

[These are derived from Kenneth Pennington, *The Prince and the Law* (Berkeley: University of California Press, 1993). The translations of the Latin passages that follow are, in some cases his and in some cases mine, but you really should try to make sense of the Latin.]

A. THE EMPEROR, THE JURISTS, AND THE HORSE

1. Continuator of Otto of Morena (c. 1220)

MGH, *Scriptores* 18 (1863) 607 (in Pennington, 16 n. 34)

(MGH, *Scriptores* 18; Hannover: 1863) 607 and Güterbock's edition in MGH *Scriptores rerum Germanicarum*, Nova Series 7; (Berlin: 1930) 59:

“Cum dominus Fredericus imperator semel equitaret super quodam suo palafredo in medio dominorum Bulgari et Martini, exquisivit ab eis utrum de iure esset dominus mundi. Et dominus Bulgarus respondit, quod non erat dominus quantum ad proprietatem. Dominus vero Martinus respondit, quod erat dominus. Et tunc dominus imperator, cum descendisset de palafredo, super quo sedebat, fecit eum presentari dicto domino Martino. Dominus autem Bulgarus hec audiens, dixit hec elegancia verba: amisi equum, quia dixi equum quod non fuit equum.”

When the lord Frederick the emperor was once riding on a palfrey between Sirs Bulgarus and Martinus, he asked them whether he was lord [*dominus*, the word also means ‘owner’] of the world. And Sir Bulgarus replied that he was not owner (*dominus*) so far as property was concerned. Sir Martinus, however, replied that he was lord (*dominus*). And then the lord emperor, when he got down off the palfrey, had it presented to the said Sir Martinus. Sir Bulgarus, however, when he heard this, concocted this elegant turn of phrase: “I lost an equine, because I upheld equity—which was not equitable.”

2. Azo, *Summa Codicis* 3.13 (On the jurisdiction of all judges)

(Pennington, p. 18 n. 47)

Azo, Summa super Codice to Cod. 3.13 (De iurisdictione omnium iudicum), Würzburg, Universitätsbibl. M.p.i.f.2, fol. 35r (1st rec.), Bamberg, Staatsbibl. Jur. 24, fol. 36r (with additiones), Jur. 25, fol. 35r (with additiones), Paris, B.N. lat. 4542, fol. 30r [I expanded this from ed. Venice 1498, fol. 45va and Venice 1499, fol. 42va. It is unclear whether the material in diamond brackets is not present in the Würzburg Ms., which P. regards as the earliest, or whether he just left it out to improve the flow. It has all the hallmarks of an *additio*, which Azo is known to have made to his work and which were later incorporated, sometimes quite awkwardly, into the text.]:

“An autem hoc merum imperium soli principi competere? Et eum solum habere quidam dicunt. Diciturque in eo merum, eo quod pure sine alicuius prelatura habet. Set certe etiam sublimes magistratus habent merum imperium si bona est definitio legis quam diximus. Nam et presides prouinciarum habent ius gladii, ut ff. de offic. presid. Illicitas § quia universas. [D.1.18.6.8, CD] Magistratus vero municipales non habent ut ff. eadem lege magistratibus. [Probably D.2.1.12. CD]. Plenam ergo vel plenissimam iurisdictionem soli principi competere dico <cum lege ortensia populis ei et in eum omne imperium et omnem potestatem transtulit, ut instit. de iure naturi § sed quod Et ipse solus statuere generalem possit equitatem, ut C. de leg. et con. l. j quod innuit iurisdictionis definitio sic enim dicit equitatis statuende. Concedo tamen quod quilibet magistratus in sua civitate ius novum statuere potest, ut ff. quod quisque ius in al. sta. l. j.> Sed merum imperium etiam aliis sublimioribus potestatibus licet ob hoc amiserim [One early MS. says *amiserit*, but KP reports that 10 of the 11 ‘first recension’ MSS. have *amiserim*] equum, sed non fuit equum.”

Does this pure power (*merum imperium*) pertain only to the prince? And some say that he alone has it. And it is said to be pure in him because he has it without any magistrate over him (*sine prelatura alicuius*). But certainly exalted magistrates also have pure power if the definition of the law that I have just given is good. For even the governors of provinces have the power of the sword, as [D.1.18.6.8]. Municipal magistrates, however, do not have it, as [(probably) D.2.1.12]. I say, however, that full or most full jurisdiction pertains to the prince alone, but pure power

also to other exalted podestà, although on account of this I lost [one early MS. says 'he lost'] a horse, which was not equitable.

3. C.7.37.3 (*Bene a Zenone*) (Justinian, 531)

(S.P. Scott trans. with corrections and with the Accursian gloss)

The Emperor Justinian to Florus: It was very properly provided by the Emperor Zeno of divine memory, in the case of fiscal alienation, that persons who obtain property from our treasury by way of donation, purchase, or any other kind of alienation—if anything should arise to impugn the validity of the contract, either on the ground of eviction, or to produce any other annoyance with reference to the ownership or hypothecation of the property—shall not suffer any loss; and that no suits can be brought against the purchasers, or those who have received the property by way of donation, or who have possession of the same under any other title; but they can only be brought against the treasury within the term of four years, which, having elapsed, no action will lie against the treasury.

We know that this rule is constantly observed in fiscal alienations, but that it is not observed in the case of property acquired from private resources of the Emperor, and from the funds of the treasury. This is unreasonable, for why should such a difference be established when everything is understood to belong to the prince, whether what is alienated is derived from his private property, or from that belonging to the treasury?

In like manner, when anything is alienated by the empress, why should it not enjoy the same privilege? Our stewards, by whom we are accustomed to administer our estates when anything is sold, are required to attach to the bills of sale agreements with reference to eviction, and others having a view to private convenience, and to acknowledge obligations of this kind in instruments relating to alienations, as well as those concerning changes or compromises, where such transactions take place. This also refers to those who do not acknowledge the imperial majesty, nor realize what a distance exists between private fortune and imperial rank, but attempt to injure and cause loss to our stewards, by whom the affairs of the imperial household are conducted.

For the purpose of correcting all these things, we order by this general rule, which shall be valid for all time, that every alienation proceeding from the imperial palace, whether it is made by us or by her august majesty the empress, or by those who may hereafter be worthy of the imperial name—whether the property has already been alienated, or may be alienated hereafter—shall remain irrevocable; whether the transfer has been by us in person, or by our agents pursuant to our authority. And let no one be so bold as to bring suit against those who acquire such property under any title whatsoever, whether the said property be movable, immovable, or capable of moving itself, or whether it consists of incorporeal rights or civil privileges, or think that there is any way open for him to molest them, but every avenue shall be closed, and every method of procedure, and every hope of the tolerance of such malignancy, shall be excluded.

They shall, however, have the right to bring actions *in rem* or hypothecary actions against us within the term of four years, as they can do against the treasury, if they think that they are entitled to such actions; and such a cause shall proceed by our order and be decided in the proper manner. When, however, the said term of four years has elapsed, no one will be entitled to bring any suit whatsoever against us. Therefore, because we know that not only we ourselves but also our illustrious consort the empress has already given, sold, and alienated much property in other ways, and that our liberality as well as that of our illustrious consort the empress has been, above all, displayed with reference to churches, hospitals, poorhouses, as well as bishops, monks, and innumerable other persons, we order that they also shall hold by indisputable title what they have acquired, and that no proceeding shall be instituted against them, and that, within the term of four years from the present time, they [presumably adverse claimants] shall all have a right to bring suit against us to recover said property; but they are hereby notified that, after the said term

of four years has expired, they shall be entitled to no recourse against us. For as imperial rank is entitled to many privileges, all imperial donations shall be irrevocable, without being recorded, and the title to any property which the illustrious emperor may have given to his august consort temporarily, or during marriage, or which he himself may have received from his illustrious consort the empress as a donation shall immediately become complete, without being subject to confirmation by time, and this shall be considered an imperial privilege. For why should those who, giving their advice and their efforts, toil day and night for the benefit of the entire world, not enjoy privileges becoming their rank?

Therefore your excellency as well as all our other judges shall cause these provisions to be observed which we have promulgated for the honor of the imperial name, and for the security of those who have experienced our bounty, and which shall be valid from the time when by the divine will we assumed imperial insignia.

Everything to the prince. Even as to property, as M. said to the prince at Roncaglia, through fear or favor. And for this proposition, see [D.1.14.3] at the end [suggesting that the emperor has the power to free any slave he wishes]. But Bulgarus said the contrary there. And explain it this way: so far as protection and jurisdiction [are concerned everything is the prince's]. In this way the sea shores in the Roman empire are said to belong to the Roman people, as [D.43.8.3]. Or more truly, everything is his, that is to say, things belonging to the fisc and his patrimony, as the argument is expounded in [D.43.8.2 and D.43.8.3]. Whence my book does not belong to the prince, but direct action for vindication is given to me not to the prince. Accursius.

4. D.14.2.9

(*On the Rhodian law with the Accursian gloss*)

Volusius Maecianus, *From the Rhodian law*. Petition of Eudaemon of Nicomedia to the Emperor Antoninus: “Antoninus, King and Lord, we were shipwrecked in Icaria and robbed by the people of the Cyclades.” Antoninus replied to Eudaemon: “I am master of the world [*tou kosmou kyrios, dominus mundi* in the translation that Accursius was using], but the law of the sea must be judged by the sea law of the Rhodians where our own law does not conflict with it.” Augustus, now deified, decided likewise.

Petition. Some people take this as a law and some subsume it under the preceding law. And note that it is read in two ways. According to one way it is an argument for custom that derogates from the law. Accursius.

Lord of the world. Understand “I am” [as the translation does].

Must be judged. That is, it is to be observed in judgments in such a way that no law can be cited in opposition to the custom of seafarers, as some say ... but badly. You however say that the aforesaid law is to be followed, that is the sea-law and their custom, only in those things in which it does not contradict our law, for the goods of those shipwrecked are to be restored to them, as [D.14.2.8; D.47.9.12].

5. Odofredus, Commentaria in Digestum 2.1.3

(Pennington, p. 25 nn. 75–7)

Ulpian, *Edict, book 1*. *Imperium* is pure or mixed. To have pure *imperium* is to have the power of the sword to punish the wicked and this is also called *potestas*. *Imperium* is mixed where it also carries jurisdiction to grant *bonorum possessio*. Such jurisdiction also includes the power to appoint a judge.

Bologna: 1967-1968), I fol. 38r-38v to Dig. 2.1.3 (Imperium), Florence, Biblioteca nazionale (Grandi formati 39) Magliabecchiano, Cl.xxix.27, fol. 34r:

“Sed hic queri consuevit cui competit merum imperium? Et certe nos dicimus quod merum imperium competit principi per excellentiam, et post principem ceteris maioribus magistratibus et clarissimis, quia si presides habent merum imperium, ut supra de offic. procon. et leg. l. Illicitas [Solent *male*] § Qui uniuersas [Dig. 1.18.6.8], multo fortius maiores iudices. Vnde dominus imperator Henricus pater domini Frederici minoris qui regnabat modo sunt xl. [sexaginta Ed.] anni tunc temporis: dominus Azo et dominus Lotarius docebant in ciuitate ista et imperator uocauit eos ad se pro quodam negocio, et dum [deinde Ed.] una die equitaret cum eis fecit eis talem questionem: ‘Signori dicatis mihi cui competit merum imperium.’ Dixit Azo domino Lotario, ‘Dicatis mihi,’ et licet dominus Lotarius esset melior miles, tamen dominus Azo fuit melior in iure nostro, et debetis scire quod dominus Lotarius diligebat multum dominas et libenter eas uidebat, licet postea fuerit factus archiepiscopus Pisanus, et propter eum fuit facta decretalis, extra. de foro compet. c. Si diligenti [X 2.2.12 and 2.26.17]. Et dixit dominus Lotarius ex quo uult dominus Azo quod prius eo dicam, dico quod uobis soli competit merum imperium et non alii. Postea dixit imperator domino Azo, ‘Vos quid dicetis?’ Dixit dominus Azo in legibus nostris dicitur quod alii iudices habent gladii potestatem, sed uos habetis per excellentiam, tamen et alii iudices habent ut presides prouinciarum, ut supra de offic. presid. l. Illicitas § Qui uniuersas [Dig. 1.18.6.8]; multo fortius alii maiores; ex quo non reuocatis iurisdictionem magistratuum, alii possunt exercere. Quando fuerunt reuersi ad palatium dominus imperator misit domino Lotario unum equum et domino Azo nichil. Vnde dominus Azo dicit in summa huius tituli, ‘Dico merum imperium competere soli principi per excellentiam, tamen alii possunt exercere merum imperium ut presides prouinciarum, multo fortius maiores iudices per § Qui uniuersas et si propterea i. Propter ista uerba amisit [amisimus Ed.] equum, non tamen fuit equum, quia bene dixi de iure et non dominus Lotarius.’”

Here it is customary to ask to whom does pure *imperium* pertain? And certainly we say that pure *imperium* pertains to the prince by excellence and after the prince to other major and most distinguished magistrates, for if a provincial governor has pure *imperium*, as [D.1.18.6.8], how much more so the greater judges? Whence [a story about] the lord Henry the father of Frederick II who was ruling forty years ago: At that time Sir Azo and Sir Lotarius were teaching in this city and the emperor called them to him for a certain business, and while he was riding one day with them, he posed this question: “Gentlemen, tell me to whom pure *imperium* pertains.” Sir Azo said to Sir Lotarius, “You tell me.” Although Sir Lotarius was a better knight, nonetheless, Azo was better in our law. (And you ought to know that Sir Lotarius greatly loved the ladies, and gazed on them freely, although afterwards he was made archbishop of Pisa, and on account of him two decretals were written [X 2.2.12; X 2.26.17 (neither of which has anything to do with scandalous behavior of the archbishop)].) And since Sir Lotarius said: “Since Sir Azo wants me to speak first, I tell you that pure *imperium* pertains to you alone and to none other.” Afterwards the emperor asked Azo, “What will you say?” Sir Azo said, “In our laws it is said that other judges have the power of the sword, but you have [it] by excellence. Nonetheless, other judges have it too, such as governors of provinces [D.1.18.6.8], [and] much more so other greater [magistrates]. Insofar as you have not revoked the jurisdiction of magistrates, others can exercise pure *imperium*.” When they had returned to the palace, the lord emperor sent Sir Lotario a horse, and nothing to Sir Azo. Whence Sir Azo said in the summary of this title, “I say that pure *imperium* belongs to the prince alone by excellence; nonetheless others can exercise pure *imperium*, such as the governors of provinces; and much more so the greater judges according to [D.1.18.6.8]. On account of these words we lost a horse, which was not equitable, because I spoke the law well and not Sir Lotarius.”

6. Odofredus, Commentaria in Codicem 7.37.3

(Pennington, 24 nn. 71, 73)

Odofredus to Cod. 7.37.3 (Bene a Zenone) (Lyon: 1480), vol. 1, unfol.:

“Tex.: ‘cum omnia principis.’ Hic uoluit colligere dominus Martinus quod imperator sit dominus omnium rerum singularium. Item pro sua opinione inducit legem que dicit quod imperator potest dare predia nostra militibus ob stipendia, ut ff. de rei uendic. l. Item si uerberatum [Dig. 6.1.15] et ff. de euict. l. Lucius [Dig. 21.2.11] et quia in libro Regum continetur ‘Falias nostras,’ etc. [Kings 1 8.11] Item pro sua opinione inducit ff. de offic. pretor. l. Barbarius [Dig. 1.14.3] et sic respondit imperatori Frederico seniori, dum esset apud Ronchaliam timore uel amore. Set Bul.

dixit contra in eodem loco. Set dicimus contra, quia cum quis habeat rei uendicationem pro sua re, ut supra de rei uendicat. l. Doce [Cod. 3.32.9]; ergo imperator non habet rei uendicationem cum duo non possunt esse domini unius rei insolidum, ff. commod. l. Si ut certo § Si duobus uehiculum [Dig. 13.6.5.15]. Et intelligebat dominus Bulgarus quod dicitur hic quod ‘omnia sunt principis’ quo ad protectionem uel iurisdictionem; uel uerius ‘omnia sunt principis,’ scilicet fiscalia et patrimonialia. Non obstat leges que dicunt quod licet imperatori dare predia nostra militibus ob stipendia, quia uerum est dato nobis pretio, ut supra pro quibus causis serui accip. prem. libert. l.ult. [Cod. 7.13.4].”

Everything to the prince. Here Sir Martinus wanted to gather that the emperor is owner of every single thing. Again for his opinion he cited the law which says that the emperor can give our lands to soldiers for their support, as [D.6.1.15; D.21.2.11] and because in the book of Kings it says “our daughters” [1 Sam. 8:13]. Again for his opinion he cited [D.1.14.3] and thus he responded to Frederick I when he was at Roncaglia, through fear or favor. But Bulgarus said to the contrary in the same place. But we say to the contrary, because since someone has an action to vindicate his thing, as [C.3.29.9], therefore the emperor does not have the action to vindicate, because two people cannot be completely [*in solidum*] the owner of one thing [D.13.6.5.15 (a famous text denying the possibility of two ownership interests in one thing; co-owners, properly speaking, each own an “undivided share” (*pro indiviso*)). And Sir Bulgarus understood what is said here “all to the prince” to apply to protection or jurisdiction, or, more truly, things belonging to the treasury and things belonging to his patrimony. It is no objection that there are laws which say that the emperor may give our lands to soldiers for support, because this is true [only] when the price is given to us, as [C.7.13.4].

B.HOSTIENSIS ON PAPAL POWER

[Note: Pennington extracts these glosses from manuscript sources. The printed edition of Hostiensis (Venice, 1581) follows, by and large, what Pennington calls the “second recension.” The printed glosses (and, I suspect, the manuscript ones) are considerably longer than what Pennington gives, and in many cases fill out the argument. Hostiensis is not as jerky and cryptic as the extracts below make him appear to be.]

1. X 1.7.3 (Innocent III, *Quanto personam*) (1198)

(with the glosses of Laurentius Hispanus and Hostiensis)

Innocent III to Peter the scholar of Mainz:

Although the person of the bishop of Hildesheim [we love with sincere affection], he, abandoning the church of Hildesheim, transferred himself to the church of Würzburg on his own authority, not mindful that Truth protests in the Gospel, “What God has joined let not man separate.” The Lord and master retained the power of transferring bishops to himself in such a way that he granted and conceded it by a special privilege only to blessed Peter his vicar and through him to his successors, as ancient practice, to which the decrees of the fathers order reverence to be paid, attests, and as the sanctions of the sacred canons plainly assert. For it is not man but God who separates whom the Roman Pontiff, who performs on earth the function not of a simple man but of the true God, separates, having weighed the necessity of the churches and their utility, by divine rather than human authority. Lest the perversity of this deed become an example for the presumptuous, which indeed, if it is true, cannot but become notorious, we command him that he entirely withdraw from the administration of the church of Würzburg. Further, since the canons of Würzburg plainly conferred their vows on him unlawfully, wishing, as is fitting, that they be punished as they have sinned, we suspend them this time from the power of election. Because, moreover, he so improperly abandoned the church of Hildesheim, to which he was bound, from which according to the Apostle he ought not to seek dissolution, we strictly forbid him from returning to it, since according to the canonical tradition he who transfers to a greater people ought to be repelled from the foreign seat and lose his own, so that

he might neither preside over those whom he spurned through pride nor over those whom he desired through avarice.

Hostiensis to X 1.7.3 (Quanto personam) v. uicem, S fol. 87r, V. fol. 84r:

“Ergo consistorium Dei et pape unum et idem est censendum, extra. d.n. de appell. Romana, responso i. [VI 2.15.3], quia et locum Dei tenet, infra ut benef. eccles. c. unico § Porro [X 3.12.1] et in ligando et in soluendo ratum est quicquid facit, clauē tamen non errante. Sic intelligas xxiiii. q.i. Quodcumque ligaueris [C.24 q.1 c.6], et habuisti simile supra eodem, c.i. responso i. uer. Non enim. Et breuiter excepto peccato quasi omnia de iure potest ut Deus, de pen. di. ii. Charitas [De pen. D.2 c.?], quod die ut not. infra de concess. preben. Proposuit [X 3.8.4] et de uoto, Magne § i. [X 3.34.7].”

Function (Hostiensis, Pennington, 51): Therefore the consistory of God and of the pope are to be regarded as one and the same thing [VI 2.15.2], for he holds the very place of God [X 3.12.1] and in binding and in loosing whatever he does is ratified, for the key does not err. This is how you should understand [C.24 q.1 c.6] and you have the same thing in [X 1.7.1]. And briefly, except for sin, he can do almost anything like God [De pen. D.2 c.5?] where you should say what is noted in [X 3.8.4] and [X 3.34.7].

2. X 1.7.1

(*Cum ex illo*, Innocent III) (1198)

Innocent III to the patriarch of Antioch:

Since by the general privilege which our Lord granted to blessed Peter and through him to the Roman church canonical institutions afterwards flowed by which greater causes concerning the church ought to be brought to the apostolic see, and because of this translations of bishops and changes of sees pertain to the bishop of the highest apostolic see of right, nor should any changes be made about these things without his consent. We marvel that you translated L. elect of Apamia [? a metropolitan of Armenia] to the church of Tripoli, and by a new kind of change made the greater small and diminished in a way the great, made a bishop out of an archbishop, even presuming to “de-archbishop” [someone]. Although the aforesaid L. had not yet been consecrated an archbishop, he had received the office of confirmation and was exercising archiepiscopal functions insofar as was permitted to him, as he tells us in his referral, and he asserts that the bishop of Valania had confirmed him. Lest therefore others be allowed to perpetrate similar audacities, we order you to be suspended from confirming bishops.

Hostiensis to X 1.7.1 (*Cum ex illo*) v. privilegio, (Strassbourg: 1512 = S) fol. 84v, (Venice: 1581, repr. Torino: 1963 = V) fol. 81v:

“Largo tamen modo omnis potestas a domino Deo est, unclē ad Rom. xiii. 'Non est potestas nisi a Deo. Itaque qui resistit potestati,' etc. Ideo dicitur quod utrumque, scilicet sacerdotium et imperium ab eadem emanarunt, in authen. quomodo o. e. in prin. col. i. [Authen. l.(Nov.6).6].”

In a broad sense all power is from the Lord God, whence [Paul’s letter to the] Romans c. 13: “There is no power except from God. Therefore whoever resists power,” etc. Therefore it is said that both of them, specifically *sacerdotium* and *imperium*, come from the same [source]. [Nov.6.6].

3. X 1.7.2

(Innocent III, *Inter corporalia*) (1199)

Innocent III to the dean and chapter of Anger:

Between corporal and spiritual things we recognize this difference, that corporal things are more easily destroyed than built and spiritual things are more easily built than destroyed. Whence according to the canonical sanctions a bishop can give the honor [of being bishop], alone he cannot take it away. Bishops also take their office of consecration from their metropolitans, but they cannot be condemned except by the Roman pontiff. Since therefore the spiritual bond is

stronger than the carnal, it ought not to be doubted that the almighty God has reserved the spiritual bond which is between a bishop and his church to be dissolved by his judgment alone. He has also reserved the dissolution of the carnal marriage which is between man and woman to his judgment alone, commanding that those whom God has joined let not man separate. Not human power but rather divine dissolves the spiritual marriage when by translation, deposition or cession by authority of the Roman pontiff (who acts, as is apparent, as the vicar of Jesus Christ) a bishop is removed from his church. And therefore these three things which we mentioned are reserved to the Roman pontiff alone not only by canonical constitution but also by divine institution. And just as a consecrated bishop should not leave his see without license of the Roman pontiff, so also a confirmed elect, since it ought not to be doubted that after election and canonical confirmation there is a spiritual contract between the persons of the electors and the elect, to which the further episcopal dignity adds nothing, since someone endowed with episcopal dignity can, nonetheless, be bishop of no church, as happens to him who renounces the pontifical burden but not the honor. Whence, since there is no greater bond of a bishop to his church than that of an elect, especially when he is confirmed, but rather the very same and no other, the same law obtains in both. [The decretal goes on to expound the law just announced and to answer a particularly knotty problem concerning the bishop-elect of Avranches, but the passages glossed are those given above.]

Hostiensis to X 1.7.2 (Inter corporalia) v. dissoluitur, Oxford, New College 205, fol. 34r, Clm 28152, fol. 49r:

“Quia quod fit auctoritate pape, auctoritate Dei fieri intelligitur, et quia vicarius eius est, ut sequitur. Et quia hanc potestatem a Deo habet, ut supra eodem, c.i. in principia et probatur, xxiii. q.i. Quodcumque (C.24 q.1 c.6) et q.iii. Si quis non recto [c.4] et xi. q.iii. Nemo contemnat [C.11 q.3 c.31], extra. d.n. de homicid. Pro humani, lib. vi. [Novellae Innoc. IV = VI 5.4.1].”

Dissolved (Hostiensis, Pennington, p. 51): Because what is done by the authority of the pope is understood to be done by the authority of God, and because he is his vicar, as follows. And because he has this power from God, as above [X 1.7.1]. And this is proved by [C.24 q.1 c.6; C.24 q.3 c.4; C.11 q.3 c.31; VI 5.4.1]

4. X 3.8.4

(Innocent III, *Proposuit*) (1198)

Innocent III to the provost and chapter of Cambrai:

T. the priest proposed to us that when C[lement III] our predecessor sent an apostolic mandate to you to receive T. as a brother and assign to him the next vacant prebend in your gift in your church, making the dean of Reims the executor, the dean, finding you contumacious, invested him in the next vacant prebend in your church which pertained to the gift of the chapter. But when the prebend which pertained to your gift in the church of Cambrai became vacant, you assigned it to others. Our same predecessor, however, wishing to ratify what had been done by the same dean, quashed the collation of the prebend which you had made and invested T. by a ring. Although it is not our intention to ratify investitures made against the canonical institutes of [benefices] to become vacant, although according to the plenitude of power we could dispense over the law, mindful, however, that the same priest was not invested by our predecessor with a [benefice] to become vacant but one that was vacant, that it to say, of one that was understood to be vacant after the quashing of the grant made by you, we command that having removed from this prebend any detainer, you assign it to T. with full canonical honor.

Hostiensis to X 3.8.4 (*Proposuit*) v. *dispensare*, S, fol. 38v, V, fol. 35r, Oxford, New College 205, fol. 128r, Bamberg, Staatsbibliothek, Can. 56, III, fol. 55v:

“Etiam contra Apostolum sine lesione tamen fidei, xxxiiii. di. Lector, et canonem Apostoli, lxxviii. di. Presbiter et § sequenti et c. Si triginta, et contra uetus testamentum quo ad decimas,

infra de decim. Ex parte, et in uoto, infra de uoto, c.i. et iuramento, xv. q.vi. c. ii. supra de rescript. Constitutus. Non potest tamen contra uniuersalem statum ecclesie dispensare, xxiiii. q.i. Memor sum et c. Si ea destruere, quod intelligo in fidei subuersione. Alias ei non aufero, etsi uelit mutare quadrata rotundis. Quid enim si uellet facere statutum quod omnes clerici de mundo contraherent, cum nee hoc prohibeat lex diuina? Nec potest dispensare ut monachus habeat proprium, quod die ut not. infra de stat. mon. Cum ad monasterium § finali [X 3.35.6]. Hoc solum tene quod in omnibus potest dispensare dummodo non sit contra fidem, et dummodo per dispensationem suam euidenter non nutriatur mortale peccatum. Nec inducat subuersionem fidei nee periculum animarum, nam in tali bus nullam habet contra Deum penitus potestatem, sic intellige xxv. q.i. Sunt quidam, xv. di Sicut. Ergo contra legem canonicam potest dispensare indistincte, et contra diuinum ubi sibi non est prohibitum dispensare, nec peccatum mortale est euidenter.”

Dispense (Hostiensis, Pennington, 60 nn. 85, 87): Even against the Apostle without, however, breach of faith [D.34 c.18 (concerning clerks who marry widows)] or against a canon of the apostles [D.78 cc. 4–5 (concerning the age for ordination)] or against the Old Testament so far as tithes are concerned He cannot, however, dispense against the general state of the church which I understand to mean in subversion of the faith. Otherwise I do not deny him anything, even if wishes to change squares into circles. But what if he wants to issue a statute that all the clergy could marry, since divine law does not forbid clerical marriages? (But [a contrary argument would be that] he cannot dispense the monastic rule forbidding a monk to have property, as is noted below [X 3.35.6].) This alone you should believe: he can dispense in all things provided that he does not violate the faith and provided that his dispensation does not lead to mortal sin, subversion of the faith, or danger for the salvation of souls. In these matters, he has no power against God. ... So, he may dispense from canon law generally and from divine law when he is not prohibited from dispensing and where there is no obvious mortal sin.

Hostiensis, *Lectura* to X 3.8.4 (Proposuit) S fol. 38v, V fol. 35r, Oxford, New College 205, fol. 128r, Bamberg, Staatsbibl. Can. 56 III, fol. 56r-56v, v. *supra ius*:

“Quasi dicat nullo iure constringimur, immo sumus positi supra omnia iura atque concilia, supra de elect. Significasti § penult. set tamen perraro a iure communi uolumus deuiare. Hoc enim decet nos, licet non astringat, ff. de constit. princ. Princeps, C. de legibus, Digna uox. Et ideo nee precise scribimus de facili contra ius alterius, ut supra de rescript. c.ii. Verum ex quo de uoluntate nostra constat, ei obediendum est, etsi postquam durum sit, xix. di. In memoriam et c. Enim uero, ix. q.iii. Cuncta per mundum et c. Per principalem, ff. qui et a qui bus manu. li. non fi. Prospexit. Tamen regulam tibi trado quod papa suiipsius tantam potestatem habet, quod et si faciat et dicat quicquid placuerit, accusari non potest, neque damnari ab homine, dummodo non sit hereticus, ut xi. di. Si papa. Potest tamen et debet moneri in secreto et etiam palam, si palam peccet mortaliter, nam uelit (curare), nolit (accusare), ipse subiacet euangelice ueritati quo ad monitionem faciendam, quia cuilibet dictum est, ii. q.i. Si peccauerit (c. 19). Set quo ad hoc quod ibi dicit, die ecclesie non subiacet nisi in heresi. Dicam ergo hoc, si sit inpenitens ecclesie, idest Deo orando quod ipsum inspirer, et ecclesie triumphanti ut oret pro ipso; alias autem etsi imperator et totus clerus et populus simul conueniant, ipsum non poterunt iudicare, ramen caueat sibi quia etsi anima sua in manibus suis, tamen eidem pre ceteris si sic decesserit iudicium terribilius iminet et intolerabilior cruciatus, ut patet ix. q.iii. Nemo iudicabit et c. Aliorum et sequentibus. In subditis autem tantam habet plenitudinem potestatis quod ex quo aliquid precipit, obediendum est, etiam si dubium sit utrum mortale sit, dummodo conscientia uinci possit; sic intellige xxiiii. q.i. Quid culpatur et not. supra de rescript. Si quando [X 1.3.5] Set certum sit quod illud quod precipit est mortale, recognoscendus est papa Celestis, xi. q.iii. Iulianus et c. Qui resistit et multis aliis capitulis ibi positis, quia ecclesia triumphans numquam fallit, nec fallitur. Ideo si conscientia tua tibi dictet quod non obedias, non recedas ab ea set excommunicationem sustineas patienter, infra de sent. excom. A uobis ii. et c. Inquisitioni, etiam si erronea sit, nisi possis deponere errorem, infra de simon. Per tuas ii. Vbicumque ergo peccatum mortale insurgit ex lege diuina non debes obedire, ubi uero ex lege humana siue canonica semper

obediendum est, ut supra de constit. c. finali et si intellige quod hic dicit, ‘supra ius,’ scilicet positium, supra de consuet. c. finali, quod qui potuit instituere, potest destituere, xii. qi. Certe, et successor, supra de elect. Innotuit § Multa, et patet in his que not. supra de prebend. Extirpande § i. De hoc tamen not. plenius supra de tempor. ordin. Ad aures § i.”

Dispense (Hostiensis, Pennington, 60 nn. 85, 87): Even against the Apostle without, however, breach of faith [D.34 c.18 (concerning clerks who marry widows)] or against a canon of the apostles [D.78 cc. 4–5 (concerning the age for ordination)] or against the Old Testament so far as tithes are concerned He cannot, however, dispense against the general state of the church which I understand to mean in subversion of the faith. Otherwise I do not deny him anything, even if wishes to change squares into circles. But what if he wants to issue a statute that all the clergy could marry, since divine law does not forbid clerical marriages? (But [a contrary argument would be that] he cannot dispense the monastic rule forbidding a monk to have property, as is noted below [X 3.35.6].) This alone you should believe: he can dispense in all things provided that he does not violate the faith and provided that his dispensation does not lead to mortal sin, subversion of the faith, or danger for the salvation of souls. In these matters, he has no power against God. ... So, he may dispense from canon law generally and from divine law when he is not prohibited from dispensing and where there is no obvious mortal sin.

5. X 3.34.7

(Innocent III, *Magne devotionis*) (1198)

Innocent III to the bishop of Troyes:

Of great devotion, etc. When the church of Troyes was burdened contrary to ecclesiastical liberty, and you believed that the same church could most easily be aided by no one other than the count of Campania, who at that time was overseas [on a crusade], you proposed to go to him and as a sign of your pilgrimage and devotion to the Holy Land you took up the cross of the Lord. Although when you heard of his death you saw your intention frustrated, you nonetheless did not wish to return to your own without consulting the apostolic see, but coming to the City [i.e., Rome] you expressed your proposal for the state of the church of Troyes. Truly, we think that three things are to be attended to in this matter: what is permissible according to equity, what is fitting according to honesty, and what is expedient according to utility. Clearly, it does not seem permissible that you go against a lawful vow, since the voice of the prophet cries: “Vow and render to the Lord your God,” [Ps. 75.12], where the first [verb] refers to counsel and the second to command. Nor does it seem fitting, since it is written in the Gospel, “No one putting his hand to the plough and looking back is fit for the reign of God.” [Cf. Lk. 9:62.] Nor does it seem to be expedient since out of your absolution scandal could be generated in the minds of laymen, who would say “Where is the God of the clerics?” [an echo of the Psalms, “The nations ask: Where is their God?"] and who would believe by this example that they are not bound to observe their oaths. For what is done by prelates is easily turned into an example by subjects, as the Lord says to Moses in Leviticus [Lev. 4.4], “If a priest, who is anointed, sins, he will make the people delinquent.” However, the deficiencies of an age of life growing old and white hair, which scarcely can bear its labors and sorrows, argues to the contrary, and the cries of the church of Troyes, to whom you are bound with a bond of pastoral care, without the assent of which you probably ought not to have uttered your pilgrimage oath. Also, the vow itself, which in its form was holy and honest, seems unlawful because of the person of the one who vowed. For since by canonical institutes a clerk ought not make a pilgrimage without the license of his bishop, and a bishop not less but rather more is bound to the apostolic see, it might be arguable that without general or special license you ought not to have taken a vow of pilgrimage, by which you would be absent for such a long time. Since moreover in the old law, in which a command of the Lord did not bind less than a vow binds today in the church, the first-born, which were mandated to be offered to the Lord, were sometimes offered, such as the first-born of the Levites, and sometimes redeemed, like [the first-born] of other tribes; some were commuted into something else, like the

first-born of an ass, which was commuted for a sheep [cf. Ex. 34:19–20; Nu. 18:15];¹ deriving from this that a vow can be commuted into another act of piety, not caring that the mouth of those who speak wicked things is speaking,² because we are sure in the authority of him who when he heard from his disciples “Do you know that the Pharisees hearing this word are scandalized?”, replied “Let them be; they are blind and leaders of the blind” [Mt. 15.12], we grant license that the vow of pilgrimage can be commuted in this way, that expenses that you would incur in going, staying and coming back, you commit to some religious person to be transferred without any diminution to the necessary uses of that land [i.e., the Holy Land]. You should also recompense labor with labors, by keeping watchful vigils, devoutly spending time in prayer, and strongly practicing fasts. It specially induced us to make this indulgence for you that you took this vow of pilgrimage to seek the liberty of the church of Troyes through the same count, who being removed from our midst, because the reasons have ceased, more easily can also its effects cease.

Hostiensis to X 3.34.7 (Magne devotionis) v. *tria*, S, fol. 134v, V, fol. 127r, Oxford, New College 205, fol. 154r, Bamberg, Staatsbibl. Can. 56, III, fol. 196v-197r:

“Que semper in omnibus de quibus agitur non est uanum considerare, arg. iiii. di. Denique, in fine [D.4 c.6], xi. q.ii. Aliud [C.11 q.1 c.34], specialiter tamen hec debet ecclesia Romana et papa attendere qui super omnes est (Bamberg and S: sunt, V: supersunt), supra de elect. Licet § finali [X 1.6.6]. Quero igitur quid licet sedi apostolice? Rn. quid quesui? Immo quid non licet? Omnia enim licent ei dummodo non faciat contra fidem. Saluo eo quod papa dummodo a fide non deuiet per neminem poterit condemnari ut patet in eo quod not. supra de concess. preb. Proposuit [X 3.8.4] et est hoc intelligendum quo ad transgressionem Decalogi et omnia alia quorum commissio uel omissio ex lege diuina, que scilicet in nouo et ueteri testamento continetur mortalis iudicatur, ut patet in eo quod leg. et not. infra de usur. Super eo [X 5.19.4] et supra de consuet. c. finali [X 1.4.11]. Secus in hiis que ex lege canonica mortalia sunt, nam in illis omnibus licet quicquidlibet, ut patet de conces. preb. Proposuit. Licet autem secundum predicta sic omnia pape liceant, quero utrum ipsum hec omnia deceant? Respondeo aut causa subest sufficiens quare a iure scripta debeat deuiare aut non. Si subest talis causa omnia quecumque licent, decent, et quecumque decent, licent, arg. infra eodem capitulo § finali, infra de accus. c;um dilecti § i. ver. penult. cum suis concordantiis [X 5 .1.18].

Three (Hostiensis, Pennington, 62 nn. 90–2): Which it is always important to consider in such matters, argument from [D.4 c.6; C.11 q.1 c.34], and especially the Roman church and pope who are above all ought [to consider] these things. I ask, therefore, what is permitted to the apostolic see? Reply: What have I asked? Rather, what is not permitted? It can do all things provided that it does not deviate from the faith. Saving that so long as the pope does not deviate from the faith, he cannot be condemned by anybody, as appears above in what I said about [X 3.8.4], and this is to be understood so far as transgression of the law of Ten Commandments is concerned and all other things the commission or omission of which is regarded as mortal sin by divine law, either in the new or the old testaments, as is apparent above and is noted in [X 5.19.4]³ and [X 1.4.11].⁴ It is otherwise in those things that are mortal sins

¹ Although neither of these mentions a special rule for the Levites. Cf. Lv. 27 and Nu. 30 on vows (suggested by Hostiensis).

² A reminiscence of Ps. 62:12 (Vulgate): ‘But the king shall rejoice in God; all they shall be praised that swear by him: because the mouth is stopped of them that speak wicked things.’

³ In X 5.19.4 (*Super eo vero*, Alexander III to the archbishop of Palermo) the archbishop had asked for a dispensation so that money could be placed out at usury (i.e., interest) and the proceeds used to redeem Christians enslaved by the Saracens. Alexander replies: ‘Since the crime of usury is condemned in the pages of both testaments, we do not see how any dispensation can be made about this, because, since holy scripture prohibits lying to save the life of another, even more is someone to be prohibited from engaging in the crime of usury, even to redeem the life of captive.’

⁴ X 1.4.11 (*Cum tanto*, Gregory IX): ‘Since the greater the sin the longer it holds the unhappy soul bound, no one of sound mind understands that it is possible to derogate in any way from the natural law, the transgression of which leads to peril for the soul [a probable reference to mortal sin], by any custom, which is more truly to be called in this respect a corruption. Although longstanding custom is not a bad authority, it is not good enough that it ought to generate prejudice to the positive law unless it is reasonable and lawfully prescriptive.’

by canon law, for in all of those anything is permissible [to the pope], as is apparent in [X 3.8.4]. Although, however, according to the aforesaid all things are permissible to the pope, I ask whether all these things are fitting for him? I reply either there is sufficient cause for him to deviate from the written law or there is not. If there is such a cause, everything that is permitted is fitting, and whatever is fitting is permitted, argument [X 5.1.18]. If, on the other hand, there is no cause, or there is one but it is not sufficient, it is not fitting for him in any way to deviate from the law. [C.1.14.4; C.11 q.1 c.39; X 3.35.7] The utility of the state and especially the church of God and the salvation of souls is always to be preferred to private utility In this place I put down this rule: When it is asked whether something is expedient, always excepting a perversion of justice, a greater is always preferred to a lesser utility provided that it is licit.

6. X 3.32.7

(Alexander III, *Ex publico instrumento*)

(1159–81, dated in Donahue, “Dating” 78 as c.1173 X c.1176)

Alexander III to the bishop of Brescia:

By a public instrument we are informed that when the bishop of Verona took up a marriage case that was pending between the man A. and the woman M. to determine it, he approved the marriage by judicial sentence and ordered the woman to return to the man and treat him with conjugal affection. When she refused, he bound her with the bond of excommunication. Further, because, although she was espoused by the aforesaid man, she is still, as she asserts, unknown by him, we command that if the aforesaid man has not known her, and the woman wishes to transfer to religion, taking from her sufficient surety that she will either transfer to religion or return to her husband within the space of two months, you should absolve her from the sentence with which she is bound in such a way that if she goes to religion each will restore to the other what he or she is determined to have received from the other. Clearly, what the Lord says in the Gospel, that it is not permitted to a man to dismiss his wife except for the cause of fornication, is to be understood according the interpretation of holy writ concerning those whose marriage is consummated by carnal coupling, without which it cannot be consummated.

Hostiensis to X 3.32.7 (*Ex publico*) v. *consummatum*, Oxford, New College 205, fol. 151r, Florence, Laur. Fesul. 117, fol. 107r [Material from the second recension is given in diamond brackets:

“Hac etiam ratione considerata possent sponsi de presenti ante carnis copulam auctoritate pape se adinuicem absoluere, sicut legitur in sponsalibus de futuro, infra de spons. c.ii. quia contrarius actus congruus interuenire potest, arg. infra de reg. iuris, Omnes res, licet altero inuito hoc non posset, arg. C. de ace. et obi. Sicut. Sed post carnis copulam non posset hoc fieri, quia nec actus contrarius congruus interuenire posset, arg. ff. de pact. Ab emptione. Hoc autem intelligo de potestate absoluta, non de potestate ordinata, nisi alia causa subesset; non enim fit quod hic statuitur sine causa. <Set et probabiliter dici potest quod cum ecclesia circa impedimenta matrimonii restringenda uel laxanda potestatem habeat, ut patet in eo quod legi et not. infra de consang. Non debet, statuere potuit ut hoc, quod coniunx ante carnis copulam etiam inuito consorte posset religionem intrare, et alius in seculo remanens cum alia contrahere, impedimento hoc non obstante. Et hanc rationem reddidit mihi dominus Mattheus sancte Marie in Porticu diaconus cardinalis. Et si queras unde procedit tanta potestas ecclesie, uide quod leg. et not. supra de transl. episc. c.i. respon. i. et c.ii. et iii. [X 1.7.1-3].> Potuit ergo papa circa non consummatum matrimonium hanc constitutionem facere etiam de potestate ordinata. <Vbi ergo deest coniunctio corporum, nichil facimus contra Deum. Et ideo circa tale matrimonium possumus statuere quicquid placet de potestate nostra absoluta, idest de plenitudine potestatis, quod etiam uerum est. Set non expedit quod in hoc casu nimis laxemus habenas nee etiam tutum est.>”

Consummated (Hostiensis, Pennington 65–7) [There are two recensions of this gloss. The second contains the material set off in diamond brackets. The printed edition combines the two.] Since the marriage has not been

consummated, a couple may part with papal permission ... because an equal good has been substituted for the marriage ... but after consummation, this is no longer possible. ... I understand that when the pope permitted the wife to enter a monastery without her husband's permission, he exercised his absolute, not his ordained power, unless there were another [here not expressed] reason for his action. Alexander did not issue this decretal without cause. <But most likely it can be said that since the church has the power of restricting or relaxing impediments to marriage ... it can legislate that a spouse can enter a religious order, even though the other spouse is opposed, and, at the same time, permit the other to remarry, the impediment of the first marriage notwithstanding. Cardinal deacon Matteo Rosso Orsini argued this position in my presence. If you would ask, from where does this great power of the church come, see [X 1.7.1–3].> Therefore, the pope might have promulgated this constitution even with his ordained power. <When therefore there has been no joining of bodies, we do not offend God. And in this case, we can make laws, insofar as we please, with our absolute power, that is plenitude of power. This is true. But it is not expedient that we loosen the reins too much; it is not safe.>

7. X 3.35.6

(Innocent III, *Cum ad monasterium*) (1202)

Innocent III to the abbot and convent of Subiaco:

[This long decretal calls the monks back to ancient rule, commanding them to give up fine clothing, abandon private property, keep silence, not eat meat, and obey their abbot and prior. The final sentence is what interested the commentators:] Nor should the abbot think that he can dispense any monk so that he may have private property, because the abdication of property, like the keeping of chastity, is so annexed to the monastic rule, that the supreme pontiff cannot grant license against it.

Hostiensis to X 3.35.6 (*Cum ad monasterium*), v. *annexa*, Oxford, New College 205, fol. 156v, Bamberg, Staatsbibl. Can. 56, III, fol. 208v, S, fol. 142v, V, fol. 134r [I'm not completely confident that I've got Pennington's attributions to the first and second recensions right. What is given below corresponds to the printed ed. of Strassburg, 1512, fol. 142va–vb]:

“Hec sunt annexa ordini de iure positio, .quod sic probo. Monachus enim nichil aliud est quam solitarius et tristis, xvi. q.i. Placuit. [C.16 q.1 c.8] Quicquid ergo ultra hoc additum est de iure positio impositum est, ex quo apparet quod papa potest dispensare cum monacho ut proprium habeat uel uxorem ducat, cum nemini dubium sit quin ipsam religionem siue ordinem et naturam siue substantiam quam dedit ordini, ex toto tollere possit, secundum dominum nostrum. . . . Alii dicunt quod licet uotum sit de substantia monachatus, tamen hoc potest de plenitudine potestatis, quasi dicat non de potestate ordinata, set de absoluta, secundum quam potest mutare substantiam rei, C. de rei uxor. act. I. unica [Cod. 5.13.1] et de eo quod nihil est aliquid facit, iii. q.vi. Hec quippe [C.3 q.6 c.10]. Arg. de con. di. ii. Reuera [De con. D.2 c.69] et not. supra de transact. c.i. [X 1.36.1]. Nec obstat quod hic dicitur, quia quod sequitur ‘possit’ exponendum est, idest potentie sue non congruit, sicut et exponitur illud Hieronymi: ‘Cum Deus omnia possit, hoc solum non potest, suscitare uirginem post ruinam,’ xxxii. q.v. Si Paulus [C.32 q.5 c.11], idest non congruit potentie sue. Vel de solito cursu, quia non consueuit hoc facere; posset tamen si uellet, sic expone et hic ‘Vel hoc non potest papa sine causa, set ex magna causa et Deo magis placente hoc posset.’ Hanc amplector ut patet in eo quod not. supra titulo i. c.i. in fine [Cum peregrinationis, X 3.34.1?].”

Annexed (Hostiensis, Pennington 68, 71): Others say that, although the monastic vow is part of the very substance of the monastic life, nevertheless, the pope can do this with his plenitude of power, as if one would say that he acts not with ordained, but with his absolute power. With this power he can change the substance of a thing ... and make something out of nothing. ... And one may not object that this is contrary to Innocent's statement, because when the pope says that he cannot, this is understood as “it is not appropriate that he do this.” <These things are annexed to the order [of monks] as a matter of positive law, which I prove thus: A monk is nothing other than one who is solitary and sad. [C.16 q.1 c.8] Anything therefore that is added to this is imposed by positive law. From which it appears that the pope can dispense a monk to have private property or take a wife, since no one doubts that he could take away entirely the religion or order and nature or substance which he gave to the order, as my master [Innocent IV] says.> [In the printed edition the material from the second recension was substituted for that from the first.]

X 3.35 .6 (Cum ad monasterium) v. *nec summus pontifex* (bis), S, fol. 142v-143r, V, fol. 134r-134v, Bamberg, Staatsbibl. Can. 56, III, fol. 208v-209r, Vienna, Nationalbibl. 2055, fol. 124r-124v:

“Nisi ex causa; quamuis enim papa dispensare possit; si tamen iusta causa dispensationis non subsit, peccat, et papa dispensans, necnon et ille cum quo dispensatur. Numquam etiam ualet dispensatio pape in proprio concedendo monacho et similibus, licet ex causa posset concedere monacho quod peregrinetur et uaticum secum portet; quod tamen non possidebit suo nomine set monasterii. Vnde nec de eo testari poterit, et hec uera sint nisi magna et uera causa subesset. Set quid si dispenser papa cum monacho in casu in quo dispensandum non esset: puta quod uxorem ducat, nee est necessitas uel utilitas dispensandi? Respondeo si mulier quam ducit dispensationem factam credit bonam et licitam, tenet matrimonium, et tenetur monachus reddere debitum, set ipsum sine peccato exigere non potest. Si uero concederet papa alicui monacho quod haberet proprium et causa non subesset, omnino dispensatio nulla esset, nee ipsum excusaret. Ratio diuersitatis hec est: quia ex dispensatione habendi proprium nemini preiudicatur, nec alicui prodest uel obest nisi illi cum quo dispensatur. Vnde illi nisi subsit utilitas non ualet dispensatio. Secus autem est in matrimonio ubi dispensatio prodest uel preiudicat alii, scilicet coniugi. Et ideo dicendum est tenere matrimonium ne illa cum qua contrahit auctoritate principis decipi uideatur, arg. C. de his qui uen. etat. impet. l.i. [Cod. 2.44(45).1] supra de donat. Per tuas § finali. [X 3.24.5] Monacho tamen non prodest quam semper peccat debitum exigendo. Dicunt etiam quidam et forte non male, quod sicut in his que sunt contra uotum taciturn uel expressum uel contra euangelium non prodest pape dispensatio, nisi ex causa facta. Idem intelligendum est si dispenses in his que sunt contra statum ecclesie generalem, arg. xxiiii. q.i. Memor sum et c. Si ea distruerem. Hoc tamen non est uerum in his dispensationibus que tantum fiunt contra ius posituum, sicut apparet in statutis editis de ordinibus infra certa interstitia temporum faciendis, lxxxvii. di. per totum. Vel quod quis non posset habere duas curas, ut not. supra de prebend. Cum iam dudum. In his enim dispensationibus sufficit sola uoluntas dispensatoris etiam sine causa, quod ex hoc probatur, quia si sola uoluntaria constitutio sit causa quare aliquid prohibetur, per consequens et sola uoluntas contraria causa erit quare prohibitio relaxetur, quia eius est destruere ius qui illud condidit et interpretari, ff. de iud. Quod iussit [Dig. 42.1.14] infra de sent. excom. Inter alia [X 5.39.31]. Princeps etiam suis legibus non ligatur quamuis ipsas eum deceat obseruare, C. de legibus, Digna uox, et res de facili reuertitur ad suam naturam, ff. de pactis, Si unus § Pactus ne peteret uer. Quodsi non ut tolleret. Alii tamen quam pape contra iura sine causa dispensare non licet, quodsi presumpserit non ualet dispensatio uel reuocatur et ipse punitur, li. di. Qui in aliqua. Set ex causa potest papa dispensare cum monacho ut proprium habeant. Quid enim si tota Christianitas uel etiam alia pars ipsius esset in periculo nisi monachus fieret rex, forte quia non est alius qui sciret uel posset regnum regere? Nonne dices quod monachus fiat rex in hoc casu? Nonne quilibet debet se totum offerre Deo in holocaustum, ut ei in eo quod sibi plus placet preeligat seruire? Set pre omnibus placet ei creaturam suam rationabilem et corporalem conseruare pro qua etiam ipse animam suam dedit. Minori etiam bono maius est preponendum et priuate communis utilitas preferenda, supra de renun. Licet, xi. q.iii. Si quis non recte, vii. q.i. Scias. Preterea si propter communem utilitatem potest monachus fieri episcopus, supra de regular. Licet, et etiam dericus siue rector incuratus, !vi. di. Priscis, xvi. q.i. Ne pro cuiuslibet, et patet in eo quod legitur et notatur supra c. proximo. Quare non eodem modo et rex? Quid enim si non potest Christianitas salua esse nisi regnum in suum proprium accipiat et relinquat suis filiis quos forte ante monachatum suscepit? Quid etiam si dicant ei illi, qui possunt dare regnum, cuius est puella heres, ‘parati sumus tibi dare puellarn et regnum, quodsi renuas dabimus earn tali tyranno uel etiam infideli.’ Nonne in tali casu tantum approbabis contemplationem unius monachi et continentiam unius hominis, et adeo reputabis Deum credelern quod nolit per dispensationern sui uicarii tante multitudini Christianitatis prouideri? Vtique dicendum est quod

papa in tali casu poterit dispensare, cum ei ad maiora potestas sua extendi uideatur ... Set credendum est quod Deo magis placeat ut quod communiter est utile eligatur.”

The supreme pontiff (Hostiensis, Pennington 69) [From the second rescension]: Except for cause. Although the pope could dispense, if there were no just cause, the pope granting the dispensation sins and so does he whom he dispensed. A dispensation of the pope granting property to a monk and like sort is never valid, although for cause he can grant to a monk that he go on a pilgrimage and take expenses for the journey with him. These, however, he possesses in the name of his monastery not in his own, and he can never make a testament about them. And these things are true unless a great and true cause is present. But what if the pope dispenses a monk in a situation where he ought not to have dispensed him, for example that he take a wife, and there is no necessity or utility in the dispensation? I reply that if the woman whom he marries believes the dispensation well and lawfully made, the marriage stands, and the monk is bound to render the debt, but he cannot require it without sin. If, on the other hand, the pope concedes to some monk that he have private property and there is no cause, the dispensation is entirely void, nor does it excuse him. The reason for the difference [in result in the two situations] is this: because no one is prejudiced by the dispensation to have private property and no one gains or loses except he who has the dispensation. Therefore the dispensation is not valid for him unless there is cause. It is otherwise in the case of marriage, where the dispensation benefits or prejudices another, specifically the spouse. And therefore it is to be said that the marriage stands, lest she who contracted it with the authority of the prince might seem to be deceived, argument [C.2.44.1; X 3.24.5]. It does not benefit the monk, however. He always sins in requiring the debt. Some people say, and indeed not badly, that just as a dispensation of the pope against an express or tacit vow or against the Gospel does not profit unless there is cause made, so too it is to be understood if he dispenses in those things which are against the general state of the church This, however, is not true in those dispensations which are only against the positive law, as appears in those statutes promulgated concerning orders to be taken within a certain time ... or that someone cannot have two cures of souls In these dispensations the will alone of the dispenser suffices even without cause. Out of this is shown that if only the constituted will is the cause why something is prohibited, by consequence only the contrary will is the cause why the prohibition is relaxed, for it belongs to him to destroy the law who makes it and interprets it. The prince is also not bound by his laws although it is fitting that he observe them [C.1.14.4] and a thing easily returns to its nature Others than the pope cannot dispense with the laws without cause, and if they do the dispensation is invalid and revoked and the dispensers punished. ... But for cause the pope can dispense a monk to have private property. For what if all Christianity or a large part of it were in danger unless a monk became king, perchance that there is no one else who knows how to and can govern the realm? Would you not say that the monk should be king in this case? Should he not offer himself entirely as a sacrifice to God to serve him who chose him to serve in a matter that pleases him more? But it pleases God above all else to preserve his rational and bodily creation for which he himself laid down his life. The greater good is to be preferred to the less and the common utility to the private Further, if for common utility a monk can be made a bishop ... and even a clerk or rector with care of souls, ... why in the same manner can he not be king? What if Christianity would not be safe unless he took the kingdom as his own and left it to his sons whom he had before he became a monk? What if those who had the power to give the kingdom, the heir to which was a girl, said to him ‘we are ready to give you the girl and the kingdom, but if you refuse we will give it to a tyrant or to some infidel’? In such a case do you place such value on the contemplation of one monk or the continence of one man, and do you think God so cruel that he would not provide by the dispensation of his vicar for such a multitude of Christians? Should it not be said that the pope can dispense in such a case, since greater power than this seems to be given to him Surely, it is to be believed that it would please God more if what was useful for the community was chosen.

8. X 5.31.8

(Clement III, *Sicut iure*) (1191–8)

Clement III to the bishop Faustinus:

Just as the uniting of bishoprics and subjecting them to the rule of others is known to pertain to the supreme pontiff, so does the union of churches of his diocese and the subjection of some pertain to the bishop. Since, therefore, the prior of Grandi subjected or united his monastery, which is in your diocese and ought to be ordered by your consent, to the monastery of Accato, without obtaining your assent, you are permitted to strike down by our authority what was done without your being consulted, notwithstanding the assent or confirmation which the metropolitan is said to have interposed. Since he ought not attempt anything contrary to the canonical sanctions in the diocese of his suffragan without the latter’s consent, we also decree that it is void.

Hostiensis to X 5.31.8 (Sicut unire), v. ita episcopi, Oxford, New College 205, fol. 219r, Florence, Laur. Fesul. 117, fol. 238v, S, val. II, fol. 312r, V, vol. V, fol. 72v:

“Set non eadem modo, quia papa hoc potest facere sine consilio ecclesiarum, ix. q.iii. Cuncta per mundum etc. Per principalem [C.9 q.3 c.17 and c.21] et arg. infra eodem capitulo in fine. Set episcopus hoc non potest absque laudatione clericorum et consensu ambarum ecclesiarum, supra de his que fiunt a prelat. c.i. [X 3.10.1] supra de rebus eccles. non alien. c.i. [X 3.13.1]. Et not.s.upra eadem capitulo, respon. i. ver. ‘Neque duas.’ Set nec papa hec uel alios casus sibi specialiter reseruatos, ut in premissis versibus, consueuit expedire sine consilio fratrum suorum, idest cardinalium. Nec istud potest facere de potestate ordinaria, arg. supra de his que fiunt a prelat. Nouit [X 1.10.4] licet secus sit de absoluta, supra de concess. preben. Proposuit [X 3.8.4].

Bishop (Hostiensis, Pennington, 72–3): But not in the same way, because the pope can do this without consulting the churches [C.9 q.3 c.17 and c.21] But a bishop cannot do this without the approval of the clerks and the consent of both churches. [X 3.10.1; X 3.13.1] ... But the pope is not wont in these cases and in others specially reserved to him, as in the preceding verses, to proceed without the advice of his brethren, that is, the cardinals. Nor can he do this of his ordinary power, as in [X 1.10.1], although it is otherwise of his absolute power, as in [X 3.8.4].

C.PRINCEPS LEGIBUS SOLUTUS, DIGNA VOX, POTESTAS ABSOLUTA

1. D.1.3.31(30)

(*Princeps legibus solutus* with the Accursian gloss)

Ulpian, *Lex Julia et Papia*, book 5. The emperor is not bound by statutes. And though the empress is bound by them, nevertheless, emperors give the empress the same privileges as they have themselves.

By statutes. Whether made by another [D.4.8.4] or by himself [D.4.8.51], by his will, however, he subjects himself [to them]. [C.1.14(17).4; JI.2.17.8] and [C.6.23.3; 6.61.7; D.32.[1].23.] are relevant.

Code 1.14(17).4. See below.

Institutes 2.17.8: And there are numerous rescripts of the Emperors Severus and Antoninus to the same purpose [refusing to accept an inheritance under a legally-deficient will]: “for though,” they say, “the laws do not bind us, yet we live in obedience to them.”

Code 6.23.3: Alexander Severus to Antigonus [232]: It has frequently been laid down that not even the emperor can vindicate an inheritance from an incomplete will. Although the law of *imperium* frees the emperor from the solemnities of the law, nothing nonetheless is so proper to *imperium* than to live according to the laws.

Digest 32.1.23: Paul, *Sentences*, book 5: For the emperor to vindicate legacies or *fideicommissa* under an imperfect will is shameless. For it is proper that so great a majesty should observe the laws from which he is deemed to be himself exempt.

2. JI.1.2.6

(*Quod principi placuit* with the Accursian gloss)

Again, what pleases the prince has the force of law, the people having conferred on him and in him all their *imperium* and power by the *lex regia*.

Pleases. To wit, for the purposes of making a common law, otherwise it is not a common law, as follows, and [C.7.45.7], <for it is said there: not every word of a judge is a sentence, and thus not every word of the prince is law.> [The matter in diamond brackets is not in all the manuscripts.]

Has the force. That is, it is a *lex* and is to be observed as a *lex*.

Lex. Which we do not have.

Regia. By this law it was provided that the power of making law be transferred from the people to the prince, as this and [D.1.2.2.8] <and this *lex regia* we do not have because it was made about transferring regality, that is *imperium*.>

Imperium. To be transferred from the people to the prince.

On him. So far as honor is concerned.

In him. So far as responsibility is concerned.

Conferred. That is, handed over, so that the people itself no longer has this right, as [C.1.17.2.21; C.1.14.12]. But others say that even now the people can make laws, and that it is said that the prince alone can do this, this is true, “alone” being understood as no one else can do it alone, according to Azo. [Some manuscripts add:] And these things were true so long as *imperium* was with the Romans; today, however, it can be said to the contrary, according to everyone.

3. C.1.14(17).4

(*Digna vox* with the Accursian gloss)

The emperors Theodosius [II] and Valentinian to Volusianus praetorian prefect (429)

It is a cry worthy of the majesty of the one who reigns for the prince to profess himself bound by the laws, so much does our authority depend on the authority of the law. And in truth it is greater in *imperium* to submit the principate to the laws. And by the oracle of the present edict we indicate that we will not tolerate what we do not allow to ourselves.

Cry worthy. But how is it a worthy cry when it is false? As [D.1.3.31(30); D.32.[1].23; Nov. 105.4; C.6.23.3] I reply, it is worthy if he says that he wills, not that he is. ... Others say that here he is permitted to lie. ...

So much. That is, so much on the authority of the law does our authority, i.e., *imperium*, depend so that it is a cry worthy of the majesty of the one who reigns.

On the authority. This is the reason for the first statement, and what he says of law, understand of the *lex regia*, which concerns the transfer of *imperium* from the people to the prince

Principate. Understand then the laws to the principate or to the *imperium*, which is to say, greater is the honor and greater the convenience, since *imperium* comes from fortune. Whence it is said, if fortune wills you will become a consul, when you were an orator, and if the same fortune wills, you will become an orator when you were consul. But the laws come forth from the divine nod ... and are immutable. Accursius.

Oracle. That is, example. And where he says “edict,” here it means “general law”; otherwise edict is taken for the edict of the praetor. Or you can say that oracle is what is granted by the speech or prayers of someone. Or oracle is the divine will declared in the mouth of man. ...

What. To wit, that we are not bound by the laws.

Indicate. To wit, to our successor, and he does not say “we command,” because an equal does not have power over an equal. ...

D.NATURAL LAW, POSITIVE LAW, PROCEDURAL RIGHTS

1. Johannes Monachus on Extrav. com. 2.3.1

(Boniface VIII, *Rem non novam*) (1303; gloss written before 1313)

Boniface VIII:

A matter not new do we approach, nor are walking on an unaccustomed road, but one trod with the footprints of preceding law, we confirm with the undoubted strength of this present

constitution, [and] we make it stable with unbroken strength. It is indeed already sanctioned that an edict of public citation having been put forth binds him who impedes and hides himself so that the citation cannot come to him and that he appears contumacious, who so behaves, and that in the album of the praetor such edicts put forward bind those who are subject to his jurisdiction and they bind more than if they [the defendants] are cited by the crier's voice, which is known to few, or by letters. For the law which puts forward such a method for citations is believed violently to have presumed, that what is open to be read in the same album by the eyes of so many people frequenting the public place of the same album will come to the notice of the person cited. Whence to give full reading and notice to all who are sanctioned it is commanded that a law be sculpted on tablets or stones be written and affixed to the porches of the most holy church. Having taken the aforesaid into due consideration and weighed them in the scales of irrefutable reason, who are known to be above all people by the disposition of the Lord, wishing by this new constitution something to be more specifically discovered about the aforesaid statutes, declare with the advice of our brethren, and nonetheless confirm and by this edict to be forever valid, that citations by apostolic authority of any persons whencesoever and wheresoever they are, of whatever status, dignity or preeminence, whether ecclesiastical or worldly, even if they shine with imperial or regal dignity, especially if they impede or see to it through themselves or others in any way that these citations do not come to them, making it that for any reason the domiciles of those cited cannot be safely or freely approached (since, as is written, we ought to judge whether it is possible for him [the ?summoner] to go where the citation is to be made); in like manner on the example of the aforesaid edicts put forward in the album of the praetor, even outside the solemn days in which the Roman pontiffs are accustomed to make general processes, citations publicly made by our special and knowing order in the audience of our letters or in the hall of our palace to be affixed to the doors of the church of the place in which the common Roman curia of all nations of Christian people resides, so that they can be apparent to all and thus brought to those cited shall be so valid and so bind those cited after the lapse of a term (a competent one of which we wish to be placed on the citations themselves, considering the distance of the places) as if they had come to them personally, notwithstanding any privileges, indulgences and letters apostolic both general and specific, granted to whatsoever persons endowed with pontifical, imperial, royal or other ecclesiastical or worldly dignity or to other inferior churches, monasteries, places, colleges and corporations in whatever form of words, even if it is necessary that special mention be made in our letters by which they are granted of them or of their entire contents word for word, or of the specific names of their persons, monasteries, churches, or of those places.

Johannes Monachus to Extravag. com. 2.3.1 (Rem non novam) v. *Non obstantibus aliquibus privilegiis*, London, BL Royal 10.E.i., fol. 214r, London, Lambeth Palace 13 fol. 363v-364r [P 161–63]:

“Ad euidenciam premissorum quero an papa procedere contra aliquem ualeat citatione non premissa? Et uidetur quod sic quia est supra illis, extra, de conces, preb. Proposuit [X 3.8.4]. Item quia princeps solutus est legibus, ff. de legibus et senatuscon. Princeps [Dig. 1.3.31(30)]. Item papa habet plenitudinem potestatis, ii. q.vi. Decreto [C.2 q.6 c. 11], extra, de pen. et rem. Cum ex en, m fine [X 5.38.14], extra. de usu pal. Ad honorem [X 1.8.4]. Sed contra. Citatio est principium processus iudiciarii ut supra not. et habetur extra, de probat. Quoniam contra [X. 2.19.11], et ad finem iudiciorum que est sententia, ff. de re iud. l.i. [Dig. 42.1.1] attingi sine principio non potest . . . Nullus potest supra ius quod non condidit, sed conditum presupponit. Sed papa uel purus homo nullum ditorum iurium condidit, sed alias conditum presupponit, xxv. q.i. Sunt quidam [C.25 q.1 c.6], igitur supra nullum illorum potest. Maior patet, minor etiam manifesta est quantum an legem eternam, uel ius eternum, diuinum, naturale, et quantum ad ius humanum quod deriuatur a naturali . . . sequitur ergo conclusio, scilicet, quod papa non potest

nisi supra ius quinto modo dictum, scilicet supra ius pure positium. Restat igitur uidere si citatio sit de iure naturali uel de humano deriuato a naturali ut conclusio ex principio: quia si papa circa talia iura nib. il possit ut ex prece. dentibus pater, consequens est quod contra nulhim possit procedere citafione non premissa . . . Cum igitur non potest ad plenum factum et iustum uel iniustum sine presentia eius qui iudicari debet cognosci et sciri, xxx. q.v. § His ita, in fine [C.30 q.5 p.c.9], extra. de re iud. Cum Bertholdus IX 2.27.18], xi. q.iii. Eorum [C.11 q.3 c.76]. Tunc necesse est ipsum citari et uocari; nec papa hoc potest omittere, et minus alius iudex, quia sic omitteretur cognitio que ad iudicium de necessitate requiritur . . . Et sic patet secundum et tertium simul, scilicet quod citatio est de lure naturali et per consequens quod papa contra aliquem procedere non potest nisi citatione premissa. . . . Et hoc probat bec constitutio euidenter. Hoc liquet etiam in notoriis in quibus licet iuris ordo non sit seruandus usquequaque, seruandus in citando et in sententiando, extra, de iureiur. Ad nostram [X 2.24.21], ii. q.i. Imprimis [C.2 q.1 c.7], extra. de diuort. Porro [X 4.19.3], ii. q.i. Manifesta [C.2 q.1 c. 15], not. extra, de accus. Quali-ter, ibi, 'Descendam' [X 5.1.17]. Et Gen. xviii, ubi factum erat notorium attamen Deus uoluit probare quam iudicare . . . Nec obstat extra, de accus, c. Euidencia [X 5.1.9], nec ibi tollitur citatio nec sententia quia Gen. iii. probatur utrumque necessarium. Item quilibet presumitur innocens nisi probetur nocens, extra, de presum, c. Dudum [X 2.23.16], extra, de scrut, in ord. fac. c. unico [X 1.12.1], ff. de manumis, test. l. Seruos [Dig. 40.4.20] et ius est promptius ad absoluendum quam ad condemnandum. Sed forte dices quod papa uel alius iudex nouit causam et ueritatem neogotii secreto, ut est priuata persona. Dicendum est quod hoc non sufficit quia iudex non iudicat ut priuata persona, sed ut publica et ideo publice debet sibi innotescere ueritas, scilicet per leges publicas, diuinas, uel humanas in communi. . . . Ad tertium dicendum est quod uoluntas principis legis habet uigorem, si sit ratione regulata, et fiat animo condendi legem cuius forma traditur C. de leg. Humanum [Cod. 1.14(17).8], quia uoluntas de se non est securus canon, ut Philosophus dicit ii. Polit. Cum autem princeps iudicat uel sententiat sine cause discussione et examinatione non habet uoluntatem regulatam secundum rectum iudicium rationis. Ad quartum dicendum est quod secundum Philosophum in i. Polit. duplex est principatus, despoficus et politicus. Primus est doming ad seruom qui non habet gus resistendi, eo quod seruus est doming totaliter secundum quod huiusmodi. Secundus est principatus liberorum, qui habent gus in aliquo resistendi, et tails est principatus ecclesie circa subditos. Non enim est uerisimile quod principatus ecclesie sit despoticus. Non enim sumus ancille filii, sed libere, qua libertate Christus non liberauit, ad Galat. iv. Job. Monac. Cardinalis.”

Notwithstanding any privileges: On the evidence of the foregoing, I ask whether the pope could proceed against someone without citation? And it would seem that he could, because he is above the law. [X 3.4.8] Again because the prince is freed from the laws. [D. 1.3.31(30).] Again the pope has plenitude of power. [C.2 q.6 c.11; X 5.38.14; X 1.8.4.] But on the other hand: The citation is the beginning of the judicial process, as is noted above, and as you find in [X 2.19.11], and it is not possible to proceed to the end of the judicial process, which is the sentence, without the beginning. . . . No one can be above the law which he has not laid down, but [the law that the pope makes] presupposes what has been laid down. But the pope or a simple man laid down none of the said laws [*iurium*, perhaps “rights”] [C.25 q.1 c.6], therefore he has power over none of them. The major [premise] is apparent; the minor is also apparent so far as eternal law [*lex*], or eternal *ius*, or divine or natural, and so far human *ius* derived from natural [is concerned] . . . The conclusion therefore follows, to wit, that the pope has power over only of the law that is said to be of the fifth mode, to wit law purely positive. It remains, however, to see if citation is of natural law or of human law derived from natural, so that the conclusion follows from the premise, since if the pope has no power over such laws as appears in what preceded, the consequence is that he can proceed against no one without having issued a citation . . . Since it is not possible to understand or to know fully a fact or justice or injustice without the presence of the person against whom the judgment is to be rendered, [C.30 q.5 p.c.9; X 2.27.18; C.11 q.3 c.76], then it is necessary that he be cited or called. And the pope cannot omit this, nor any lesser judge, because thereby he would omit the *cognitio* [a play on words, literally “understanding,” but also the technical term for a judicial hearing], which is of necessity required for a judgment . . . And thus both the second and the third appear at the same time, to wit, that citation is of the natural law, and by consequence that the pope cannot proceed against anyone without having issued a citation. And this constitution proves this evidently. This is also plain in notorious matters in which, though the *iuris ordo* is not to be observed completely, it is to be observed in citation and

sentencing. [X 2.24.21; C.2 q.1 c.7; X 4.19.13; C.2 q.1 c.15; note X 5.1.17] And Genesis 18, where the fact was notorious, nevertheless God wanted to prove before he judged. Nor does [X 5.1.9] stand in the way, for neither citation nor sentence is taken away there, because Genesis 3 proves them both necessary. Again, anyone is presumed innocent unless he is proved guilty. [X 2.23.16; X 1.12.1; D.40.4.20] And the law is quicker to absolve than to condemn. But perhaps you might say that the pope or another judge knows the cause and the truth of the matter in secret, in his capacity as a private person, but as a public person and therefore publicly the truth ought to be known to him, to wit by laws public, divine or human, together. ... To the third [objection; perhaps “second” is meant] it ought to be said that the will of the prince has the force of law if it is ruled by reason and comes about in the spirit of laying down law according to form of which it has been passed on, [C.1.14(17).8], for will is not a secure rule, as the Philosopher says in Politics 2. When moreover the prince judges or renders sentence without discussion and examination of the cause he does not have a will regulated according to the right judgment of reason. To the fourth [objection; perhaps “third” is meant] it ought to be said that according to the Philosopher in Politics 1 there are two kinds of principate, despotic and political. The first is of the owner over a slave who does not have the right to resist, because he is the slave of his owner entirely according to this manner. The second is the principate over children, who have the right of resisting in anything [?], and such is the principate of the church over her subjects. It is not plausible that the principate of the church is despotic. We are not the children of the slave woman but of the free woman for which liberty Christ freed us, Galatians 4[:31, reading *nos* for *non*]. Johannes Monachus, Cardinal.