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DOCUMENTS

Bartolo on the Conflict of Laws

Translated by J. A. CLARENCE SMITH*

INTRODUCTION

If it should be enquired why Bartolo's observations on what we call the Conflict of Laws need a new translation^a, the answer is given in the preface to the only English translation so far published, by Beale in 1914:

"The translator can urge as a qualification neither an adequate command of the Latin language, knowledge of medieval law, nor English style."

No one with a smattering of the knowledge which Beale disclaimed would find his disclaimer exaggerated. His continual errors, a few of them truly monumental, are not worthy treatment of a text nearly every paragraph of which was cited time and time again for three hundred years.

Bartolo, who died in 1357 aged 43, effected a concise synthesis of his predecessors over the century and a half since the birth of Private International Law, and then added to this twice as much again on points touched by them elsewhere, together with his own reflections. The synthesis is to be found by itself in his commentary on Digest I.iii.32 (*de quibus*), taught in the first year of the curriculum, which he repeated^b (much of it nearly word for word) on the first law of the Code (*cunctos populos*), taught in the fourth year, with certain additions and a significant change of order: in passing contracts in the later version before instead of after crime he set the future fashion.

In the following pages the earlier version is translated first, partly by way of underlining the distinction between the old and the new, and partly because it has a greater spontaneity of style

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a. See Ehrenzweig's plea in 12 *Am. J. Comp. L.* 384 (1963).

b. There are difficulties, which the reader will no doubt see for himself, in the assumption that the commentary on the law *de quibus* was written first; but on balance it seems more probable.

than the later, at least as printed. The later and more famous version follows, omitting what has already been said, but for greater convenience referring back to the page on which the identical (or nearly so) passage in the earlier version is to be found.

In common with all other medieval commentators Bartolo relied on two main sources of primary authority, the *Corpus Juris Civilis* commissioned by Justinian, and the *Corpus Juris Canonici* commissioned in stages by the Papacy; but he was not a canonist, and of the few citations which he made from this latter source most are at second hand. He himself included all references in the body of his text; but in the present translation those from these primary sources have been taken out and will be found in the first bank of (lettered) footnotes: the reader may reconstitute the original form of the text simply by reinserting them. The references are given in modern form, that is numerically instead of by citation of first words, though part of the verbal citation is retained as more eye-catching. Of the constituents of the civil Corpus, the Institutes, Digest and Code were as we know them; but the Novels were known as the Authentica in the middle ages, and part of their text was inserted piecemeal at appropriate points in the Code: the extracts so inserted are identified by a lower-case "a" after the number of the law in the Code which they follow. The constituents of the canon-law Corpus to which Bartolo paid attention were Gratian's collection (about 1160), the "Extravagantes" (collected for Pope Gregory IX in 1234), and the "Sext" (collected in 1298).

There was no medieval edition of the bare text of either Corpus, the text being always surrounded by marginal notes called glosses. The glosses surrounding the civil Corpus were those collected and in part composed by Accursius (about 1227, except for the famous one on the law *cunctos populos* (below), which was added about 1245): Accursius' glosses were called collectively the Standard Gloss (*Glossa Ordinaria*). Citations from the Corpus sometimes mention the gloss, and sometimes refer more to the gloss than to the text without expressly saying so.

The second bank of (numbered) footnotes forms no part of Bartolo's own text: it consists of translations of the passages which he cited, with the gloss where appropriate; for, although to our post-medieval minds the connection is sometimes far-fetched, it is misleading to suppose that they were cited merely as a matter of form, any more than the cases on which our modern text-books rely; and since we no longer know them by heart we cannot follow the argument completely without their being set out.

The reader's attention is specially drawn to the fact that at all stages, whether of text or of footnotes, square brackets indicate the intrusion of the translator.

The references which Bartolo also makes to his recent predecessors cannot be reproduced in this way: their remarks were often longer than Bartolo's own text. It is hoped to offer translations of some of them separately later; but a very summary account of the relations between the writers cited (in capital letters below) may not be out of place here.

Although it was usual for a student to go through all five years of his curriculum with the same master, Bartolo himself is said to have sat (at Perugia) at the feet of CINO (died 1336), and (at Bologna) of JAMES BUTRIGAR (died 1348) besides Oldrad and Rayner of Forlì, all before taking his doctorate at Bologna at the age of 20: Rayner of Forlì annotated the lectures delivered at Toulouse in 1315 and 1316 by WILLIAM of CUGNEUX.

A generation further back, DINO (died about 1298) was the master of both Cino and Oldrad, Cino being also strongly influenced by the commentaries of PETER of BELLEPERCHE (died 1308). Oldrad had another master in JAMES of ARENA (died about 1296): this James and ALBERT of GANDINO (also died at the end of the thirteenth century) shared a master in the canonist Guy of Suzara. Of the same generation again were NICHOLAS of MATARELLI (teaching in 1279) and the great SPECULATOR, who seems to have published his *Speculum Juris* comparatively early in life in 1271.

A generation earlier again, Speculator's master was "Hostiensis," himself a pupil at Bologna of James Baldwin. James Baldwin's other pupils included Pope INNOCENT IV (died 1254), ODOFRED (died 1265), and JAMES of REVIGNY (died at a great age in 1296). This last was the master of Peter of Belleperche, above, and the inventor of the technique of appending his remarks on conflicts to the law *cunctos populos* under the divisions of offenses, contracts and successions.

James Baldwin (died 1235) could, without much exaggeration, be called the father of Private International Law; but he left nothing written except a few glosses, and Bartolo does not cite him. With Accursius (above, died about 1260), the compiler of the Standard Gloss on the civil Corpus, and MARTIN of FANO, he was a pupil of Azo. Bartolo mentions another contemporary, HUBERT of BOBBIO, but only at second hand. Indeed it does not seem that Bartolo consulted independently any authority older than his masters' masters.

So much for Bartolo's antecedents. In the succeeding centuries his was the uniquely great name in every field of the law until the "Bartolists" were displaced in the sixteenth century by the devotees, such as Cujas (died 1590), of "pure" Roman law; "purity" involved the rejection of such concessions to contemporary practice,

whether contrary or complementary, as had been operated by the more practical Bartolists. "Pure" Roman law, however, knows nothing directly of the Conflict of Laws; and since this conflict is a fact of life which will not go away by dint of not being thought about, the structure of the rules founded on Bartolo continued to fill the gap. Even Huber's methodless iconoclasm^c in the seventeenth century did not succeed in dissolving his own Bartolist foundation; and when Scotland in that century and England in the next took over the continental doctrine of conflicts ready-made—a "reception" unique in the history of the common law—Bartolo was still important enough to be cited in not a few early English and American cases. Story, it is true, hardly mentions him directly, partly no doubt because he was baffled by the extensive abbreviations in the Latin text available to him^d, but the continental writers on whom Story relies mention him all the time.

It is not possible to give any precise date for the appearance of Bartolo's commentaries; but they were known and textually cited in the next generation. They were not, of course, printed for another two centuries. It was the printers who added the paragraph numbers, more to indicate salient points than to sub-divide the text: for this reason I have felt free to shift them occasionally.

The Latin text from which this translation is made was printed at Basel in 1589 and the following years. The commentary on the law *cunctos populos* was reprinted from the same edition as Appendix I to Guthrie's translation of Savigny (second edition, 1880, page 433), literally except that it was seen fit to recast the style of the references: this was Beale's text. Apart from simple misprints^e, it can be seen that the manuscript behind this edition was corrupt at several important points: confirmation came to hand, while the present translation was going through the press, from a manuscript (Vat.Lat.2589) which I found at the Vatican Microfilm Library at St. Louis. Only the most significant corrections can be made: they are indicated by daggers, a double

c. Text reprinted with an English translation by Lorenzen in (1919) 13 Ill. L. R. 375, 401 ff, and in his Selected Articles at page 136.

d. So he avows at page 19 of the second edition, note (1). He was not the last to be in such difficulties, but the only one to avow it.

e. A rough count shows about forty new misprints in Guthrie's text, all but two of single letters, excluding mistakes in the references. The same commentary was reprinted from the Turin edition of 1574 by Professor Meili of Zurich University in (1894) 4 *Niemeyer's Zeitschrift für Internationales Recht*, 258 and following, 340 and following, and 446 and following. This reprint contains a fair sprinkling of errors, including, *mirabile dictu*, some of Guthrie's, but mainly in extending abbreviations and in translating the references into yet another system.

dagger showing omission of words in the printed text, and a pair of separated daggers showing that everything between is inserted or substituted.

The translation prefers a familiar word to pedantry where no doctrine of conflicts is affected: thus "tutor" and "fideicommissum" are translated "guardian" and "trust," although it need hardly be said that the correspondence is not exact; and "publicatio" of a will becomes "probate," the correspondence this time being close: there is no resemblance at all to our "publication." "Domicilium," however, is translated not by its familiar homonym, but by "residence" which is closer to the sense. "Jus commune" has nothing to do with our "common law," and becomes the "general law;" while "statutum" is not "statute" but "local legislation." "Serviceman" is not very elegant for "miles," but seems to be the only word capable of covering both officers and men. "Inspicitur" could be "governs" if one could forget the jurisdictional overtones of the latter word: to avoid prejudging this issue we have to use the more literal "is looked to," and leave it to the context. One has occasionally to break the rule against translating a word by the same word: no other translation of "contractus" is possible but "contract." "Delictum," however, does not become "delict," which is not English. For this word, which indicates both a crime and a tort, one has the choice between "offense" which looks more like crime, and "wrong" which looks more like tort: since Bartolo was (from the context) clearly referring to crime I have chosen "offense."

On a particular point, "favorabile" and "odiosum" are not translated "favorable" and "odious," with the suggestion that the latter means "contrary to public policy," or even distasteful to the judge. These words refer to the intention of the legislature to benefit, or on the other hand to harm or to reduce the privileges of, a class of persons: "confiscatory" might do duty for "odiosum," but on the whole it has been thought better to translate by "benevolent" and "malignant."

Bartolo's treatment of his subject is highly schematic, and a synopsis setting out the arrangement of his commentary on the law *cunctos populos* may perhaps assist:

I. Application of legislation to Persons (whether legislation affects non-subjects)

A. Legislation regarding Contracts

Point 1

1. Formalities—place of contracting
2. Rights created by contract—
 - a. Conduct of case (procedure)—place of trial
 - b. Decision of case (merits)

- i. rights arising with contract—place of contracting, except dowry
 - ii. rights arising after contract—place for performance
- B. Legislation imposing Penalties for offense within the territory Point 2
 - 1. If offense under general law—applies to non-subjects
 - 2. If offense created by local law, and
 - a. Offender knew or ought to have known of it—applies
 - b. Offender reasonably did not know—does not apply to non-subjects
- C. Legislation regarding Wills made within territory Point 3
 - 1. Reduction of formalities—applies to non-subjects
 - 2. Increase or reduction of capacity—does not apply to non-subjects
- D. Rights annexed to Property—law of site Point 4
- E. Lay legislation in church court Point 5
- II. Application of legislation to Places (whether legislation effective outside territory)
 - A. Prohibitive (i.e. disabling) legislation Point 6
 - 1. Formality, increase for wills—does not affect act outside
 - 2. Directed at property—does not affect property outside
 - 3. Directed at person, reduction of capacity—
 - a. if benevolent—affects subject acting outside, and subject's property outside
 - b. if malignant—does not affect subject's property outside
 - B. Permissive (i.e. enabling) legislation Point 7
 - 1. Enabling to act as notary—
 - a. does not enable act outside
 - b. act inside respected outside
 - 2. Reduction of formality—will made inside affects property outside
 - 3. Increase of capacity—
 - a. does not enable act outside
 - b. act inside does not affect property outside
 - 4. Increase of proportion of inheritance
 - a. directed at property—does not affect property outside
 - b. directed at persons—
 - i. does not affect non-subjects
 - ii. even for subjects (being malignant) does not affect property outside
 - C. Punitive legislation Point 8
 - 1. Expressed to extend to conduct outside

- a. both parties outsiders—does not affect conduct outside, except by treaty
- b. victim citizen, offender outsider—does not affect conduct outside, except: theft from shipwreck; by treaty; or no justice at place of offense
- c. offender citizen and trial here—affects conduct outside
- 2. Expressed generally
 - a. legislation on procedure (inquisition or accusation)—affects conduct outside
 - b. legislation on penalty—does not affect conduct outside
- D. Criminal Judgment Point 9
 - 1. Against person
 - a. prohibition of access to place
 - i. expressly by judgment—ineffective for place outside
 - ii. as consequence in law—effective for places outside
 - b. prohibition of occupation—ineffective for place outside
 - c. reduction of capacity, as consequence in law—effective outside
 - 2. Against property (N.B. where effective, forfeiture always to site)
 - a. site under same exchequer but different court
 - i. sentence under general law—affects property outside
 - ii. sentence under local law
 - also in force at site: affects property there
 - not in force at site: does not affect property there
 - b. site under different exchequer
 - i. sentence under local law—does not affect property outside
 - ii. sentence under general law—affects property outside

TRANSLATION

Part I—Commentary on law *de quibus*

Text of Digest I.iii.32 (*de quibus*):

In cases where we are not guided by written legislation, we should conform to what has been established by usage and custom . . .

Commentary:

25. The fifth main point is the effect of a custom . . . Thirdly this may be interpreted as an enquiry to what persons and to what places its force extends.

On this point persons must first be treated; and whatever I may say about a custom is to be taken also as of local legislation and vice versa. The first point then is whether they bind infants and lunatics . . .

26. The next point is whether they bind outsiders, a matter dealt with by CINO^a and by SPECULATOR^b.

The answer is that it depends on whether we are considering offenses, in which case it depends on whether what was done in this city [Perugia] is an offense under the general law, when it is punishable under the local legislation and custom of this city^c. And so holds DINO^a and JAMES of ARENA and everyone: [the trial of prominent persons "under the laws applicable to everyone"]^e does not tell against this, in view of CINO's answer^f to it.

If on the other hand it was not an offense under the general law, then it depends on whether the outsider in question had stayed long enough there for it to be reasonable that he should know of it, when the result is the same^g.

If on the other hand he has not stayed so long, then it depends on whether that conduct was generally forbidden in every city, or

a. On Code I.i.1 (*cunctos populos*), [his §§ .12 to 20] and on Code VIII.iii (*Que Sit Longa Consuetudo*) .1

b. On Ordinances (*de Constitutionibus*), [vv. 5 to 11].

c. Cf. Code III.xv.2 a (*qua in provincia*),¹ and Digest XLVII.xi.9 (*sunt quaedam*).²

d. On Digest XLVIII.ii.7 (*si cui*), § .5.

e. Code III.xxiv (*Ubi Senatores*) .1.³

f. Commenting on that law.

g. For this I cite Code III.xv (*Ubi de Criminibus*) .2, and the comment on it in the last gloss.⁴

1. In whatever province a man has offended, or may be liable in debt or in crime . . . or for whatever cause he may have become liable on whatever matter, there in that province the law must take its course against him.

2. There are certain crimes that attract punishment according to the usage of each province.

3. Any person not "right honorable" but merely "honorable" who has abducted a maiden or broken close, or has been caught at any other misdeed, shall be forthwith tried within the province in which he committed the outrage under the laws applicable to everyone.

4. . . . the competent judge will take cognisance of the case there if the person whom you accuse of selling a free-born boy stays there. *Gloss* 3, "stays:" that is, has his residence there. Or the reference may be to a person without fixed residence. Or the answer is "lives" there, like a student at his place of study, though he may not be "resident" before ten years.

throughout the province, as for instance that grain shall not be removed from the territory, which is generally forbidden throughout Italy: in this case he may not rely on ignorance as a complete defence^h.

If on the other hand it is not uniformly forbidden in this way, then he is not bound without actual knowledgeⁱ.

27. Then comes the point: what about contracts? The answer, to be fuller than the authorities, is that it depends on whether the point is local legislation or custom [(1)] regarding the manner of entering into the contract in question, or [(2)] relating to the rights arising out of that contract.

In case (1) the place of the contract is looked to^j.

In case (2) it depends on whether the point relates to the manner of conducting the case, when the place of trial is looked

h. Cf. Digest XXXIX.iv.16, § .5 (*licet quis*).⁵

i. Cf. Digest L.ix (*de Decretis ab Ordine*) .6.⁶

j. Cf. Digest XXI.ii.6 (*si fundus*),⁷ and on the ground of Code VI. xxxii (*Quemadmodum Testamenta*) .2.⁸

k. Cf. Digest XXII.v.3 (*testium*), § .6.⁹

5. No plea of ignorance will save a man from a revenue penalty, according to the ordinance of the Emperor Hadrian of happy memory. (*Gloss*: . . . This is a matter of natural law, or nearly so, on which no mistake is allowed . . . But even here ignorance will lead to a more lenient sentence: §.10 below). §.10: The imperial brothers of happy memory further decided that when a man has incurred a penalty not in fraud but by mistake, the collectors should remain satisfied with the double tax, and restore the [confiscated] slaves.

6. The legislation of a certain borough provided that anyone bringing an action outside the borough should be barred of his judgment and fined a thousand drachmae [This translates the medieval Latin version of the Greek] . . . an opinion was sought on whether the penalty should be incurred by a person breaking the regulation in ignorance of it. He advised that such penalties are intended only for those who know of it. *Gloss* 1, "know of it:" and not for those ignorant of it . . . unless he can be blamed for not knowing . . . Digest XXXIX.iv. 16, §.5 [above, note (5)], which founds a contrary view. In that case he is punished even in ignorance, seeing that it is not permitted to be ignorant of what is publicly promulgated.

7. Where land shall have been sold, security against eviction must be furnished according to the custom of the locality where the transaction was concluded.

8. Upon oath that your father has given you his will for the purpose of production in his own country, you may produce it there so that it may be registered in accordance with the legislation and usages of that place.

tok, or relates to the decision of the case; and, if the latter, it depends on whether it is [(i)] a matter arising from the nature of the contract, or [(ii)] a matter arising subsequently from neglect or delay.

In case (i) the place of the contract is looked to: where the contract was concluded, not the place at which performance was fixed, on which point the Gloss^m and DINOⁿ agree. The rule does not apply to dowry^o.

In case (ii) the custom of the place at which performance is fixed is looked to^p: the reason is plain, that that is where the neglect or delay may be said to have been committed.

These [principles] are helpful for many [problems]. First, if the customs on accruer of dowry vary between the husband's

l. As would follow from Digest XLIV.vii.21 (*contraxisse*).¹⁰

m. [? on Digest XXI.ii.6 (*si fundus*).] ¹¹

n. [? on Digest XLIV.vii.21 (*contraxisse*).]

o. cf. Digest V.i.65 (*exigere*),¹² for the reasons set down in that text.

p. Cf. Digest XII.i.22 (*vinum*),¹³ and XIII.iii (*de Triticaria*) .4.¹⁴

9. . . . The imperial brothers of happy memory also decided that "in so far as concerns the summoning of witnesses, it is the duty of the judge to investigate what may be the custom of the province in which he sits."

10. All contracts are deemed to have been made at the place fixed for performance.

11. Where land shall have been sold, security against eviction must be furnished according to the custom of the locality where the transaction was concluded. Gloss 1, "concluded:" although the land may be elsewhere, for there may be a sale of land situated elsewhere . . . It follows that [on the point] whether the vendor is bound to refund double the purchase price, or simply the purchase price, or furnish a surety or not, it is the custom of the place of contracting that is looked to.

12. A widow should claim her dowry at the place where her husband had his residence, not where the deed settling her dowry was executed. For that is not the kind of contract to be referred to the place where the deed of settlement was made, but rather to the [person] to whose residence the wife in question was to go back as an incident of the marriage.

13. A claim was made in court on wine lent. An opinion was sought . . . on what place's price should furnish the measure of damage. [Sabinus] advised that if replacement had been promised at a particular place, then the price at that place; but if it had not been so specified, then the price at the place of action.

14. . . . The measure of damage should be first the price at the place for delivery; but if no such place was agreed, then the place of action is applicable.

city and the wife's city, the husband's city is looked to^q.

Again, in this city [Perugia] the local legislation is that whoever does not claim a debt for ten years is barred of his right. [Suppose] now a Florentine has lent me a hundred [pieces] to be repaid him in this city; and he sleeps on it for ten years. The contract will be prescribed, because it may be said that the neglect was committed here, and that is why the custom of this city should be looked to.

28. The next point is: what about wills? It is the custom at Venice that a will may be validly executed before three witnesses: suppose now a visiting businessman has executed his will there before three witnesses: it is valid?

We must first consider whether the custom [itself] is valid.

JAMES of ARENA has argued this point^r, and has explained it as follows. It depends on whether this custom [lacks the consent of the Emperor, when it will not be valid. As a matter of fact it^s] is in terms disapproved, since there must be at least five witnesses [even] in a place where there is no skill in the law^t. Besides the custom may be said to be bad and imprudent. For it was from fear of forgery that the requirement of seven witnesses came in^u: but to follow such a custom will make easier the perpetration of for-

q. Under Digest V.i.65 (*exigere*) above,¹² and the reasons there set down.

r. [Argument beginning "According to the custom of the city of Venice."]

s. [A line has dropped out: supplied from the commentary on the law *cunctos populos*, § 22 below]

t. Cf. Code VI.xxiii (*de Testamentis*) .31.¹⁵

u. Cf. Code VI.xxiii.29 (*jubemus*);¹⁶ Code VI.xlii (*de Fideicommissis*) .32.¹⁷

15. §.3: But if seven witnesses are not available there, then we command that at all events five be present: on no account do we permit less [than five].

16. §.2: But if it should occur that the gravity of his disease or his ignorance of letters prevent him [from signing], then in the presence of the attesting witnesses he must pronounce the name or names of the heir or heirs, so that at all events the witnesses may know who are the heirs appointed . . . §.3: But if the testator is in such a state that he can neither write nor speak intelligibly, then he is as good as dead, and the provisions of his will [as] forged. *Gloss* 2, "forged:" that is, could easily be forged if we permitted him to make such a will.

17. §.1: . . . for the law, fearing that forgery might be concocted between only two witnesses, demands a greater number, so that the truth may by more men be more perfectly revealed.

gery^v. And bad customs which have crept in ought not to be followed^w.

If on the other hand the custom has the consent of the Emperor, then it is valid; for if he suffers it then he may be said to have established it^x. And no one denies that the Emperor could have [expressly] granted this favour of a peculiar franchise^y; and the franchise may be established [equally] by a custom of this kind^z.

v. Cf. Code VI.xl (*de Indicta Viduitate*) .2, at the end;¹⁸ Digest II. xiii.1, § .2 (*editiones*);¹⁹ Digest XXIX.iii.2, § .] 6 (*diem*).²⁰

w. Cf. Authentica IX.xvii (*Ut Nulli Judici*) .1.²¹

x. Cf. Digest III.ii.13 (*quid ergo*), § .1;²² Digest XIX.ii.60, § .6 (*locator horrei*);²³ Digest XIV.i.1, § .5 (*magistrum*).²⁴

y. Cf. Code VI.xxiii.9 (*si non speciali*).²⁵

z. Cf. Gratian C.IX.iii.8 (*conquestus*);²⁶ and Gratian D.LXV:6 (*mos antiquus*).²⁷

18. §.2: . . . since it may seem unintelligent that laws designed to punish perjury should open the way to perjury.

19. Statements of claim should not recite the day and year [of deeds relied on] in case anything should be thought up . . . *Gloss* 8, "day and year:" These must be put on the deed . . . but are not recited, so as to avoid opportunity for forgery, under this law and Digest XXIX.iii.2, §.6 (*diem*). [note 20 below].

20. The court at Rome will not allow the copying or inspection of the date and year of a will, to avoid forgery, for even inspection gives an opportunity to commit forgery.

21. . . . For bad practices which have crept in are not confirmed by length of time, nor bad customs by their age.

22. . . . A man suffering his son or his daughter to be a party may of course be said in a manner of speaking to have made himself a party.

23. A warehouseman had no intention of accepting at his risk gold silver or pearls; but then, after discovering that such goods had been introduced he suffered them [to remain]. I maintained that he was liable to you as if he could be said to have waived his intention.

24. . . . but if [the owner] knows and suffered him to perform the master's duties on the vessel, he is deemed to have appointed him himself.

25. Unless by a peculiar franchise of your country (*Gloss* 1: granted by the Emperor) there is an exemption from strict compliance with the law, the will cannot possibly stand if it was witnessed out of the testator's sight.

26. [Pope Nicholas I, A.D. 864] . . . For it is our decision that primates and patriarchs have no peculiar right above other bishops, except such as the holy canons allow or primitive custom anciently conferred upon them.

27. [Council of Nicaea, A.D. 325, canon 6] Let ancient usage continue in Egypt, Libya and Cyrenaica to the intent that the Bishop of

As I see it myself, the local legislation and custom are valid even if the Emperor knows nothing of them. For [although] probate is essential to give validity to a written will^a, yet the formalities of probate may be reduced and varied by local legislation and custom; and by the same token the formality of witnessing^b. [The prohibition of less witnesses than five]^c does not tell against this, for that restricts custom already existing rather than forbidding a future custom. That seems to be the view of CINO^a. Nor does the contention that the custom is imprudent and bad: on the contrary it is good, that last wills may not be frustrated, since in the city of Venice, on account of the claims of business, witnesses are almost impossible to find; and it is the same in other cities for many reasons best known to the citizens living there. There is the same consideration [to reduce formality] as in the case of servicemen, and of a father disposing between his children.

a. Cf. Code VI.xxiii.2 (*publicati*);²⁸ Digest XXIX.iii.7 (*sed si quis ex signatoribus*);²⁹ and the comment on it.

b. Code VI.xxxii (*Quemadmodum Testamenta*) .2³⁰ which may be said to be an illustration.

c. Code VI.xxiii (*de Testamentis*) .31.³¹

d. On that law and on Code IV.xxxviii.14 (*dudum*).

Alexandria have power over all these, since there is a like usage for the Bishop of Rome.

28. The faith due to a will once proved is not diminished by the destruction, by an accident so found, of the material on which the testator originally wrote it and left it. *Gloss 1*, "proved:" Probate takes place as follows: before the ordinary judge . . . the will is opened and the attesting witnesses swear . . . and then it is recorded on public paper, . . . or even on the same paper as bears the original will . . .

29. But where one of the attesting witnesses is absent, the will must be sent to him for recognition . . . *Gloss 6*: . . . after which . . . the witnesses' writings will be sent back to the ordinary judge before whom the opening of the will is sought, and it will be opened and authenticated by the judge's order. And from that time it has the force of a public document, which it had not before: cf. Code VI.xxiii.2 (*publicati*) [above, note 28].

30. Upon oath that your father has given you his will for the purpose of production in his own country, you may produce it there so that it may be registered in accordance with the legislation and usages of that place . . .

31. §.2: But in those places where literate men are hard to come by, we grant to country folk by this law that their ancient custom shall take the place of our legislation; but so that . . . §.3: . . . we command that at all events five witnesses be present: on no account do we permit less [than five].

29. Secondly we must consider whether such a custom extends to an outsider. JAMES of ARENA decided *note*: although country-folk may have been allowed to make wills before five witnesses, no such concession is made to town-dwellers going there^f. Besides, local legislation is styled the law peculiar to a city^g: it follows that it does not extend to strangers.

My own view is as follows. It depends on whether the local legislation is in terms restricted to its citizens, in which case it does not extend to outsiders: so^h a concession peculiarly to country-folk is so restricted; and the reasons set down at the beginning of the law cited are not applicable to townsmen. And granted the same reason might apply to a townsman living in the countryside,

e. By reason of Code VI.xxxiii.9 (*si non speciali*),³² and Digest XLIX.xiv.32 (*sed si accepto*).³³ Further,

f. On the ground of [Code VI.xxiii.31,³⁴ read with] Digest XXIX.vii.8 (*conficiuntur*), § 2.³⁵ [? sic]

g. Cf. Digest I.i.9 (*omnes populi*).³⁶

h. I interpret Code VI.xxiii (*de Testamentis*) .31,³⁴ read with Digest XXIX.vii.8 (*conficiuntur*), § 2.³⁵ for

32. Unless by a peculiar franchise of your country (*Gloss*: granted by the Emperor) there is an exemption from strict compliance with the law, the will cannot possibly stand if it was witnessed out of the testator's sight.

33. But once they have taken Roman dress (*Gloss* 1: from the Emperor, for it was the Emperor who permitted Roman dress to be worn) and act habitually as citizens of Rome . . . their rights are quite different from the status of a hostage: the same rights must be guaranteed [to their heirs] as they would have if appointed heirs by lawful Roman citizens.

34. §.2: But in those places where literate men are hard to come by, we grant to country folk by this law that their ancient custom shall take the place of our legislation . . .

35. A codicil is valid wherever a will could validly be made. This does not imply a requirement that at the moment when the [particular] codicil was executed a will could have been made—what if the number of witnesses available were insufficient?—but that there should be capacity to test.

36. All peoples governed by laws and usages are guided in part by their own peculiar law and in part by that common to all men. The law adopted by each people for itself is peculiar to it, and is called municipal law, as being the law peculiar to that city; while what is adopted by all men under natural reason and is kept equally by all peoples, is called universal law, as being the law by which men are universally guided.

it would still be doubtful, since identity of reason [for any provision] does not imply amendment in [another] lawⁱ.

If on the other hand the legislation is in general and unqualified terms, then it extends to outsiders making their wills there^j.

Besides, in matters of non-contentious jurisdiction city legislation includes outsiders^k. Further again, this is the rule for contracts^l, as has been shown above [§ .27]. It follows, etc. And the argument from contracts to last wills holds good^m. [The need

i. Cf. the comment³⁷ on Code I.ii.23 a (*quas actiones*).

j. On the ground of Code VI.xxxii (*Quemadmodum Testamenta*) .2, above.³⁸

k. Cf. Code VIII.xlviii (*de Emancipationibus*) .1.³⁹ In this direction [Digest] XXIX.i (*de Militari Testamento*) .44⁴⁰ is extremely helpful.

l. Digest XXI.ii.6 (*si fundus*).⁴¹

m. Digest XXX.44, § .5 (*eum qui chirographum*).⁴²

37. Gloss 2, "are barred:" . . . Again, is it the same for a city as for the church, to which the favor of the hundred-year prescription was granted? The answer is No according to Pilleo and John . . . because for cities there is no such amendment, though Placentin maintains it to be the same because there is the same or stronger reason, and it follows that the law is the same.

38. Upon oath that your father has given you his will for the purpose of production in his own country, you may produce it there, so that it may be registered in accordance with the legislation and usages of that place . . .

39. If a law of the borough in which your father emancipated you gave power to the co-mayors to allow even outsiders to emancipate their children, then your father's proceedings must be treated as confirmed. Gloss 2: "co-mayors:" From what has gone before it is clear that Digest XXI.ii.6 (*si fundus*) . . . is not opposed to this . . . for the reference there is to contentious jurisdiction.

40. Imperial decisions show that everyone without exception, if not of a rank to make a serviceman's will, and if taken prisoner and dying in enemy territory, may make his will how he would and how he may, whether he be a provincial governor or anyone else not entitled to make a serviceman's will. Gloss 3, "provincial governor:" who was not on military strength, but for some reason he was there, and so for the others.

41. Where land shall have been sold, security against eviction must be furnished according to the custom of the locality where the transaction was concluded.

42. Bequest of an acknowledgment means a bequest of the debt, not merely of the instrument, by analogy from sale; for by sale of an acknowledgment the debt also is taken to have been sold.

for a "peculiar franchise" in the city]ⁿ does not tell against this, because I interpret it subject to the foregoing distinction. Nor does [the need to take Roman dress]^o, for the reference there is to hostages who, not being Roman citizens, have no power to make wills^p. And that is why they must take Roman dress and be regarded as Roman citizens, in order that their wills may be valid [at all]. But our point is that a man who is already a Roman citizen may make his will anywhere in Roman territory according to the local custom, as has been shown.

Whether such a will validly reaches property elsewhere situated we shall consider below [not in this commentary: see on the law *cunctos populos*, §§ .36,37 below].

A further point is: what of those other matters which are neither offenses nor contracts nor last wills? Suppose some outsider has a house here, and a dispute arises whether he may increase its height. The short answer is that whenever the point is a right flowing from the property itself, the custom of the place where the property is must be followed^q.

n. Code VI.xxiii.9 (*si non speciali*).⁴³

o. Digest XLIX.xiv.32 (*sed si accepto*),⁴⁴ at the end.

p. Cf. Digest XXVIII.i.11 (*obsides*).⁴⁵

q. Code VIII.x.3 (*an in totum*).⁴⁶ And this is the meaning of Digest VIII.iv.13, § .1 (*si constat*).⁴⁷

43. Unless by a peculiar franchise of your country there is an exemption from strict compliance with the law, the will cannot possibly stand if it was witnessed out of the testator's sight.

44. But once they have taken Roman dress (*Gloss 1*: from the Emperor, for it was the Emperor who permitted Roman dress to be worn) and act habitually as citizens of Rome . . . their rights are quite different from the status of a hostage: the same rights must be guaranteed [to their heirs] as they would have if appointed heirs by lawful Roman citizens.

45. Hostages may not make a will unless permitted in that behalf. *Gloss 2*, "permitted:" by the Emperor in terms, and by no one else . . . or even by implication, as by grant of the right to wear Roman dress, under Digest XLIX.xiv.32 [above, note 44].

46. Whether it is permissible in any city for a house which has collapsed to be converted into a garden and not restored to its original shape, and whether this requires both the consent of the civic authorities and absence of objection from the neighbours, is for the governor, after due hearing, to decide in accordance with the rules usually followed in the town in the same kind of dispute.

47. If it is not disputed that the quarries are on your land, no one may cut stone without your consent, whether in a private or in a public capacity, unless he has a right to do so, or unless there exists a custom

30. Another point is whether the local legislation and customs of layfolk bind the clergy, and should be followed in the bishop's court . . . [no interest for conflict of laws].

31. Now we must consider what places are bound by custom. On this point it is to be observed that some local legislation is prohibitive [otherwise than],^r criminally; some is permissives; and some is punitive.^s

On the first class the answer is that it depends on whether the local legislation is prohibitive in respect of formality, for instance that a will or deed shall be executed only before two notaries, and suchlike: in that case subjects are not bound beyond the territory, because on the formalities of an act the place of acting must always be looked to, in the view expressed above [§§ . 27 and 29].

If on the other hand the prohibition be directed at property, that is a prohibition in respect of property, for instance on alienation, then even if the contract be made outside the territory the alienation will be invalid, because this legislative prohibition affects the property within the territory.^t

If on the other hand the prohibition be in respect of a person or of a person's acts, as that no one under the age of twenty may make a will, or that a husband may leave nothing by legacy to his wife, and so on, then in my view a man of that city may not, even outside its territory, make a will or do whatever other act is in question.

Because we may observe in the case of a man disqualified by his own judge from dealing with his possessions in general that the effect of this disqualification reaches everywhere.^u In the same

r. [This correction of the printed text is taken from the commentary on the law *cunctos populos*, § .32 below, and is necessary to the sense].

s. [Neither of these categories is dealt with in this commentary: see on the law *cunctos populos* below, §§ .34 to 43 and §§ .44 to 49.]

t. Cf. the comment⁴⁸ on Code IV.vi.3 (*ea lege*).

u. Cf. Digest XLV.i.6 (*is cui bonis*);⁴⁹ Digest XXVIII.i.18 (*is cui*);⁵⁰ Digest XXVII.x.10 (*Julianus*).⁵¹

in respect of the quarries that anyone desiring to cut stone may do so on payment of the usual fee to the owner.

48. Gloss 2 . . . a contract [between partners] not to divide is so annexed to the property that it follows whoever takes it, including a purchaser.

49. A man disqualified from dealing with his possessions may obtain the benefit of a promise to himself, but may neither transfer [property] nor bind himself by a promise.

50. A man disqualified by law from dealing with his possessions may not make a will; and if he does it is void without more . . .

51. Julianus writes that those disqualified judicially from dealing

way this is a particular disqualification; and general and particular disqualifications are on the same footing^v.

Part II—Commentary on law *cunctos populos*

Text of Code I.i.1 (*cunctos populos*):

We desire all peoples who are subject to our merciful sway to live in that religion. . . .

Gloss on "who:"

Ground for the proposition that if proceedings are brought at Modena against a man from Bologna, judgment should not follow the local legislation of Modena to which he is not subject, since it says: "Who are subject to our merciful sway."

Commentary:

13. We must now come to the Gloss which says that "if . . . a man from Bologna," etc. This is a good place to consider two matters, first whether local legislation extends †† to non-subjects; and secondly whether the effect of such legislation extends beyond the legislators' territory.

My First Point is: what about contracts? Suppose a contract concluded by some outsider in this city, and that a dispute has arisen and an action is in progress in the party's place of origin: which place's local legislation should be followed or applied? Since these points are much agitated, we must put on one side the various distinctions and less than full discussion of the authorities on this law, and distinguish as follows: It depends on whether the reference is to local legislation (or custom) regarding [(1)] the formalities of this contract, or ††† form; or [(2)] †matters relating to the enforcement of the rights arising out of the contract.†

14. In case (1) . . .

15. In case (2) . . .

16, 17. In case (i) . . .

^v. As is demonstrated by Digest I.iv (*de Constitutionibus Principum*) .152.

with their possessions may pass no property to anyone, having no power over their possessions.

52. §.1: No one denies that whatever the Emperor has laid down by letter under his signature, or by judicial decision, or in answer to an extrajudicial enquiry, or has prescribed by proclamation, has the force of law.

[These four paragraphs reproduce the commentary on the law *de quibus*, § .27 (2) to (4), above at page 165 except for an addition in § .16 that] although the land may have to be delivered where it is, the place of conclusion of the contract is still looked to [with a reference to Digest XXI.ii.6 (*si fundus*) and by evident implication also to the Gloss on it, note 11 above].

18. In case (ii) performance may be fixed at a particular place, or at several places alternatively at the option of the plaintiff, or at no [particular] place, because the promise was in general terms. In the first of these cases whatever custom may be in force in the place fixed for performance is looked to_y. In the second or third cases the place where the claim is made is looked to_z; the reason for the foregoing is that that is the place where the neglect or delay was committed.

19. On the basis of the foregoing many problems may be solved. †Take† the local legislation of Assisi, where a contract of dowry and marriage has been concluded, to the effect that a third part of the dowry accrues to the husband on the death of his wife without children, whereas in this city of Perugia, where the husband comes from, the local legislation is that half accrues to the husband: which is to be applied? There is no doubt that it is the local legislation of the husband's country_a.

y. Digest XII.i.22 (*vinum*), at the end;⁵³ Digest XIII.iii.3 (*in hac*);⁵⁴ and in terms Digest XXII.i (*de Usuris*) .1, pr, and the Gloss on "the contract was made."⁵⁵

z. Digest XII.i.22 (*vinum*);⁵³ Digest XIII.iii (*de Triticaria*) .4.⁵⁶

a. Digest V.i.65 (*exigere*), above [Note 12].

53. A claim was made in court on wine lent. An opinion was sought . . . on what place's price should furnish the measure of damage. [Sabinus] advised that if replacement had been promised at a particular place, then the price at that place; but if it had not been so specified, then the price at the place of action.

54. . . . Delivery of a slave blinded in one eye after the time for delivery does not discharge; and in such a case the measure of damage is his value as at the time for performance.

55. Where the claim is unliquidated it is for the judgment to fix the rate of interest according to the usage of the locality where the contract was made, if not contrary to legislation. Gloss 4, "the contract was made:" it may be said that the contract is made where the money is to be paid: cf. . . . Digest XLIV.vii.21 (*contraxisse*) [above, note 10].

56. The measure of damage should be first the price at the place for delivery; but if no such place was agreed, then the place of action is applicable.

57. Either party may gain from an action in which judgment may be

Here is another problem. The local legislation here is that the right to claim on a debt is barred by the lapse of ten years. Suppose a Florentine has borrowed a hundred [pieces] before the court at Rome, with an undertaking to repay it in the city of Perugia. There is no doubt that if he slept on his rights for ten years the legislation of the latter place will apply, for that is where the neglect was committed.

The foregoing may be said to be against the Gloss^b where it is maintained, as it seems, that it is not the place of the contract that is looked to, but that of the trial. This gloss is indeed disapproved under its own law †by† WILLIAM [of CUGNEUX], †although† on this law^c he distinguishes it in this way: †where we are dealing with matters arising out of the terms of the contract† and in the contemplation of the parties, then indeed the place of the contract is looked to^d; but where it is something not contemplated, as in an action to set aside a contract, then it is the place of trial that is looked to, under the Gloss in question^e.

b. On Digest XIII.iv (*de Eo quod Certo Loco*) .2, pr.⁵⁷

c. [(*cunctos populos*)], William's § .3.]

d. Digest XXI.ii.6 (*si fundus*).⁵⁸

e. On this Digest XLVI.iii.98, § .1 (*diversum*)⁵⁹ is helpful.

for a sum different from the claim [because it is claimed at a place other than that at which satisfaction is due] . . . If it would have been better for the defendant [to satisfy the claim where he promised], then judgment against him will be for less than the claim; while if it would have been better for the plaintiff [to have satisfaction there] judgment will be for more. Gloss 1, "either party:" . . . But what if it is better for the defendant to the whole extent of the claim to be sued where he promised performance, because if sued there he would be able to claim to be wholly relieved under Roman law, while where he is [in fact] sued he may not, under Lombard law, because he is over 18 and under 25? The answer is that it may be said to be applicable, because nothing at all must always be less [than the claim] . . . My view however is the opposite, for that depends on personal considerations, while this Title refers to its being better for the defendant in consideration of the subject-matter to be sued there . . . [N.B. in Roman law minority is not a question of incapacity, but a ground for relief by the court from resulting prejudice.]

58. Where land shall have been sold, security against eviction must be furnished according to the custom of the locality where the transaction was concluded.

59. The answer is otherwise in the case of money or property [transferred by a freedman against release of his obligation] which a patron recovers by the Fabian action after his freedman's death, for the sub-

So he maintains, but his remarks are not convincing, for it is one of the maxims of the law that the custom of the place of contracting is looked to^f.

In short my view would be this: it depends on whether the claim is for relief from prejudice arising out of the contract itself at the time of the contract, when the place of contracting is looked to, or from prejudice arising after the contract from some other neglect, such as delay, and then the place where the delay was committed is looked to, as appears from the foregoing. If that were the place of trial, then the place of trial is looked to, and in that sense this Gloss might be sound; but otherwise it is wrong.

20. My Second Point is: what about offenses? If an outsider offends here, will he be punished under the local legislation of this city? This question was dealt with by CINO_g; but the answer must be wider. It depends on whether what he did in this city is an offense . . . [as on the law *de quibus*, § .26, page 164 above, except for two canon-law references to be added to notes (c)_h and (i)]_i.

f. Cf. Digest L.xvii.34 (*semper in stipulationibus*).⁶⁰

g. On this law [(*cunctos populos*), his §§ .13 to 15], and on Code VIII.lii (*Quae sit Longa Consuetudo*), 1.

h. Extravagantes V.xxxix.21 (*a nobis*),⁶¹ and the comments on it in the Gloss.

i. Sext I.ii.2 (*ut animarum*).⁶²

sequent accrual of this cause of action cannot cancel the release once granted. The same applies to a person under twenty-five who, because he was overreached by his creditors, is restored to property delivered in payment of a debt. Gloss 9, "the same applies:" . . . so that a minor's creditor deceiving the minor into giving him property of great value in lieu of payment of a modest sum [and having to surrender it] does not recover his action [on the original debt].

60. In any kind of contract we always enforce what was agreed, or, if that does not appear, then it follows that we must enforce what is usual in the locality where the agreement was made.

61. [Pope Clement III, 1187-1191] The question which you have put to us is whether a proclamation that "whoever shall have committed theft be excommunicate," so generally expressed, should be taken as referring to the subjects of the excommunicating authority or should extend generally to everyone, even if not subject to his jurisdiction. We reply to this that only subjects are bound by such a decree. [The Gloss is too long for a note.]

62. [Pope Boniface VIII, 1294-1303] To avoid danger to souls, we desire that sentences issued by decree of any bishop shall bind none ignorant of them, provided always that their ignorance was not slovenly or slothful.

21. My Third Point is: what about wills? Suppose there is local legislation or a custom at Venice that a will may be validly executed before two or three witnesses: if some visitor has executed his will there, is it valid?

On this question we must first consider whether the legislation or custom is itself valid, and secondly whether, if valid, it applies to an outsider.

22. On the first step, JAMES of ARENA has argued this . . . [as on the law *de quibus*, § .28(3), (4), page 167 above, with verbal variations].

23. As I see it myself . . . [as on the law *de quibus*, § .28(5), page 169 above] . . . reduced and varied by local legislation and custom. It follows, etc. Secondly, a father may dispose as between his children with two witnesses^j; and in the same way the fatherland may dispose in respect of its subjects, since its power is on the same footing as a father's power^k. Further, it cannot be found to be forbidden to pass such legislation: it follows that it may be said to be permitted^l. [The prohibition of less witnesses than five . . . as on the law *de quibus*, § .28(5), page 169 above]. Nor does it tell against it that it is contended to be imprudent: on the contrary it is useful and good and benevolent, from the point of view not only of the testator, like laws dealing with those serving in the field, but also of the legatees, like laws which help between children, and

j. Code VI.xxiii.-21, § .3 (*ex imperfecto*);⁶³ Code III.xxxvi (*Familiae Erciscundae*).⁶⁴

k. Digest I.i.2 (*veluti*);⁶⁵ Digest XLIX.xv.19, § .7 (*filius*).⁶⁶

l. Digest I.i.9 (*omnes populi*), above [note 36].

63. We do not desire that the intention of the deceased be established by an imperfect will, unless it be a disposition by parents of either sex between their children, and no one else.

64. Provided it be between all his heirs, in whatever degree so long as they are the same, . . . if a will begun but not executed . . . by a parent is propounded, or if writings are left in any other way and in whatever words or signs (*Gloss 5*; "or signs:" provided however that it be proved by two witnesses . . .) . . . the deceased's dispositions are to be kept, although this disposition be innocent of the forms prescribed by legislation.

65. . . obedience to our fathers and fatherland.

66. An unemancipated son who goes over to the enemy may not come back like a prisoner of war, even in his father's lifetime: his father has lost him in the same way as his fatherland; and military discipline has priority with Roman parents over love of their children.

again of the witnesses, to save them from being called away from their business^m.

24. On the second point, whether such a custom extends to an outsider, JAMES . . . [as on the law *de quibus* § .29(1) to (4), page 170 above, with verbal variations and less two referencesⁿ].

25. Whether such a will extends to possessions found elsewhere, where there is no such custom, we shall see below [§§ .36, 37].

26. But here is a problem. What if local legislation deals with personal capacity, as to the effect that an unemancipated son may [nevertheless] make a will? And then an outsider's unemancipated son makes his will in that city: does that make it valid? I maintain it would not, because local legislation cannot grant capacity to a person not subject to it, or deal in any way with his capacity^o.

The view expressed above on formalities does not tell against this, for the formalities of an act belong to the jurisdiction of him within whose territory it is done, and so vary with each different

^m. Digest XXIX.iii.7 (*sed si quis ex signatoribus*).⁶⁷

ⁿ. [Gloss on Code I.ii.23a (*quas actiones*); Digest XXX.44, § .5 (*eum qui chirographum*), notes 37 and 42.]

^o. Cf. Digest XXVI.v (*de Tutoribus Datis*) .1, § .2;⁶⁸ Digest XXVI.i.10 (*etiam*),⁶⁹ and the comments on both.

67. But where one of the attesting witnesses is absent, the will must be sent to him for recognition; for it is burdensome to call him for recognition, seeing that it is often very inconvenient to be called away from our business, and it is unfair that a [gratuitous] function should cause him to be out of pocket.

68. The authority of a provincial governor to appoint a guardian is restricted to wards belonging to his province or having their residence there. *Gloss* 7, "province:" . . . so also they may appoint [only] those under their jurisdiction: . . . against this is Digest XXVI.i.10 [note 69 below] according to one reading: the answer is given there.

69. Even a non-burgess may be appointed guardian [by the borough authorities] so long as the ward is a burgess. *Gloss* 1, "non-burgess:" Some read it without the "non," as in the Pisa MS, meaning not only a citizen of Rome or of some other city, but even of some borough outside the capital . . . And observe that the guardian or curator appointed by the judge, as well as his ward, must both be of the same borough or city, and must be under the jurisdiction of the appointing authority . . . Others read "non-burgess," in which case it means not only a citizen of a given city, but even a man living outside, provided that it is within the city's jurisdiction [sic: N.B. the appointment of a guardian was imposed on him, regardless of his willingness].

place_p; but a person's capacity is †† the same everywhere, †and† no one may deal with the capacity of a person not subject to him.

But it is against the foregoing [that a son may be emancipated anywhere]_q, so that capacity is †† granted in respect even of a person not subject under the procedure of the local legislation. The answer is that that legislation does not †† grant capacity directly, because it cannot, but prescribes a procedure and formalities for grants to be made there, as that emancipation is to be pronounced before such and such a judge. It follows, since it deals with formalities, that it extends to outsiders.

And that is why I maintain that if local legislation places a restriction on personal capacity, as here that a husband may not appoint his wife his heir, then there is no doubt that if an outsider makes his will here, that will not restrain him from appointing his wife for the foregoing reasons. This is the view of SPECULATOR_r.

27. My Fourth Point is: what of those matters which are neither . . . [as on the law *de quibus*, § .29(6), page 172 above].

28 to 31. My Fifth Point is whether the local legislation . . . [as on the law *de quibus*, § .30, page 173 above].

32. Sixthly, we must consider whether the effect of local legislation or custom extends beyond the territory, which must be examined under several points, for some local legislation is prohibitive, not criminally but for some other †reason of policy;† some is permissive; and some is †punitive.†

On the first class I maintain as follows. It depends on whether the local legislation is prohibitive by way of requiring a formality

p. Cf. Digest XXII.v.3 (*testium*), § 6;⁷⁰ Code VI.xxxii (*Quemadmodum Testamenta*).2.⁷¹

q. Code VIII.xlviii (*de Emancipationibus Liberorum*).1.⁷²

r. On Judgments, § .5, v.3 (*pone quidam*)

70. . . . The imperial brothers of happy memory also decided that "in so far as concerns the summoning of witnesses, it is the duty of the judge to investigate what may be the custom of the province in which he sits."

71. Upon oath that your father has given you his will for the purpose of production in his own country, you may produce it there, so that it may be registered in accordance with the legislation and usages of that place . . .

72. If a law of the borough in which your father emancipated you gave power to the co-mayors to allow even outsiders to emancipate their children, then your father's proceedings must be treated as confirmed.

for a particular act, for instance legislation providing that a will or deed shall be executed only before two notaries, or subject to some other formality. In that case such legislation does not extend beyond the legislator's territory, because on a question of formalities we must always look to the place of acting, in the view expressed above [in § .24], as much for contracts as for last wills.

If on the other hand the local legislation is prohibitive on property, and in respect of property, as for instance a prohibition on alienation of the ownership of [a share in joint] property otherwise than to another co-owner, then in that case, whatever may be the place of dealing with such property, it will be invalid, because such a provision affects the property and prevents transfer of its ownership.

33. If on the other hand the local legislation is prohibitive personally, then it depends on whether it contains a benevolent prohibition, as for example, in order to prevent minors being cheated when they draw up their wills, that no one under †twenty† years of age may make a will. Or suppose local legislation

t. Institutes II.viii (*Quibus Alienare Licet*), pr.;⁷³ †Code† V.xxxiii (*de Fundo Dotali*) .1;⁷⁴ Code V.xiii.1, § .15 (*et cum lex*);⁷⁵ and the comment on Code IV.vi.3 (*ea lege*).⁷⁶ Code VIII.x.3 (*an in totum*)⁷⁷ is also helpful.

73. It sometimes happens that a man may be the owner and incapable of alienation . . . For the Julian law forbids a husband to alienate the dowry without his wife's consent, although it is his, given him by way of dowry. We however amended the Julian law for the better; for since this law applied to property in land only in Italy . . . we remedied this defect so that in respect of property in land situated outside Italy alienation should be [equally] forbidden . . .

74. . . . the Julian Law applies: and alienation includes any act by which the ownership is transferred.

75. And since the Julian law forbade the alienation by a husband without his wife's consent of dowry property in Italy . . . we were asked if it were not proper that such protection should be applicable to property not only in Italy but everywhere.

76. *Gloss 2*, towards the end: . . . A contract [between partners] not to divide is so annexed to the property that it follows whoever takes it, including a purchaser.

77. Whether it is permissible in any city for a house which has collapsed to be converted into a garden, and not restored to its original shape, and whether this requires both the consent of the civic authorities and absence of objection from the neighbours, is for the governor, after due hearing, to decide in accordance with the rules usually followed in the town in the same kind of dispute.

that a husband may not leave a legacy to his wife, and vice versa, which is to prevent their taking advantage each of the other's affection to rob or cheat^u him. In that case such local legislation covers a citizen of that city wherever he may be.

The same applies to the disqualification of a man in his own court from dealing with his possessions, meaning generally, for this disqualification is benevolent, to prevent the squandering of his possessions, and its effect therefore extends to wherever his possessions may be^v. For the same reason this special disqualification from a particular act [should extend everywhere]: general and special disqualifications should be on the same footing^w.

If on the other hand the local legislation contains a malignant prohibition, then in that case it does not extend beyond the legis-

u. [These words are from Digest XXIV.i (*de Donationibus inter Virum et Uxorem*). 1.]

v. Cf. this law [Code I.i.1 (*cunctos populos*)];⁷⁸ and Digest XLV.i.6 (*is cui bonis*);⁷⁹ †Digest XXVIII.i.18 (*is cui*)†;⁸⁰ Digest XXVII.x.10 (*Julianus*).⁸¹

w. This is demonstrated by Digest XLIX.xvii.18 (*ex castrensi*) pr. [i.e. § .2] and § .1 [i.e. § .3];⁸² Digest XXVI.vii. 51 (*si duo*) at the end.⁸³

78. We desire all peoples who are subject to our merciful sway to live in that religion . . .

79. A man disqualified from dealing with his possessions may obtain the benefit of a promise to himself, but may neither transfer [property] nor bind himself by a promise.

80. A man disqualified by law from dealing with his possessions may not make a will; and if he does it is void without more . . .

81. Julianus writes that those disqualified judicially from dealing with their possessions may pass no property to anyone, having no power over their possessions . . .

82. §.2: And so we maintain that a [decree on a] father's partition action in his son's lifetime will pass no title [to a share in his son's campaign property] . . . nor will the other co-owner take anything [in the campaign property] by an action against the father, any more than he would in an action against a man disqualified from dealing with his possessions. §.3: The father may accept a release of a usufruct in a slave forming part of [his son's] campaign property, as well as of any . . . servitude on his land, and acquire such servitudes; for it is the fact that this result could be achieved also by a man disqualified from dealing with his possessions.

83. . . . A withholding (*Gloss 5*, "withholding:" of the management) of the property in dispute is as effective as a general withholding.

lators' territory_x. And that is why I maintain that local legislation providing that a female child may take no share in the succession, being prohibitive and malignant_y, does not extend to possessions situated elsewhere_z.

x. Cf. Digest III.i.9 (*ex ea causa*)⁸⁴ at the end.

y. Cf. Code VI.xxviii.4 (*maximum vitium*),⁸⁵

z. On this distinction between a prohibition which is reasonable and benevolent and [one which is] malignant, Sext V.xi.16 (*si sententia*), the last paragraph,⁸⁶ is helpful.

84. A man forbidden to sue out a writ for another, but for a reason which does not involve disgrace . . . , may not properly sue for others in that province alone which is subject to the governor who made the order; but in any other province he is not forbidden, even on the same cause of action.

85. By this law we set right a great defect of ancient scholasticism, which considered different rules to be applicable, in succession to their parents . . . to males and females . . .

86. [Pope Boniface VIII, 1294-1303] . . . But where the people of any country is placed under an interdict, no individual member of that people . . . may anywhere . . . take part in worship or receive the sacraments of the church. [Unless an interdict is considered to be "benevolent," a more apposite quotation from the Sext would have been V.xiii.15 (*odia*): It is right to construe malignant provisions strictly and benevolent provisions widely.].

(To be continued in next issue)

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DOCUMENTS

Bartolo on the Conflict of Laws

Translated by J. A. Clarence Smith

(Continued from page 183)

34. My Seventh Point concerns permissive local legislation; and in this connection there are two matters to be examined, namely whether the act permitted may be performed outside the territory of the permitting authority, and again, if it is performed in that place or in a permitted place, whether it has any effect outside the territory. We shall deal with the two side by side.

Sometimes then local legislation grants and permits something which in nature could be within no one's power, but only by franchise particularly granted, and in matters to which it extends. For instance, under a city's legislation someone is appointed notary: may he draw up deeds outside the territory of that city? This is a point discussed by SPECULATOR^z. In my own view he may not draw up deeds outside the territory; and the rule is the same for similar matters which may be performed [only] within the territory.

For acts of non-contentious jurisdiction, under power granted by authorities inferior to the Emperor, may not be performed outside the territory^a.

z. On Documentary Evidence, § .12, v.25 (*quid de his*).

a. Digest I.xvi (*de Officio Proconsulis*) .2,⁸⁷ which is a leading authority on this point; Sext II.ii.1, § .4 (*nec clericos*)⁸⁸ is also helpful; and the latter is cited by Speculator [note z] as illustrative.

87. Every provincial governor has jurisdiction immediately on leaving the capital, but only in non-contentious, not in contentious, proceedings. . . .

88. [Pope Innocent IV, 1243-1254] Nor should they send their clerks into the dioceses of their suffragans for contracts to be entered into or acknowledged before them, nor compel the subjects of the same suffragans to submit their differences to them for decision on such an occasion.

35. But in my view deeds drawn up by such a notary within the territory should have full faith and credit anywhere outside the territory. So also an emancipation before the authority having jurisdiction by the law of any one borough is treated everywhere as confirmed^b; and for this reason that it goes more to the formalities than to the dealing itself, as we shall see [in § .41] below.

36. Sometimes local legislation is permissive in the sense that it permits what is [already] permitted by the general law, but the legislation removes an obstacle in the general law. This can happen in several ways. The obstacle removed is sometimes one of formality, as for instance where by general legislation seven witnesses are required for a will, and local legislation makes four sufficient. Such legislation will †not† indeed †profit a citizen outside the territory, because on formalities the place of acting is looked to, as has been maintained [in § .24] above:† but doubt may be felt on whether a will made within the territory should be respected regarding the testator's possessions outside the territory.

This is a point that many have dealt with, such as HUBERT of BOBBIO and the other old authorities from beyond the Alps whose views are recorded by SPECULATOR^c, without however letting it appear which he prefers. Then JAMES of REVIGNY came forward to maintain^d that the heir appointed should take the possessions within the territory, while possessions outside the territory should go to the heirs in intestacy^e. His having [in that case]

b. Cf. Code VIII.xlviii (*de Emancipationibus Liberorum*) .1.⁸⁹

c. On Documentary Evidence, § .12, v.16 (*quid si de consuetudine*).

d. [On Code I.i.1 (*cunctos populos*)].

e. Cf. Digest XXVI.v.27 (*pupillo*);⁹⁰ and Digest XXVI.vii.47, § .2 (*tutores*).⁹¹

89. If a law of the borough in which your father emancipated you gave power to the co-mayors to allow even outsiders to emancipate their children, then your father's proceedings must be treated as confirmed.

90. Where a ward has assets both in Rome and outside Italy, jurisdiction to appoint a guardian in respect of the property at Rome belongs to the court at Rome, but in respect of the property outside Italy to the governor of the province.

91. Guardians appointed for the Italian property have found at Rome the deeds by which debtors outside Italy promise to pay money at Rome or wherever it may be claimed. The question is whether, since neither the debtors nor their lands were in Italy, the getting in of these debts is the business of the Italian guardians. I advised that, if it were a provincial contract then it would not be; but it was their duty to see that ignorance of the deed did not conceal the existence of the contract from those who had the management of it.

died part testate and part intestate^f does not tell against this, because that is the result of the plurality of customs, and there is the same result in other circumstances from plurality of estates^g. It was to this view that CINO remained attached to begin with^h.

37. Later WILLIAM of CUGNEUX came forward to maintainⁱ that the will was valid without qualification, and extended to the possessions everywhere, even outside the territory. This he shows first by saying that the effect of the local legislation is on the will; and if the will was valid when made, then it is as it were consequentially that the legislation will be extended through this will to all the possessions; and although the local legislation cannot deal with the possessions directly, yet it may consequentially^j. Besides, just

f. [Contrary to] Digest L.xvii.7 (*jus nostrum*).⁹²

g. Cf. Digest I.vii.22 (*si arrogator*) and the comment on it.⁹³

h. [On Code I.i.1 (*cunctos populos*), his § .17.]

i. [On Code I.i.1 (*cunctos populos*), his §§ .6 to 9.]

j. Cf. Digest XXVI.iv (*de Legitimis Tutoribus*) .3, pr.,⁹⁴ and Institutes I.xvi (*de Legitima Patronorum Tutela*).⁹⁵

92. Our law does not permit of the same man dying both testate and intestate if he is a civilian: "testate" and "intestate" are by their nature irreconcilable.

93. §.1: The point has been raised whether the adoptive father may appoint an heir on behalf of his adopted son under puberty. I should say that he may not, except perhaps for the fourth part derived from his own estate; and even then such an appointment will cease to be effective when the child reaches puberty. *Gloss 1*: . . . but suppose the adoptive father to have appointed an heir on behalf of the child he had adopted in respect of the fourth part of the estate coming from himself, and then the adopted child dies before the age of puberty. Can I say that the heir appointed on his behalf in respect of the fourth will be able to take the fourth, while the heirs on intestacy take the rest of the child's property, assuming his natural father to have made no appointment on his behalf? I dare not say so, for no one may die part testate and part intestate, under Digest L.xvii.7 (*jus nostrum*) [note 92 above]. But can I say that an heir appointed on his behalf by his natural father should succeed to the other possessions, and to the fourth part the heir appointed on his behalf by his adoptive father, as if his succession should be governed by two wills? . . . It will appear from what has gone before that this adopted child may leave two wills made on his behalf, one made by his natural father and the other by his adoptive father: this is a wonderful thing, not occurring elsewhere except in the case of a testator who is a serviceman . . .

94. The legal guardianship conferred on the patron by the Twelve Tables is not specifically conferred on him by name, but as a consequence of the inheritance which the Twelve Tables give him.

95. From the very fact that the inheritance of a freedman or freedwoman on intestacy went by command of the law to his patron or the

as an action may properly be brought elsewhere than at the site of the land in issue, so may property be dealt with elsewhere than at its site^k. Further, the record of one judge is given full faith and credit before another^l. He goes on to maintain that^m if a will is made before one judge where less formality is required, yet on that the inheritance may be entered upon, which entry will be effective everywhere. It was to this view that CINO was later convertedⁿ; and Master JAMES BUTRIGAR was of the same opinion^o.

I agree with this view, and for the reasons given above, except for WILLIAM's first reason, with which I disagree, as I shall explain below. By way of further support^p, a will made in the countryside before five witnesses is effective everywhere, although elsewhere greater formality were required. In the same direction, the effect of a will made on service in the field extends everywhere; and on a point of formality of an act in issue the custom of the locality is

k. Cf. Code VII.xxxiii (*de Praescriptione Longi Temporis*) .12.⁹⁶

l. Cf. Code II.i.2 (*is apud quem*);⁹⁷ Code VII.lxii.15 (*ne causas*)⁹⁸ and 19 (*a proconsulibus*);⁹⁹ Code †IV.xx (*de Testibus*).20;†¹⁰⁰ Code II.lv. †5 (*cum antea*)† towards the end.¹⁰⁰

m. Code VI.xxiii.19 (*omnium*), at the end,¹ is an illustration:

n. And he added a supplement [§ .18] to his commentary, although he did not there fully set out the views of Master WILLIAM.

o. By reason of Code VI.xxiii.9 (*si non speciali*), which may be said to be an illustration, and of Code VI.xxxii (*Quemadmodum Testamenta*) .2 [I have not traced this reference in James Butrigar].

p. I cite Code VI.xxiii (*de Testamentis*) .31,² where

latter's children, the ancients believed that the law intended the guardianship also to belong to them.

96. §.3: There is nothing to prevent a dispute being litigated in the court of any province, whether the property be situated in the same or in another province.

97. The authority before whom any matter comes will order public records, whether criminal or civil, to be produced for inspection as prima facie evidence of their truth.

98. . . . we prescribe that the record [sent up on appeal] shall contain the evidence in full.

99. . . . the judge shall furnish the appellant with a copy of his judgment, and forward the record to us.

100. [These two texts, not in William, deal with the admissibility in court of depositions recorded in arbitration proceedings.]

1. Any will may be said to be dispensed from formality by entry . . . in the [register of] petitions . . . so as to bind the conscience of the Emperor. §.3: we command that the successors named by this type of appointment should have all the rights of heirs appointed in writing . . . their title may be said to be perfected by entry on the inheritance.

2. [above, note 15.]

looked to_q. And that would be my opinion.

But as for WILLIAM's first reason, with which I disagree, what is not allowed directly may sometimes be allowed consequentially, namely when what is not allowed directly has a necessary consequential effect on the subject-matter, but not otherwise: so DINO's comments_s. But it is not a necessary consequence of the will being valid that it should catch all the possessions: the fact is that legislative power (and provision) may enable one to die part testate and part intestate, as in the case of a serviceman_t.

q. Cf. Digest XXV.iv (*de Ventre Inspiciendo*) .1, § .15.³

r. Cf. Digest XXXIV.iii.29 (*si is qui duos*);⁴ and Digest III.ii. 4, § .2b (*sive autem*).⁵

s. On Digest XXVI.viii (*de Auctoritate Tutorum*) .1.

t. Digest XXIX.i.6 (*si miles*),⁶ and 41 (*miles ita*), § .1 [recte pr.].⁷ To the same effect is Code V.ix (*de Secundis Nuptiis*) .1, and the comments on it.⁸

3. The usage of the locality is to be looked to, and the surveillance of the pregnancy, of the birth, and of the child, should follow it.

4. Where a man entitled against two promisors directs his heir to release both, and where one cannot take this legacy and they are not partners, then the one who takes nothing will have to assign [his share] to the one who in law is eligible for the benefit, with this double result that, on the latter's application, he obtains this benefit and the former is released. But if they were partners, then by reason of one being eligible the other takes consequentially, the debt being released by a book-entry; for this would have resulted if the heir had been directed to release only him who is eligible.

5. Moreover, whether he does this as his main business or as a sideline to his main business . . . he is liable to the penalty for living off immoral earnings.

6. If a serviceman has appointed a man his heir to certain land, it is thought that he would have died intestate in respect of the rest of his estate; for a serviceman may die part testate and part intestate.

7. A serviceman may appoint his heir as "Titius for life and after his death Septicius;" but if he should say "to Titius for ten years." with no gift over, then a claim in intestacy will lie after ten years. And since we have maintained that servicemen may appoint heirs from a certain time as well as up to a certain time, it will follow that until the day arrives from which the appointed heir takes the estate will devolve as on an intestacy; and what is permitted him in respect of different parcels of his estate (*Gloss 4*, "permitted:" that he may die part testate and part intestate . . .) is equally available, by the same privilege, in respect of duration of title, though the duration may be considerable.

8. If any woman in her haste to remarry wholly neglects her duty of mourning for her first husband . . . §.1: . . . she may not bring her second husband more than a third of her possessions in dowry, nor leave him more than a third by will. *Gloss 4*, "by will:" . . . But what if she

38. Then again there is permissive legislation which removes an obstacle of personal status, as for instance local legislation allowing an unemancipated son to make a will, or any other person to whom this capacity is forbidden by the law. Or local legislation providing that a bastard may be appointed heir, which is forbidden by the general law. We may assume for the sake of argument that such local legislation is valid: I shall discuss that elsewhere, but I do not propose to discuss its validity here.

39. There is a point whether such a person may †make a will† outside the territory †or† be appointed heir there, and then enter on the inheritance. I maintain he may not, since this is a grant by an authority lower than the Emperor, although it is concerned with an act of non-contentious jurisdiction: it still cannot be performed outside the jurisdiction of the granting authority^u. The legitimation of a son by offer to the city council is applicable only †as between the son and father so offering, and not as against others.† So on the point under discussion a grant of capacity by the local legislation of one city is inapplicable save within the city so granting it.

40. But a matter of great difficulty, and which comes up constantly, is the following. If a person with capacity so granted makes his will in the same city, or is there appointed heir and enters on the inheritance, does the validity of this will, or the effect of this entry, extend to possessions in another city? It may be said that it does, by reason of what has been shown [in § .37 above] on the subject of local legislation dealing with formalities. Further to the same

^u. Cf. Digest I.xvi (*de Officio Proconsulis*) .2.⁹ In favour of this is Authentica VII.i.4 (*filium vero*),¹⁰ where

makes him sole heir? If you say he takes everything this law is against you, while if you say he takes a third it follows that she will be part testate and part intestate, which should not be the case, under Digest L. xvii.7 (*jus nostrum*) [above, note 92]. The answer, according to JOHN is that he takes everything as sole heir, but is bound to surrender to the heirs on intestacy the excess over a third . . . Others say that this is a special case, where death part testate and part intestate is possible . . .

9. Every provincial governor has jurisdiction immediately on leaving the capital, but only in non-contentious, not in contentious, proceedings . . .

10. . . . For we command that a natural son offered to the municipal council become the lawful successor only to his father, and that he should have no part in the inheritance of his father's ascendants, descendants or collaterals on either side, nor they any part in his.

effect_v, an emancipation performed in one place is effective in every place, in the view expressed [in § .35] above on the capacity of a notary. Further again, a judgment delivered by [one] judge may be sent for execution by the judge of another territory, and on possessions situated elsewhere_w. Further, this will, since a will is like a judgment_x, should extend to possessions situated elsewhere.

41. But there is also reason to say that it does not extend_y. A provision in general terms is to be taken as referring only to possessions in the territory of the authority providing_z. In this direction_a legiti-

v. is Code VIII.xlviii (*de Emancipationibus Liberatorum*) .1,¹¹ for

w. Cf. Digest V.i.45 (*argentarium*), § .1;¹² Digest XLII.i.15 (*a divo Pio*), § .1;¹³ Code III.i.13, § .3 (*sin autem reus*).¹⁴

x. Cf. Digest XXVIII.i (*de Testamentis*) .1.¹⁵

y. Cf. Digest XXVI.v.27 (*pupillo*);¹⁶ and Digest XXVII.i.10, § .4 (*et qui in testamento*), and the comment on it.¹⁷

z. Cf. Digest XLII.v.12, § .1 (*is qui*);¹⁸ and in this direction is Authentica VII.i.4 (*filium vero*) above [note 10], where the effect of legitimation is construed strictly.

a. Extravagantes IV.xvii.13 (*per venerabilem*)¹⁹ may be said to lay down in terms that

11. If a law of the borough in which your father emancipated you gave power to the co-mayors to allow even outsiders to emancipate their children, then your father's proceedings must be treated as confirmed.

12. Judgment having been given outside Italy against a girl's guardians in that capacity, execution proceedings will lie on it against her curators at Rome, where the loan was made to the mother whose daughter and heir is this girl. *Gloss* 3, "loan was made:" Observe that judgment is given in one place and executed in another; cf. Digest XLII.i.15, §.1 [note 13 below].

13. Judgment delivered at Rome may be completely executed outside Italy by the governor if so ordered.

14. In default of appearance by the defendant . . . judgment against him may be satisfied out of his property and assets, whether in exercise of the court's own jurisdiction if it is sufficient, or by reference to a higher court. . .

15. A testament is the just judgment of our will concerning what we desire to be done after our death.

16. Where a ward has assets both in Rome and outside Italy jurisdiction to appoint a guardian in respect of the property at Rome belongs to the court at Rome, but in respect of the property outside Italy to the governor of the province.

17. Even guardians appointed by will may lawfully apply to be excused from the management of property in another province. *Gloss* 11, "even guardians appointed by will:" . . . again it says "by will," because it is clear that if he is appointed by the court to property in

mation effected by the Pope does not extend to what is not under his jurisdiction, such as inheritance and other temporal matters, which are in the Emperor's territory, under the comment in the Gloss ††and by the†† authorities.

My reply to the first view is that a provision dealing with the formalities of an act is one thing, and dealing with the grant of capacity to do it is another. The reason is that, with the variation of place the reason for the [degree of] †formality† varies. For a serviceman's will fewer witnesses are demanded because the consequence of concentration on military matters is that less men are available, and that is why in that case legislation provided for less witnesses. It may be also that in one city there are more qualified men than in another: that is why their local legislation varies. This being the reason for the [degree of] formality, that is why it is applicable to an outsider's will as much as to a citizen's: and that is why the law has laid it down that so far as regards formalities its effect shall extend to every place. This causes no prejudice to any other city, for the same act may be executed anywhere, though with other formalities. But a provision dealing with the grant of capacity to make the act is not of this character: that is why I cannot grant capacity except in so far as belongs to me as legislator, nor does it extend beyond my own territory, because I should cause prejudice to another legislator. [The fact that a son may be emancipated anywhere]^c does not tell against this, nor does the view expressed [in

c. Code VIII.xlviii (*de Emancipationibus Liberorum*) .1 [note 11 above].

another province than its own jurisdiction, the appointment is void without more, and there is no need for him to be excused . . .

18. An order for attachment will be taken to refer to the area for which the authority making the order is responsible.

19. . . . Your humble petition to us is that we vouchsafe to adorn your sons with the status of legitimacy, to the end that their succession to you be not prejudiced by the impediment of their birth. That this Apostolic See has full power in this behalf is evident from the fact that . . . not only natural but even adulterine children have by legitimation been so far dispensed for spiritual purposes as to be capable of promotion to the episcopate. From this it is a probable and reasonable belief and opinion that it may legitimate for secular purposes, particularly where no other superior is acknowledged beside the Roman Pontiff as having power to legitimate . . . It would seem to be abhorrent that a man who has become legitimate for spiritual purposes should remain illegitimate for secular purposes. Dispensation therefore for spiritual purposes implies dispensation for secular purposes. And that may freely be accomplished by the Apostolic See in the Patrimony of Blessed

§ .35]above on notaries, because there the local legislation does not deal directly with the act but only with its formalities. For it is not the local legislation that emancipates a son, in which case it would not extend to outsiders, but the father who emancipates him, by means of the formalities prescribed by the legislation. It is the same for the notary, for he is not enabled himself to make acts, but to clothe with formality an act made by another: hence the reason is the same as was given above in respect of formalities. And the view expressed [in § .40] above on judgments does not tell against this, because there the judge deals with rights already grounded and defined, rights which accompany the person everywhere, as where he gives judgment against a party by reason of an obligation already existing, which binds the defendant so obliged in every place: that is why it may be sent to another judge for execution. But when the judge himself creates a new right, by judgment within the territory, this does not extend beyond the territory, as has been demonstrated above [?].

42. Then doubt could be felt on the following point. It is the custom in England for the firstborn to succeed to all the possessions: now suppose someone has died leaving possessions in England and in Italy. The problem is what is the legal position. JAMES of REVIGNY^d and WILLIAM of CUGNEUX^e hold that for the possessions to be found in England judgment should follow the custom of that place; but for the rest in Italy, the general law should be the rule, so as to divide them between [all] the brothers^f. That a particular pattern is provided for the possessions there situated is no reason for extending it everywhere^g. The same was the opinion of CINO^h.

d. [On Code I.i.1 (*cunctos populos*) and elsewhere.]

e. [On Code I.i.1 (*cunctos populos*), his § .10.]

f. Cf. Digest XXVI.v.27 (*pupillo*)²⁰ [in §.41] above.

g. Cf. Code X.i.4 (*certa forma*); ²¹ Digest L.i.24 (*constitutionibus*).²²

h. On this law [Code I.i.1 (*cunctos populos*), his §§ .19, 20].

Peter, where the authority of the Supreme Pontiff is exercised together with the power of supreme sovereignty.

20. Where a ward has assets both in Rome and outside Italy jurisdiction to appoint a guardian in respect of the property at Rome belongs to the court at Rome, but in respect of the property outside Italy to the governor of the province.

21. A particular pattern is provided on the subject of foreign settlers who by order of the Emperor have transferred to another city

22. The Emperors Antoninus and Verus decided in these words: And the consequence of this is that not even in future may the pattern observed be departed from.

Othersⁱ maintain that the place of entry on the inheritance should be looked to, as being the place where the quasi-contract is concluded^j, just as on a matter of contract we look to the place of contract^k.

43. My view is that the words of the local legislation or custom have to be carefully scrutinised. It depends on whether they deal with property, as in these words: The possessions of deceased persons shall pass to the firstborn—and in that case I should adjudge all the possessions according to the custom and local legislation of the site of the property, for the law affects the property itself, whether it belong to a citizen or to a visitor^l.

If on the other hand the words of the local legislation or custom deal with persons, as in these words: The firstborn shall succeed—then in that case it depends on whether this deceased did not

i. [Identified by later writers, citing Bartolo here, as James Butrigar. I have so far found no such view in his writings: it seems rather to echo a *reductio ad absurdum* by James of Revigny (on Digest V.i.1) of a suggestion by his master James Baldwin.]

j. Cf. Digest XLII.iv.3 (*apud Julianum*) at the end.²³

k. Cf. Digest XXI.ii.6 (*si fundus*);²⁴ and Digest L.xvii.34 (*semper in stipulationibus*).²⁵

l. Cf. Digest L.iv.6 (*rescripto*), § .5;²⁶ and Code VIII.x.3 (*an in totum*).²⁷

23. §.3: If the heir to anyone is in ward, and as heir is liable for legacies, it has to be considered whether the remedy is applicable; and it is better law, as Marcellus writes, that even a ward's possessions may be attached for security . . . for a child is deemed to contract by entry on an inheritance. *Gloss*, "contract:" meaning to make a quasi-contract with the legatees . . . [the common-law equivalent is a special assumption].

24. Where land shall have been sold, security against eviction must be furnished according to the custom of the locality where the transaction was concluded.

25. In any kind of contract we always enforce what was agreed, or, if that does not appear, then it follows that we must enforce what is usual in the locality in which the agreement was made.

26. Burdens on property are of two kinds: some are imposed on the holders of property whether they be burgesses or not, and some only on burgesses or inhabitants. . . .

27. Whether it is permissible in any city for a house which has collapsed to be converted into a garden and not restored to its original shape, and whether this requires both the consent of the civic authorities and absence of objection from the neighbours, is for the governor, after due hearing, to decide in accordance with the rules usually followed in the town in the same kind of dispute.

belong to England, though having possessions there, when the local legislation will not extend to him or his children, because a provision dealing with persons does not extend to outsiders, in the view expressed above, at the end of the Third Point [in § .26].

If on the other hand this deceased was English, then the first-born will succeed to such possessions as are in England, but succession to the rest will be under the general law, as the aforesaid authorities maintain, because it may either be regarded as legislation depriving the younger sons, which is malignant, and therefore does not extend to possessions situated elsewhere, as has been demonstrated above on the Sixth Point [in § .33], or it may be regarded as permissive, in removing the obstacle by which the younger sons stand in the way of the firstborn, with the same result, in the view expressed [in § .41] above^m.

I do not agree with the view of those who look to the place of entry on the inheritance: entry can have no relevance except in so far as the inheritance has devolvedⁿ; and it does not devolve except as aforesaid, where there is no higher claim, etc. But contracts reach as far as the parties intended, their intentions being presumed to have been in accordance with the custom of the place

m. For looking to whether the provision deals with property or with persons, Digest XVIII.i (*de Contrahenda Emptione*). 81, § .3²⁸ is helpful.

n. Cf. Digest V.iv.3 (*antiqui*);²⁹ Digest XXIX.ii.10 (*si ex asse*)³⁰ and 75 (*ex semisse*).³¹

28. Lucius Titius promised to provide 100,000 bushels of grain a year from his land for the property of Gaius Seius. Then Lucius Titius sold his land on terms that "the property of Lucius Titius is sold and shall be held by the same right and on the same conditions as it is held today." I asked for an opinion on whether the buyer was liable to Gaius Seius for the provision of the grain. He advised that according to the instructions submitted the purchaser was under no duty to Gaius Seius. *Gloss* 2, "no duty:" . . . because a personal duty does not run with the land. . . .

29. The ancients looked forward to the unburdening of the womb by keeping all rights in suspense until the time of the child's birth. . . .

30. Where an heir to 100% attempted to have (*Gloss*: by entering upon) a part (*Gloss*: only) of the inheritance, it may be said that he has taken upon himself the succession to 100%.

31. Titius was appointed heir to 50%, and by mistake claimed to be put in possession of 25% I asked an opinion on whether it was a nullity, or whether the proceeding should continue as if the 25% had not been mentioned. He advised that it was better to regard it as a nullity than to say that the heir appointed to 50% had entered on the inheritance for 25%.

where the affair is transacted, in the view expressed [in § .16] above. It follows, etc.

44. Eighthly, punitive local legislation: treatment of this raises several different points. First, may its effect be in terms extended beyond its own territory? On this I maintain that it depends on whether both parties, namely the offender and the victim of the offense outside the territory, are outsiders, in which case it is the maxim that even a provision in terms on the point does not extend to them, because "There is no penalty," etc.^o; and because local legislation is "law peculiar to that city^p."

This maxim is not applicable to confederate and allied cities, as where local legislation of Perugia might provide punishment here for an offense at Assisi^q. I consider it would be the same where the city in whose territory the offense was committed had consented to the passing of such legislation, for the same reason.

45. If on the other hand the injury is inflicted by an outsider on a citizen beyond the territory of this city, and there is provision in local legislation for the punishment of the outsider here, is this valid? It may be said that it is, on the ground that a layman injuring a churchman attracts church jurisdiction^r. Further, by reason

o. Cf. Digest II.i.20 (*extra territorium*).³²

p. Cf. Digest I.i.9 (*omnes populi*).³³

q. As is observed at the end of Digest XLIX.xv.7 (*non dubito*).³⁴

r. Cf. Code I.iii.2a (*item nulla communitas*);³⁵ Extravagantes II.ii.8 (*cum sit generale*).³⁶

32. There is no penalty for disobedience to one giving judgment outside his own territory . . .

33. . . . The law adopted by each people for itself is peculiar to it, and is called municipal law, as being the law peculiar to that city . . .

34. §.2: Proceedings may be brought in our courts against citizens of states bound to us by treaty, and we take steps against them if they lose the case.

35. [Emperor Frederick II, A.D. 1220] Again, no community may . . . impose . . . contributions on the clergy . . . And if they do, and pay no heed to summons from church or empire to change their ways, they must refund threefold. *Gloss 5*, "church:" It follows that the jurisdiction of the church courts depends on the offense, though the offender be a layman.

36. [Pope Lucius III, 1181-1185] Although it is the general rule that the plaintiff must sue in the defendant's court . . . yet, since justice to churchmen is apt to be laggard in trials before secular judges. it has become the rule, in favor of the church, that those in charge of sacred places may hale criminals against them (who must be considered guilty of sacrilege) before the judge of their choice.

of the place of commission of an offense the offender attracts the local jurisdiction, even if an outsiders; and if the offense is committed upon the person of a citizen, that counts as in a place subject to the city. It follows, etc. But that is not helpful, for in the case of the injury to the churchman the reason is that the offense is of sacrilege, which is a church felony: that is why it belongs to the church. And the other argument from the place of the offense I take to refer to an immoveable, such as territory, not to what is moveable or moves itself. The answer is therefore that as a general rule such local legislation is not valid because no one can deal [with a place] outside his own territory and in respect of persons not subject to him.

This rule does not apply to thieves from a shipwreck, who may be punished by the injured party's judge; and since such an offense concerns persons subject to the city's [judicial] jurisdiction, it may also pass legislation against such offenders^u, although CINO^v does not agree.

The rule is also inapplicable to confederated cities, as I have maintained [in § .44] above. It is again inapplicable if the judge

s. Digest I.xviii (*de Officio Praesidis*) .3;³⁷ Code III.xv (*Ubi de Criminibus*) .1³⁸ and 2a (*qua in provincia*).³⁹

t. Cf. [Extravagantes II.ii.8] (*cum sit generale*), above [note 36].

u. Cf. Digest XLVII.ix.7 (*ne quid*), the passage beginning "on those," with the comment on it in the Gloss.⁴⁰

v. On Code III.xv.2a (*qua in provincia*), above, his Fourth Point.

37. The governor of a province has jurisdiction only over the men of his own province . . . But he has also authority over strangers who resort to violence, for under their imperial instructions governors are to be vigilant to rid their province of evildoers, irrespective of where they come from.

38. It is common knowledge that the trial of offenses, whether under the regular procedure or summarily, should be held where the offense was committed or attempted, or where the alleged offenders are found.

39. In whatever province a man has offended . . . there in that province the law must take its course against him.

40. To prevent theft from wrecked ships . . . the Emperor Hadrian of happy memory prescribed by proclamation . . . that on those proved to have stolen anything the governor was to pass a heavy sentence, as for robbery. To facilitate proof of such crimes, he allowed anyone claiming to have suffered any such loss to approach the governor and give evidence before him, and apply that the accused be sent up to [that] governor. Gloss 7, "sent up:" Observe that it is peculiar that the complainant may compel the appearance of the defendant before the former's judge, although it may sometimes be done [otherwise also] by complaisance. . . .

of the place where my citizen was injured does not avenge the injury, whether because he will not or because he cannot: that is a case where legislation may be passed against injuries to citizens outside the territory^w. In this direction I cite INNOCENT_x, who in terms holds such local legislation to be valid.

46. If on the other hand it is a citizen who offends outside the territory, and local legislation refers in terms to the commission abroad of an offense, then I consider such legislation to be valid, because his origin gives jurisdiction to punish for an offense committed anywhere_y. It follows, since such an offense is within the city's [judicial] jurisdiction, that it may pass legislation about it_z.

But beyond the foregoing there is room for doubt. Suppose this city's army to be in occupation of another's territory, and one out-

w. On the basis of Code I.ix.14 (*nullus*), with its Gloss,⁴¹ and Gratian C.XXIII.ii.2 (*dominus noster*).⁴²

x. On Extravagantes II.ii.14 (*postulasti*) [whence is taken the reference to c. *dominus noster* above].

y. Code III.xv (*Ubi de Criminibus*) .1.⁴³

z. Helpful in this direction is Digest L.ix (*de Decretis ab Ordine*) .6;⁴⁴ and very helpful is Code IV.xlii (*de Eunuchis*) .2,⁴⁵ and Code IV.1xiii.4 (*mercatores*).⁴⁶

41. . . . let no one make so bold as to take the law into his own hands. Gloss 6, "take the law:" But will you allow it in a case where [the other] will not appear in court, and the court cannot compel him? The answer is Yes in JOHN's view.

42. [St. Augustine, Qu. VI.10] . . . But wars are commonly called just if they avenge wrongs, on condition that the people or city which it is proposed to attack shall have neglected either to punish its citizens or to surrender property wrongfully taken.

43. It is common knowledge that the trial of offenses, whether under the regular procedure or summarily, should be held where the offense was committed or attempted, or where the alleged offenders are found.

44. The law of a certain borough provided that anyone bringing action outside the borough should be barred of his judgment and fined a thousand drachmae [translation of the medieval Latin version of the Greek].

45. We command that men of Roman race who have been made eunuchs, whether or Roman or on foreign soil, shall in no wise be conveyed into anyone's ownership.

46. Merchants subject whether to our sway or to that of the King of Persia shall in no wise frequent markets outside those places agreed at the time of the treaty between us and the aforesaid nation . . . §.1: No one therefore subject to our sway shall from now on make so bold as to go outside Nisibis, Callinicus or Artaxata for the purchase or sale of goods. . .

sider kills another outsider there: will he be able to be punished by the authorities of this city? It may be said that he cannot, even if local legislation in terms so provides, as has been shown [in § .44] above. The opposite is customarily followed, and may be justified as follows. "Territory" is derived from "terrify_a," and so long as the army is there, terrifying and dictating to that place, an offense there committed will properly be able to be punished by the authorities of the city as if it had been committed in their own territory: So maintained MARTIN [of FANO], and JAMES BUTRIGAR_b.

47. My next point is: what if there is no provision in terms for this in the local legislation, the legislation being in general terms? Does it then extend outside the territory? As an aid to elucidation I put a point dealt with long ago. It is provided by the local legislation of the city of Perugia that the authorities may enquire into any homicide: they may proceed either by accusation [at the instance of a complainant] or by inquisition [of their own motion]. It is provided by other legislation that a particular penalty shall be imposed for homicide. It happens that a man of Perugia kills outside the territory; the point arises whether the authorities of this city may enquire and punish in accordance with this legislation, or only under the general law. This point was raised by ODOFRED , and he came to the conclusion that the procedure could not be by inquisition, nor could the offender be punished in accordance with the local legislation, but only under the general law: his views are cited by ALBERT of GANDINO_c. Later on Master CINO argued this point and came to the opposite conclusion, dealing with the laws cited by ODOFRED, but without acknowledgment. For this reason I reproduce his argument here, leaving out much that is unprofitable.

There is no doubt that an offender may be punished under the general law in the place of his residence or origin for an offense

a. Digest L.xvi.239, § .8 (*territorium*).⁴⁷

b. [On Code I.i.1 (*cunctos populos*), his §§ .9, 10.]

c. [As cited by Albert of Gandino, below.]

d. At the end of his monograph [on Crimes, the last chapter on "Whether a crime committed elsewhere may be enquired into at the place of the accused's residence or origin."]

e. In the city of Siena [argument beginning "The ruler of the city of Siena."]

47. "Territory" means the lands, taken as a whole, within the bounds of any one city: some say it is so called from the right of the authorities of the said place, within the said bounds, to terrify, that is to drive out.

committed elsewhere^f. That said, let us see whether the procedure may be by way of accusation only, that is under the general law, or by way of inquisition under municipal law. It may be said that only accusation will lie, since by the general law inquisition is directed to public vengeance^g, and that offenses may be punished and not covered up^h. But it may be said that any [public] harm exists only in the place where the offense was committed, not in the offender's place of originⁱ. It follows that the judge of his place of origin will not be able to proceed by inquisition. Further, the

f. Cf. Code III.xv (*Ubi de Criminibus*) .1 [above, note 43]; Digest XLVIII.xxii.7, §§ .9 (*sed et in eas*) [et seq., i.e. § .10, v. *sed in eos*]⁴⁸ and 13 (*si quis*).⁴⁹

g. Cf. Authentica III.iv.4, § .2, v. *quod si delinquentes*.⁵⁰

h. Cf. Authentica VI.xiv.3, § .1, v. *sancimus*.⁵¹

i. Cf. Digest II.i.7 (*si quis id quod*),⁵² and 9 (*si familia*).⁵³

48. Those who have committed a crime in a province of which they are not inhabitants fairly come within the decision. Gloss 14, "within the decision:" Meaning that they may be banned from the province of their origin by the governor of the province which they inhabit . . . And so observe that a man may be charged with an offense in the province of his inhabitance, although he offended elsewhere—Code III.xv.1 [note 43 above].

49. Where a man has incurred such a penalty that having committed a crime in another province he may be banished by the governor of that province (Gloss 24, "province:" which he inhabits), the result of his banishment is that he must avoid three provinces besides Italy: that where he offended, that of his inhabitance, and that of his origin.

50. But if you find them (Gloss, "find:" the aforesaid servicemen) offending, you will take care that they suffer all becoming corporal punishment, and also that the injured parties be satisfied out of their pay.

51. For we command that . . . municipal magistrates and city fathers be punished with fine of three pounds of gold, and be liable to the punishment of death if they discover such conduct and, instead of punishing it or reporting it to those with power to punish, they allow it to remain hidden.

52. Whoever shall have with evil intent defaced what is published on the notice board . . . in respect of the standing provisions for the administration of justice, not about a particular matter, shall be punished with fine of 500 guineas, and anyone may prosecute.

53. Where a man's household shall have defaced the notice board, the same rule does not apply as in theft, to bar an action against the others when the master assumes the defense and does so in the name of one, as if one free man were defending himself, perhaps because there is here a contempt of court to be avenged, and separate acts are counted, . . . not, as in theft, one only . . .

rulers of cities are styled fathers of their subjects_j; and the outsider injured abroad is not the subject of the judge of the country of origin of the offender, who is therefore not in the position of father to him, and may properly take no proceedings on the harm done him.

In the other direction it may be said that he may take proceedings because under the general law he has jurisdiction as has been shown above. It follows that he may exercise that jurisdiction, with the extended capacity under the local legislation to proceed by inquisition, for there is no difficulty in extending an existing capacity_k. Further, there is the argument from self-interest, for the State has an interest in having good subjects_i; and men are made good by being punished for offenses_m; and because †this is what is demanded by public policy and morality_n. It follows that it

j. Cf. Authentica VI.xiv.3, § .1, v. *sancimus*,⁵¹ above; and Authentica II.ii.8 (*eos autem*).⁵⁴

k. Cf. Digest IX.iv.4, § .3 (*si detracta*).⁵⁵

l. Digest I.vi (*de His qui sunt Sui vel Alieni Juris*) .1, § .2 [the reference is in fact to the same title of the Institutes, I.viii, § .2⁵⁶, which is Cino's own citation]; Authentica II.ii. pref., § .1 (*cogitatio*).⁵⁷

m. Digest I.i (*de Justitia et Jure*) .1, § .1, v. *bonos non solum*.⁵⁸

54. Moreover those who thus . . . fill public offices which they have not purchased . . . must . . . show themselves good fathers to the well-affected . . .

55. Where an action is brought against a master with no claim for surrender of the slave, on the ground of the master's own connivance, and is lost because he did not connive, and the trial is finished, any further action for surrender will be barred by the defense of *res judicata*, because the issue was open in the former trial, and is decided . . . But while the former trial is in progress the plaintiff is at liberty, if he changes his mind about proving connivance, to amend so as to claim surrender.

56. . . . for it is to the advantage of the State that no one should use ill his own property.

57. . . . whereas our subjects will obtain the greatest benefit by protection from the depredations of [corrupt] judges, while the Empire and the treasury will abound in prosperity when founded on wealthy subjects. . . .

58. . . . for we are devotees of justice . . . desiring to make men good not only by the fear of punishment but also by the encouragement of reward.

59. . . . Any sum extorted by coercion shall be restored with a three-fold penalty. Further, under the summary procedure, they are punished. The former remedy secures the rights of private parties, and the latter enforces public morality.

has an interest in punishing its subjects, and so the legislation should reach them. Further, the reason for the procedure may be said to be the same whether it be by accusation or by inquisition; for inquisition merely replaces accusation. It follows, etc. Further, suppose †a citizen† [disturbs public worship] outside the territory^p, there is no doubt that the judge at his place of origin will have jurisdiction as such to enquire into it: the same follows in our question. Further, the legislation is in general terms: it follows, etc.^q. These were the reasons which led CINO to the conclusion that the judge may proceed by inquisition and indictment as lawfully as by accusation: whether this is sound I shall consider [in § .48] below.

On the other question, however, the question of sentence, it may seem at first sight that he should be punished under the law of the place of offense^r. Contracts and offenses are on the same

n. Cf. Digest XXXIX.iv.9, § .5 (*quod illicite*).⁵⁹

o. Cf. Digest IX.ii.32 (*illud*).⁶⁰

p. Contrary to Code I.iii.10 (*si quis in hoc*).⁶¹

q. Cf. Digest XXXVII.v.1, § .1 (*generaliter*).⁶²

r. Cf. Code III.xxiv (*Ubi Senatores*) .1.⁶³ Further

60. This point has been put, whether the same judicial rule as applies to theft committed by a household (that is that proceedings will not lie against each slave separately, but that it is enough to pay what would have been paid if a single free man had committed the theft) should apply to an action for damages for harm. It has been thought best that the same rule is to be applied, and rightly. For since the reason for the rule in an action for theft is that the master should not lose the whole household for one offense, and since the same reason presents itself in an action for damages for harm, it follows that the same consideration should prevail . . . *Gloss 5*, "consideration:" Observe that where the reason is the same so is the law. . . .

61. If anyone should erupt into such manner of sacrilege as to burst into any Catholic church and offer insult to the priest or server, or to the service or place of worship, his conduct calls for steps to be taken against him by the provincial governor.

62. . . . Where the testator's will is set aside and the estate is adjudged notwithstanding the will, the same judgment preserves legacies and trusts to certain persons, that is descendants and ascendants . . . §.1: The proclamation names ascendants and descendants generally, without mention of their degree: they are therefore counted without limit of degree. *Gloss 7*, "without limit of degree:" Observe that the expression "generally" is to be understood generally. . . .

63. Any person not "right honorable" but only "honorable," who has abducted a maiden or broken close, or has been caught in any other misdeed, shall be forthwith tried in the province in which he committed the outrage under the laws applicable to everyone. . . .

footings_s; and in a question of contract the place of making is looked to_t, as has been demonstrated [in § .16] above. It follows, etc. Further, as has been maintained above, towards the beginning of this treatise [in § .20], the place of offending should be looked to. It follows, etc._u.

As against this, that he is punishable under the law of his own city is demonstrated as follows. A law and a judgment are on the same footing_v; and one may bind one's subjects by one's judgment: it follows that one may bind him by one's law. Further, an offense committed in a church, which no one maintains to be under temporal jurisdiction, may nevertheless be punished by the temporal judge under his own law_w. Further it is demonstrated in terms_x that a subject is bound even outside the territory.

For these reasons CINO came to the conclusion that for an offense committed in another city a citizen may be punished in his own city under his own city's legislation. And if it be asked how its

s. Cf. Digest V.i.57 (*tam ex contractibus*)⁶⁴ and 20 (*omnem*).⁶⁵

t. Cf. Digest XXI.ii.6 (*si fundus*).⁶⁶

u. An illustration in this direction is Sext I.ii.2 (*ut animarum*), § .1.⁶⁷

v. Cf. Digest XL.i.9 (*servus hac lege*).⁶⁸

w. Cf. Code IX.ix.29a (*si quis*);⁶⁹ ††

x. by Code IV.xlii (*de Eunuchis*) .2.⁷⁰

64. Proceedings may be brought against an unemancipated son in contract as much as for an offense.

65. It is to be considered that every obligation should be treated like a contract, so that wherever a man becomes liable there also may a contract be said to be made, even if the cause of action be not in debt.

66. Where land shall have been sold, security against eviction must be furnished according to the custom of the locality where the transaction was concluded.

67. [Pope Boniface VIII, 1294-1303] A bishop's decree pronouncing excommunication against all who shall have committed theft shall in no wise be considered to bind his subjects committing theft outside his diocese, since "there is no penalty for disobedience to one giving judgment outside his own territory."

68. A slave sold subject to a term [in Latin "law"] that he may not be enfranchised, . . . or whose enfranchisement is for some offense barred by the governor, may not be given his freedom.

69. . . . If however [an adulterous wife and her paramour] are caught in converse in a sacred chapel . . . the husband may hand the pair of them over to the church proctor . . . until the judge takes cognisance and requests the bishop of the city to hand them over to him.

70. We command that men of Roman race who have been made eunuchs, whether on Roman or on foreign soil, shall in no wise be conveyed into anyone's ownership. . . .

effect can extend outside the territory, he admits that it cannot introduce a new kind of duty outside its own territory; but it may well qualify what is already an offense under the general law, for it is easier to qualify than to create^y. [That no general excommunication affects even subjects offending abroad]^z does not tell against this, for that decision was due to a mistake of the canonists, or it is peculiar to the sentence of excommunication. That is the gist of his remarks; and the foregoing is derived from the remarks of PETER †of BELLEPERCHE†^a.

48. But as I see it the words of the local legislation have to be more carefully scrutinised. For it depends on whether it deals in terms with what a citizen does, even outside the territory, in which case he may be proceeded against and punished [under it]^b. I have so maintained above on the last point [meaning § .46(1)]. If on the other hand it refers specifically to what is done inside the territory, then it does not reach what is done outside^c.

If on the other hand the local legislation is in general terms, then this is our point, and the case we are about to consider. [In that case] it depends on whether the point at issue be the manner of proceeding, when proceedings would lie as provided by the local legislation of his city of origin, because legislation regarding the trial or the manner of conducting a case extends to every case litigated in that city, even if it is about what was done outside the city^d: this is the view expressed [in § .15] above on contracts^e.

y. Cf. Digest IX.iv.4, § .3 (*si detracta*) [note 55 above].

z. Sext I.ii.2 (*ut animarum*) [§ .1, note 67 above].

a. In his commentary on Digest II.i.20 (*extra territorium*).

b. Code IV.xlii (*de Eunuchis*) .2 [note 70 above].

c. Digest XXIV.iii.64, § .9 (*de viro*),⁷¹ and similar texts.

d. Cf. Digest XXII.v.3 (*testium*), § .6;⁷² and [Code] VI.xxxii (*Quemadmodum Testamenta*) .2⁷³ †† and Code I.iii.25 (*cum clericis*), § .3.⁷⁴

e. In this direction is Code X.xiv (*de Custodia Reorum*) .1, pr.⁷⁵

71. The law refers only to the husband and his heirs: nothing is said in the law about the father-in-law and his successors . . . in cases therefore where the law is silent no action will lie, even by analogy.

72. . . . The imperial brothers of happy memory also decided that "in so far as concerns the summoning of witnesses, it is the duty of the judge to investigate what may be the custom of the province in which he sits."

73. Upon oath that your father has given you his will for the purposes of production in his own country, you may produce it there, so that it may be registered in accordance with the legislation and usages of that place. . . .

And so on the first point you may accept CINO's view that the proceedings could be by inquisition.

If on the other hand the issue be of sentence, then he may be punished either under the general law or as provided by the local legislation of the place where he offended, because legislation regarding the decision of the case does not extend to what is committed outside the territory: it is the place where the †transaction occurred† that is looked to, as has been maintained [in § .16] above, as much for an offense as for a contract. In this I hold to the views of ODOFRED and of ALBERT of GANDINO.

49. So the judge must take heed in drawing up his record to say in his decision for inquisition: "On all which and singular I purpose to proceed and inquire in manner provided by the legislation of this city, and to punish the †accused if found† guilty and sentence him in manner provided by the law." In this way he will found on the local legislation for procedure, and on the general law for sentence.

50. The Last Point is the effect of a criminal sentence, whether its effect reaches outside the territory of the judge passing it. Without any citation of authority I shall set down the various limbs, as I see it, to be distinguished. It depends then on whether the issue is of sentence [(1)] regarding persons, or [(2)] regarding possessions.

Within case (1) it depends on whether the sentence inflicted regards a ban on access to a particular place, in which case it does not extend outside the territory of the banning [authority] by force of the judgment itself; but there are certainly places to which it extends consequentially and by provision of law_g. But if it does not

f. And it is here that Sext I.ii.2 (*ut animarum*), § .1 [note 67] above is an illustration. Digest XLII.v.12, § .1 (*is qui*)⁷⁶ is [also] helpful.

g. Cf. Digest XLVIII.xxii.7 (*relegatorum*), §§ .1,⁷⁷ 10 (*interdicere*),⁷⁸ and following.⁷⁹

74. In regard to the other various court officers of Your Eminence, we command that the fees which are customarily due for their services be maintained.

75. Whatever the case may be, once the defendant is produced . . . the inquiry must proceed forthwith, so that the guilty may be punished and the innocent freed.

76. An order for attachment will be taken to refer to the area for which the authority making the order is responsible.

77. A provincial governor may banish to an island, provided he have an island under his jurisdiction . . . but if he have none he may pass sentence of banishment to an island, referring to the Emperor to desig-

regard a ban on access to a particular place, but rather a ban on the exercise of a particular calling, then it will not extend outside the territory^h.

But if again it regards chiefly not the banning either of place or calling, but reduction of status (as where the accused is disgraced, and so is said to have his status reduced, or becomes the "slave of his punishment," and then †† is said to have his status †extinguished†ⁱ), then under case (1) the penalty inflicted here is effective everywhere^j. All the more so, I maintain, in the case of those who become "slaves of their punishment" under the sentence, for the reduction in their status stems automatically

h. Cf. Digest III.i.9 (*ex ea causa*).⁸⁰

i. Cf. Digest L.xiii.5 (*cognitionum*), §§ .1 and 3.⁸¹

j. Cf. Digest III.i.9 (*ex ea causa*) [above] in its reference to disgrace.⁸²

nate one. But he cannot banish [directly] to an island which he does not have in the province under him.

78. Those who have committed a crime in a province of which they are not inhabitants should fairly come within the decision. *Gloss 14*, "within the decision." Meaning that they may be banned from the province of their origin by the governor of the province which they inhabit.

79. It has been doubted whether the governor of the province of the convict's inhabitation may ban him from the province of his origin when he does not ban him from his own . . . or if it should be taken to extend consequentially to his own also: the latter view is preferable. [Possibly § .13 is intended—see note 49 above.]

80. A man forbidden to sue out a writ for another, but for a reason which does not involve disgrace . . . may not properly sue for others in that province alone which is subject to the governor who made the order; but in any other province he is not forbidden, even on the same cause of action.

81. Status . . . is by our own offense either reduced or destroyed. § .2: It is reduced wherever . . . for instance . . . a commoner is flogged . . . or a man is guilty of conduct which according to the list in the Standing Proclamation is visited with disgrace. § .3: It is destroyed wherever . . . for instance . . . a commoner is . . . consigned to the mines.

82. [Text above, note 80] *Gloss 2*, "does not involve." Otherwise he could not sue in any province, as if the disgrace accompanied him at all times, as his leprosy a leper: this is the law in respect of a sentence of excommunication, cf. Gratian C.XI.iii.2 (*si quis a proprio*) (which reads: [Council of Antioch, canon 6, A.D. 332] Whoever has been excommunicated by his own bishop should have no relief from others until his own bishop has taken him back).

from the nature of the penalty^k. If then it is the kind of penalty, it is immaterial whether the sentence passed be as prescribed by local legislation or by the general law^l; and for this reason I should consider the woman who was sentenced here to be burnt, and was then rescued by her family, to have become forthwith a "slave of her punishment," even under the law "nowadays.^m" For after judgment she ought not to have †survived†, and that is why, wherever she may be, I maintain that she is a "slave of her punishment," and incapable of making a will or contracting or doing anything of the kind. It is the same, I maintain, [as] for an

k. Cf. Digest XLVIII.xix.29 (*qui ultimo*)⁸³ above [sic]; and 17 (*sunt quidam*);⁸⁴ and Code V.xvi.24 (*res*), pr., in its reference to the "nature of the penalty."⁸⁵

l. Digest III.ii.22 (*ictus fustium*)⁸⁶ is helpful on this, with the comment on it.

m. Cf. Digest XLVIII.xix.29 (*qui ultimo*) [note 83] above, and the comment on it;⁸⁷ and Code V.xvi.24a (*sed hodie*).⁸⁸

83. Condemnation to the supreme penalty involves loss forthwith both of citizenship and of liberty. Forfeiture thus antedates death, and often by a long time, as happens where the condemnation is to the wild beasts. . . .

84. "Slaves of their punishment" are for instance those consigned to the mines . . . and anything left them by will is void, on the ground of its being given to the slave not of the Emperor but of his punishment.

85. I direct a wife's property which . . . came to her . . . before her husband's condemnation and death, or his reduction to servile status by the nature of his penalty, to be unaffected.

86. It is not the flogging that produces the disgrace, but the reason for which it was deserved . . . Gloss 1, "flogging:" . . . And so observe that disgrace is sometimes incurred by judgment [to that effect] . . . sometimes by the kind of penalty as in this law . . . Again this law may be taken as referring to a man against whom judgment has gone in a [private] action for theft, and who is later flogged: for it is not the flogging that produces the disgrace, but the antecedent judgment. . . .

87. Gloss 3, "to the wild beasts:" and observe that one condemned to death becomes forthwith a slave . . . and again if sentenced to the mines . . . This is amended "nowadays" for the "well-born," not, I would say, for a bastard . . . It follows that such sentences are self-executory, like a sentence of excommunication.

88. But nowadays no one originally well-born becomes a slave by punishment . . . Gloss 1 . . . Is Digest XLVIII.xix.29 (*qui ultimo*) [note 83 above, Gloss note 87] thereby amended? The answer is No.

excommunicate, who is treated everywhere as excommunicated». These penalties regarding reduction of status are imposed upon the person and accompany that person as his leprosy accompanies a leper».

Under case (2), where the penalty regards possessions, suppose a person to have been sentenced in one city to forfeiture of his possessions, and to have some of his possessions elsewhere: are those also forfeited? WILLIAM of CUGNEUX deals with this^p, and is of opinion that every city takes the possessions situated in its own territory, for this property is like *bona vacantia*^q and the heirs in intestacy take nothing. And that is why, since each city is regarded as the crown [separately], the possessions escheat to each to the extent that they are in the territory [of each]^r.

n. Gratian C.IV.v.1 (*quisquis*).⁸⁹

o. [Gloss 2 on Digest III.i.9 (*ex ea causa*), above, note 82.] Digest XV.i.16 (*quis ergo casus*),⁹⁰ †† is helpful, and Digest XVII.ii (*Pro Socio*). 3, pr., and the comment⁹¹ on them.

p. On this law [Code I.i.1 (*cunctos populos*), his § .13] and on Digest IV.v (*de Capite Diminutis*). 2.

q. Cf. Code X.x (*de Bonis Vacantibus*). 1.⁹²

r. On the basis of Digest VII.ii.3 (*idem Nerattus*), § .1.⁹³ In this sense is Code I.iii.20 (*si quis presbyter*),⁹⁴ to the effect that part of the possessions goes to the church, and part to the crown, municipal council or patron. Digest L.xv.4, § .2 (*is vero qui*)⁹⁵ is helpful, as is Digest XXVI.v.27 (*pupillo*),⁹⁶ and Digest XXVII.i.30, § .1 (*cum oriundus*).⁹⁷ Code X.xix (*de Exactionibus Tributorum*)⁹⁸ may be said to be an illustration, and Code X.x.3 (*si quando 2*)⁹⁹—or so he says.

89. [Council of Carthage III, A.D. 391, canon 7] Wherever any bishop is accused . . . after the second month he should not communicate until he has been acquitted . . . And indeed during the time when he should not communicate he should communicate neither in his own church nor in a [nother] parish.

90. In what circumstances then may the *peculium* of a shared slave belong to one only of his owners? . . . Another circumstance is where one owner's grant, though outright, is of debts [due to that owner]. Gloss 3, "of debts:" . . . debts and [other] rights of action can no more be separated from their owner than can the soul from the body, under this law and Digest XVII.ii (*Pro Socio*). 3 [note 91 below].

91. Such property as consists of debts continues in the same situation [i.e. the separate property of the individual partners] . . . Gloss 1, "such property:" It follows that tangible possessions are lost more easily than intangible, or even spiritual, as we say in referring to the right to partake of the sacraments, and to the imprint of membership of our faith, that they so cling to a man's bones as to be inseparable from him . . . as appears from this law and from Digest XV.i.16 [note 90 above].

Others cite NICHOLAS of MATARELLI as maintaining in one of his arguments, that it depends on whether [(a)] the forfeiting judge derives his jurisdiction from a general law and inflicts the penalty within the scheme of the general law, or [(b)] both, meaning jurisdiction and sentence, or either of them, are under a municipal law. In case (a) the sentence reaches his estate wherever situated, but its reduction into the possession of the crown will be effected by the treasurer in whose territory the possessions are situated. By analogy from the fact that where there are several

s. [Great Book of Argued Points, No. 1.]

t. Cf. Digest XLII.i.15 (*a divo Pio*), § .1;¹⁰⁰ and Digest XLII.v.12, § .1 (*is qui*), and the comment on it;¹ and Code X.x.3 (*si quando* [2]) above,² and 5.³

92. You must understand, sir, that the property of persons dying intestate and without lawful heirs is to be claimed on account of the crown . . .

93. Hence Celsus write in Book XVIII that if two owners of land should transfer it reserving the usufruct, and then one should release it, the usufruct [released] would return to the ownership, but not to the whole ownership, the usufruct of each being annexed to that share which he himself transferred, for it should return to that share from which it was originally divided.

94. If any priest . . . should die leaving no will and [no heirs] any property which . . . belonged to him shall be merged for all purposes . . . with that of the holy church . . . to which he was attached; but subject to the exception of such assets as may have been left by churchmen . . . who are crown serfs, or subject to the claims of a patron, or liable to municipal service. For it is not right that possessions . . . which are owed by legislation either to the patron or to the lord of the holding to which [the deceased] was annexed, or are found to belong in some sense . . . to a municipal council, should be kept by a holy church.

95. The owner of land in another city should declare it in the city where it is, for land tax is leviable to the city in whose territory it is held.

96. Where a ward has assets both in Rome and outside Italy, jurisdiction to appoint a guardian in respect of the property at Rome belongs to the court at Rome, but in respect of the property outside Italy to the provincial governor.

97. Where a curator was appointed by order both of the provincial governor and of the court at Rome to a person originally from outside Italy but resident at Rome, and had entered on the management of his affairs at both places, it was decided that there were not two administrations, because one person cannot have two estates.

98. Where the imperial household . . . possesses . . . lands . . . let them be assigned to the municipal council of the city under which the estates are situated . . .

guardians of the same ward, his estate being situated in various cities or provinces, one of them may take steps in one province leading to the surrender [to the ward] of possessions in another^u, so here the several treasurers in the various provinces all represent a single crown. In case (b), where both or either derive from a municipal law, then the forfeiture does not reach possessions not under the [judge's] jurisdiction^v.

What must be maintained on this point, as I see it, is that no city can forfeit to its own use for offenses against the general law^w;

u. Cf. Digest XXVI.vii.39, § .3 (*heres*).⁴

v. Cf. Code V.xxxiv.5 (*neque*),⁵ and so on.

w. Cf. Code X.x (*de Bonis Vacantibus*) .1, and the comment on it.⁶

99. Wherever . . . by any man's forfeiture . . . an addition is to be made to our demesne, the reduction to possession should be regularly . . . effected by . . . the accounts officer residing in each province . . .

100. A judgment delivered at Rome may be completely executed outside Italy by the provincial governor, if so ordered.

1. An order for attachment will be taken to apply to the area for which the authority making the order is responsible. *Gloss 6*, "an order:" . . . But what if the defendant has nothing there? The answer is that the court will make an order of attachment, and the court of the site of the property will attach as under a final judgment—cf. Digest XLII.i.15 (*a divo Pio*), § .1 [note 100 above].

2. Wherever . . . by any man's forfeiture . . . an addition is to be made to our demesne, the reduction to possession should be regularly . . . effected by . . . the accounts officer residing in each province.

3. Where possessions are ownerless or have otherwise by law devolved on the crown . . . let the provincial governor diligently inquire . . .

4. An heir appointed with no alternate departed this life before entering on the inheritance, which he was bound [by trust] to surrender to a minor. The inheritance was in Italy; but the heir appointed was outside Italy when he departed this life. I took the view therefore that it was the guardians of the property outside Italy who were liable, as being in breach of their duty, if, despite their knowledge of the purpose of the appointment, they neglected the interests of their ward [by allowing the trust to lapse]. For the way would have been cleared for the claim in law by assignment under the trust outside Italy, although the management of the property would have had to fall on the persons who had assumed the guardianship in Italy.

5. Neither the provincial governor nor the municipal authorities may appoint a guardian not subject to their jurisdiction, originally from another city and with no residence where he is appointed . . .

6. You must understand, sir, that the property of persons dying intestate and without lawful heirs is to be claimed on account of the crown; and no claim is to be admitted by cities asserting the right, for instance by sufferance, to claim such property . . . *Gloss 4*, "by sufferance:"

and again no city has by the general law sovereign power [to punish], or jurisdiction of the more serious offenses.^x It follows that those cities in Italy which exercise that jurisdiction, and which forfeit possessions to their own use, do so either by franchise granted them by the Emperor or by ancient custom, which has the force of an established franchise.^y And so the cities which nowadays possess an exchequer chamber may be regarded as representing the crown for its property in that city; for they exercise the rights of the crown for their own benefit by grant from the Emperor, whether tacit or express.^z

51. On this basis I maintain as follows on the foregoing point. It depends on whether [(a)] the jurisdictions are distinct but the exchequer is in actual fact one and the same, or [(b)] the jurisdictions are distinct and the exchequers distinct also.

In case (a) it depends on whether the forfeiture is [(i)] under the general law, when the possessions in each place will be forfeited^a, and the sentence will be carried out by the treasurer of the site of the possessions, under the view expressed above. Hence I maintain that if the Papal Governor of the March of Ancona forfeited a man's possessions under the general law, this would be

x. Cf. Code I.lv.5 (*defensores*, 2).⁷

y. Cf. Digest XLIII.xx.3, § .4 (*ductus aquae*);⁸ and Digest XXXIX.iii (*de Aqua . . . Pluviae Arcendae*) .1, at the end.⁹ So says the Gloss on Authentica III.ii.2 (*jusjurandum*), at the end of the long Gloss.¹⁰

z. As has been shown [? by the citations in note (y) above ?].

a. Cf. Code X.x.3 (*si quando*) [note 2 above].

. . . But may a city take it in consideration of an offense? The answer is No, for the same reason. Indeed even the crown nowadays does not, except for the felony of contempt of the crown.

7. Municipal magistrates . . . may not try serious criminal charges . . .

8. Watercourses dating from earlier than memory extends are treated as rightfully established.

9. § .23: . . . If however no rule can be found [to govern the water] on the land, then antiquity takes the place of law. For indeed it is the same with easements, that where no grant of an easement can be found, a man who has long enjoyed one otherwise than by force, sufferance or stealth may be said to have a right to it by long custom as much as by title.

10. . . . save those matters only over which they [i.e. the municipal magistrates] have no jurisdiction. Gloss, "jurisdiction:" . . . Other remedies, under the exclusive jurisdiction [to punish] or the concurrent jurisdiction [to appoint guardians], they may not grant, or so it says here. But the practice is different, whether by custom or sometimes by grant to particular cities by one of the Emperors, as by Frederick [I] to those of Lombardy [at the Peace of Constance, A.D. 1183].

taken to include his possessions in the Duchy [of Spoleto]; but the sentence would be carried out on the latter possessions by the treasury representative in the Duchy.

If on the other hand the forfeiture is [(ii)] under some ordinance or peculiar legislation, then it depends on whether that peculiar legislation is in force in each of the places which between them contain the possessions. For instance several judges may be appointed by a single king for the various territories of his kingdom, and one of them may forfeit under a royal ordinance: in that case all the possessions in the kingdom would be forfeited to the same extent and under the same legislation. If on the other hand this peculiar legislation is not common to both places—for instance there are some ordinances in the March which are not in force in the Duchy—then such forfeiture reaches no possessions outside the place to which the ordinance applies^b.

In case (b), where the jurisdictions are separate and the exchequers separate also, it depends on whether the forfeiture be otherwise than under the general law, when it will not reach other possessions situated elsewhere, under the texts above. If on the other hand it is under the general law, then it will reach all possessions, even if situated elsewhere; but each exchequer will take the possessions situated in its own territory, as was maintained by WILLIAM of CUGNEUX. I should demonstrate this as follows. Each city is regarded as representing the crown, as has been shown above. But if it represented the crown, and the getting in and reduction of the said property to the possession of the crown for the

b. Cf. Digest II.i.20 (*extra territorium*);¹¹ and Sext I.ii.2 (*ut animarum*), [§ .1];¹² and Code V.xxxiv.5 (*neque*);¹³ and Digest XXVI.v. (*de Tutoribus . . . Datis*) .1, § .2¹⁴ and 27 (*pupillo*);¹⁵ and so on.

11. There is no penalty for disobedience to one giving judgment outside his own territory . . .

12. A bishop's decree pronouncing excommunication against all who shall have committed theft shall in no wise be considered to bind his subjects committing theft outside his diocese, since "there is no penalty for disobedience to one giving judgment outside his own territory."

13. Neither the provincial governor nor the municipal authorities may appoint a guardian not subject to their jurisdiction, originally from another city and with no residence where he is appointed . . .

14. The authority of a provincial governor to appoint a guardian is restricted to wards belonging to his province or having their residence there.

15. Where a ward has assets both in Rome and outside Italy, jurisdiction to appoint a guardian in respect of the property at Rome belongs to the court at Rome, but in respect of the property outside Italy to the provincial governor.

benefit of the crown formed part of its functions, as has been shown above, it follows that now it belongs to it and for its benefit.

But I do not accept the distinction between the judge's jurisdiction deriving from the general law or from a municipal law, because the source of his jurisdiction is immaterial. All that matters is whether his judgment enforces what is already provided by the general law, or whether it creates a new right, as I have maintained above on Point 7, § .41.

[CONCLUDED]

c. In this direction [Code] †X.xix (*de Exactionibus Tributorum*).
8 [note 98] above is an illustration, with Extravagantes II.ii.14
(*postulasti*).¹⁶

16. [Pope Innocent III, A.D. 1213] You have asked to be enlightened by the Apostolic See on whether a priest having his church in one diocese and residing in the same, but having a residence founded on property in another and there offending, should be tried by the bishop in whose diocese his property is situated for the offense committed there, particularly in cases requiring deprivation of his office or benefice. The short answer is that judgment may be pronounced against him by the bishop in whose diocese he offended; but that execution of the judgment in so far as regards the benefice should be ordered by the bishop in whose diocese he holds it.