quite without the same. And the better to note and perceive this difference the law says that it is not lawful for a man to appeal from the punishment set down by the law,[23] being pronounced by the magistrate, but only from that the judge has declared and denounced the party accused to be guilty; whereas it is right lawful for a man to appeal from the punishment which the judge by his own discretion appoint. For he who appeals from the law, appeals from the prince, from whom no appeal is to be made. And thus much concerning distinction of the power of magistrates, whereby not only the question of *Lothair* and *Azo* is decided, but many others also concerning the charge and duty of magistrates, wherein divers have sore entangled themselves, some mistaking the practice and some the theory, but most part for not having understood the Roman estate, albeit that they were well exercised and seen in all parts of their laws, and yet nevertheless in the state of magistrates concerning their power and authority they found themselves greatly troubled. For *Moulin*[24] himself (the honor of lawyers) not using the distinctions by us before set down has without reason

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[20] [In Douaren a similar distinction is made between *officium ius dicentis* and *officium iudicis*, slightly more accurate as an historical matter, but not as interesting. CD]

[21] [D.1.4.1;] et Pauli libri decretorum in cognitionibus praelatorum dumtaxat ad principem refertur, cuius propria iurisdictio dicebatur cognitio.

[22] Cicero elegantly in the *Pro Quintico* and in [*De officiis* 3] distinguishes between judges and arbitrators given *in jure*, as Aristotle: *dikastas apo ton diaiteton.*

[23] [D.42.1.32 (again, not quite what the passage says); Felinus Sandeus on X 2.1.10.]

[24] [Charles Dumoulin, *In consuetudines Parisiensis* 1.1.5.58.]

followed the opinion of *Alciat* and *Lothair*, whereunto he adds that the praetors of cities, whom we call bailiffs and seneschals, by the laws of this realm to have had the power taken from them for the appointing of their deputies for that they are but as simple users and occupiers and that he which has a thing but only to use and occupy cannot make any other user or occupier but himself, which is a reason without appearance as we have before shown. Whereunto join also that it is not an hundred or six score years at the most, since that *Charles* the seventh and the eighth were the first which made an office of the lieutenants or deputies of bailiffs and seneschals.[25] For if *Moulin* his opinion were well grounded, why should *Papinian*[26] expressly say that magistrates may depute and commit in their presence so much and so long and with such limitation as they themselves please of such things as they have by virtue of their office and which are proper to their estate? Now their magistrates' estates and offices in ancient time were much less proper and less appropriate unto the persons than they be at this present. For with us they are perpetual and in Rome they continued but for one year, and therefore might with much better reason than they appoint their lieutenants or deputies. Besides that, the lawyers themselves have made and written divers express books concerning lieutenants and deputies, which were to no purpose, if the comparison of him which has but the use only unto the magistrate were to be admitted and received. And as for others, the ancient doctors and interpreters of the law have in such sort entangled themselves, as that it evidently appears them to have had no insight into the estate or government of the Roman commonweal, without which it is impossible to determine any thing concerning these questions. For whereas the Romans had properly separated the office of the proconsul's lieutenant whom they called *legatum*, from the deputy in the quality of a particular commissioner, whom they called *iudicem datum*, from him unto whom the power was given by the magistrate to command whom they called *eum cui mandata iurisdictio est* [corrected], the doctors have confounded all together under the name of delegates,[27] which were a thing too long and too superfluous to refute, having proposed unto ourselves no other end but to entreat of that which concerns the estate and duty of magistrates in general.

[What follows is simply the summaries in the margin of the remaining paragraphs in this chapter:]

The magistrates in popular and aristocratic states much more bound unto the prescript laws than in regal monarchies.

Why in trial of private men's right, as also in public judgments, many things to be left unto the wisdom and conscience of the magistrate?

The magistrate may revoke his own decree or commands but not his judgment once given.

The magistrates' simple commands of right ought to be obeyed.

Whether private men may by force resist the magistrate offering them violence or wrong.

Private men are not to judge whether the magistrate do them wrong or not.

In what cases the magistrates offering wrong may of right in their judgments be withstood.

Violence in commonweals to be always detested.

Whether the magistrate may revenge the wrong and injury offered to him as he sits in place of justice.

Private injury soonest by sufferance buried.

That the person of the magistrate ought to be always sacred and inviolate.

And heavy censure upon a man for striking of a magistrate.

Magistrates to be always religiously respected.

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[25] [Charles 7, art. 101; Charles 8, art. 73.]

[26] [D.1.21.1; D.2.1.5, .16.]

[27] [Bartolus, Fulges. [Raffaele Fulgioso?], Alexander Tartagni, Paulus de Castro on D.11.21.1; Cynus on C.3.4.un; Baldus on D.1.16.9.1; Johannes Andreae *additio* to Durantis, *Speculum, de iudice delegato*, last section; Ludovicus Romanus on D.2.1.3; Antonius de Butrio, Johannes ab Imola, Panormitanus, Felinus Sandeus, on (probably) X 1.38.1 and X 1.31.10; Baldus on C.7.52.6, on X 1.29, on (probably) X 1.31.10.]

The duty of the magistrate for the maintenance of his reputation.

Lenity or rigor, neither of them commendable in a magistrate.

Lenity more hurtful in a magistrate than severity.

Gravity beseems a magistrate.

More severity to be required in a martial magistrate than in a civil which severity ought not yet to pass into cruelty.

The notorious cruelty of Piso the proconsul.

[I offer below the abridged version of these passages by M. J. Tooley (pp. 94–6):][28]

In ancient times it was usual to bind the hands of magistrates, governors, ambassadors, and generals in the field by compelling them by the strict letter of the law in what undertook, the forms they used, and the penalties they inflicted, without power of addition or subtraction of any sort. Today the tendency is all the other way. There is hardly a state in which pains and penalties do not depend upon the consideration and arbitrament of the magistrate. In all civil cases he has complete discretion, without being bound in in any way by the pains ascribed by Roman law or by decisions recorded in the courts. The Emperor Justinian caused a great deal of confusion by attempting to embody these latter in a code strictly binding on magistrates in the execution of their functions. But judges and jurists alike wished to do what they considered just, and that was often incompatible with ancient rules. In the end it was found necessary to leave all to the conscience and good faith of the judges, owing to the variety of circumstances, of places, and persons. This variety cannot be comprehended in any law or ordinance. And although there are still certain pains and penalties which are required by law to be inflicted without qualification in certain cases, nevertheless the magistrates do not keep to the restrictions. An example is the edict against coining published by King Francis I, inflicting the death penalty in cases either civil or criminal. The very parlements, bailiffs, and seneschals who registered it without demur do not keep it. They have found by time and experience that the edict is inequitable. The infinite variety of circumstances to not permit of uniform treatment. …

The magistrate, when not in court or exercising his magisterial function, is no more than any other private citizen, and if eh does anyone a wrong, he may be resisted and legal redress sought. But when exercising his function in his official resort, and not exceeding his powers, there can be no doubt that he must be obeyed whether he does that which is right or wrong, for so says the law. If he exceeds his sphere or his competence one is not bound to obey if the excess in notorious. The remedy is the appeal. If there is no possibility of appeal, or if the magistrate persists without deferring to his superior, then one must distinguish between the wrong that is irreparable and that which can be remedied. If the latter, the injured person has no right of offering any sort of resistance. If the former, for instance if it is a question of life or limb and the magistrate persists in proceeding to execute judgment without permitting appeal, in that case one can resist, not so much in order to defy the magistrate, as to defend the life of one in danger, provided always the action is disinterested. It is never permissible to resist the magistrate in the confiscation of property, even if he is exceeding his powers, and will not allow an appeal. Once can proceed to appeal, or petition, or to bring an action against him, or by some other means. But there is no law human or divine that permits one to take the law3 into one's own hands, and use force against the magistrate, as some have argued. This opens the way to rebels to trouble the commonwealth. For if it is permitted to the subject to seek redress against the magistrate by force, by parity of argument one could similarly resist the sovereign prince, and trample the laws underfoot. …

Not only is it not permissible to offend or injure the magistrates by word or deed, but they should be honored and reverenced as those to whom God has given power. … The magistrate on his side should merit respect for his justice, his prudence, and devotion, so that subjects should have sufficient occasion to honor him. he should not prejudice the honor of the commonwealth by hi sown unworthiness, for a fault

[28] [I have yet to decorate this with the citations from the original edition.]

committed by a magistrate is doubly reprehensible. By a provision in his laws Solon allowed the magistrate who was drunk in the exercise of his duties so to be put to death. This illustrates how strongly vice was reprobated, and a good reputation expected in a magistrate. many magistrates seek to avoid criticism by severity in judgment. Other seek popularity by pardoning freely. But the law condemns both excesses. Many of those who have discretionary powers of punishment not precisely defined by law make the mistake of thinking that equity supposes a greater leniency than the rigor of the law requires, imagining that equity does not spring from strict justice but from mercy. But equity is not to be identified with either justice or mercy, but is a balance which can incline either way. If the crime is greater than the penalties of the law cover, the magistrate with discretionary powers should increase them. If the misdemeanor is light one, he should mitigate them. he should not aim at a reputation of a merciful magistrate; for this a fault more to avoided than a reputation for severity. For severity, though it is blameworthy, maintains the subject in obedience to the laws, and the sovereign who has instituted them. That is why the law of God expressly forbids the exercise of mercy towards the poor in giving judgment. …: