Volume XXX] *October, 1924* [*Number 1*

The

American Historical Review

THE CASE OF THE MISCREANT CARDINAL[1]

IT is difficult to suggest a reason why so striking and picturesque a case as that of the Miscreant Cardinal in 1382–1383 should have remained in print for four hundred years in a well-known repository of law reports without exciting a single word of comment from the lawyers and controversialists who have sought argument and precedent within the famous pages of Fitzherbert's *Graund Abridgement*.

Taking the story as it stands in Fitzherbert (for there are no other independent published reports of this portion of Richard II.'s reign),[2] we learn that the king brought an action of *Quare impedit* to recover the right of making a presentation to an unnamed church in the diocese of Durham, the defendant, or, as they said then, the impedient, being the parson *de facto,* whom our report simply designates as "P". The tale the king's sergeant told was that the church was of the patronage of the bishops of Durham, that the pope had put in a certain cardinal (unnamed in our report) by provision, and that this cardinal became a miscreant, the church thereby falling vacant. Moreover, since this vacancy occurred while the see of Durham was likewise vacant and its temporalities in the king's hand, it was for the crown to exercise the prerogative of presenting for that occasion in the right of the vacant see. Hereupon there occurred a remarkable debate, in the course of which several notable observations were made which will claim our attention.

Before going into the law of the case, however, it will be interesting to try to identify some of the persons involved, and to pierce the veil of anonymity with which Fitzherbert's report enshrouds them. In the library of Lincoln's Inn there is a manuscript Year Book[3] which gives a report of this case in almost the same words as Fitz-

[1] A paper read at the meeting of the American Historical Association at Columbus, Dec. 27, 1923.

[2] *Triall,* p. 54. The report in Bellewe, p. 325, is merely a reprint of Fitzherbert.

[3] MS. Hale 77. I have used the rotograph facsimile in the Harvard Law Library.

herbert, with the valuable addition for us of the full name of the impedient, and so we learn that "P" is a certain Peter Galoun. From this one fact all the rest can be derived. From the patent rolls it appears that in the year in which the case closed, this Peter Galoun obtained the king's ratification of his estate in the church of Wearmouth[4]—a frequent mode of settling actions of this sort. Wearmouth is in the diocese of Durham, and so is the church concerned in our case.[5] From the same source we learn that the king made several prerogative presentations to this church in July, 1381,[6] from which it is clear that their failure of success provoked the king to bring this action which occupied the next year, 1382,[7] while in March, 1383, Galoun received the ratification of his estate. Finally, it is equally certain that Thomas Hatfield, who had been bishop of Durham since 1345, died on May 8, 1381,[8] the see remaining vacant until the following October,[9] the king in the meanwhile having attempted to exercise his prerogative in favor of Lynton, Packington, and, in 1382, Trofford.

As for the Miscreant Cardinal, neither Fitzherbert nor the Lincoln's Inn manuscript discloses his identity, but the industry and erudition of the county historians have provided us with a partial list of the incumbents of Wearmouth, from which we learn that at least twice in the fourteenth century it had been honored with a prince of the Church as its rector; Simon, cardinal of St. Sixtus, occupied it from 1370 until he resigned in 1372, and he was succeeded—almost immediately, it would seem—by the Lord Robert of Geneva, cardinal priest of the Basilica of the Twelve Apostles, who is mentioned as rector in Bishop Hatfield's register under the date 1375.[10] Robert's abilities were so considerable that the larger stage of European politics claimed all his attention, and the rich, perhaps, but remote parish in the north never saw its illustrious rector. Perhaps he felt little love for England since another of his English benefices—the treas-

[4] *Calendar of Patent Rolls, Richard II.*, II. 237.

[5] It is later called Bishop Wearmouth to distinguish it from Monks' Wearmouth, which was not in the gift of the bishop but of the dean and chapter. Surtees, II. 11; Hutchinson, II. 511.

[6] Thomas Lynton was presented on July 18, 1381 (*Cal. Pat., Rich. II.*, II. 28), the patent being subsequently surrendered; William Packington was presented on the 28th (*ibid.*, p. 31); and William Trofford on July 17, 1382 (*ibid.*, p. 154).

[7] The date is given as Mich. 5 Ric. II. (1381) by Fitzherbert, and as Mich. 6 Ric. II. (1382) by MS. Hale 77; the litigation may well have extended over both years.

[8] *Dictionary of National Biography* (reissue), IX. 155.

[9] Rymer, VII. 333.

[10] Surtees, I. 231; Hutchinson, II. 512; Hatfield's register has not been printed.

urership of York—was wrested from him by a royal favorite in 1375.[11] However, greater things were in store for him. Allied by birth with many of the royal and princely houses of Europe,[12] and remarkable for his personal bravery and military skill, he nevertheless possessed as well those qualities which made him an astute and successful figure in ecclesiastical affairs. Preferment fell upon him rapidly; lord of Geneva, bishop of Thérouanne, chancellor of Amiens, bishop of Cambrai, cardinal, legate in Lombardy—these were only some of the titles of the rector of Wearmouth, until in 1378 he reached the zenith of his fortune. It was on the 20th of September, at Fondi, that the cardinals who had elected Pope Urban VI. repented of their choice, declared that they had acted under fear of their lives, and set in his place the Cardinal Robert of Geneva, who took the name of Clement VII. and reigned at Avignon until his death in 1394.[13] Antipope is a word our Year Books refuse to utter, and so the courts of England know him simply as the miscreant cardinal.

These then are the characters hidden beneath the cautious reticence of the reports, which must now receive a more detailed discussion. The text of the Hale manuscript here reproduced is collated (as to the more material variations) with that in Fitzherbert's *Abridgement*, and accompanied by a translation, for the first time it is believed.

MS. Hale 77, f. 189.

[14] Le Roi porta quare impedit [14] vers [15] P. Galoun [15] clerc dun esglise deinz le Eveschie de Duresm et counta coment levesque qui mort est presenta un son clerk et le clerc murust et [16] lappostail et noma qui etc. fist [16] collacion a un Cardinall et noma son non et par cause de mescreantise et sismatise lesglise se voida esteant les temporalties en la mayn le Roi. Issint appent a Roi a presenter.

Burgh [17] [18] defendit tort et force et demanda jugement si le court voet conistre quar [18] il ad counte

Translation.

The king brought *Quare impedit* against P. Galoun, clerk, of a church in the diocese of Durham and counted how the late bishop presented one of his clerks, who died, and the pope (and he said which) collated a cardinal (and he told his name), and because of misbelief and schism the church fell void while the temporalities were in the king's hand. And so it is for the king to present.

Burgh denied tort and force and demanded judgment whether the court would take cognizance for he

[11] Le Neve, III. 160–161. He was also archdeacon of Dorchester; *Calendar of Papal Registers, Letters*, IV. 188.

[12] Noël Valois, *La France et le Grand Schisme*, I. 81.

[13] Eubel, I. 367, 166, 38, 26, 21.

[14] Quare impedit par le Roy. F.

[15] Un P. F.

[16] Cap' fuit. F.

[17] Brugh. F.

[18] Omitted in F.

dun voidance del esglise par cause de mescreantise dun Cardinal al court de Rome quel chose nest pas triable [19] cy et demanda jugement ut supra.[19]

BELKNAP. Ieo vous die pur certain que le court auera conistre de ce plee et ceo ieo provera par resoun quar tout le court christien est un court et si un home en le Arche cy en ce terre soit arette dun certein cryme pur que il est privable et post il appelle al court de Rome et est prive la [20] ce privacion est triable en le court le Roi auxi bien come [21] sil ust este prive en lez Arches quant tout est un court. Et si un [22] home soit aherdant as enemys le Roi en France sa terre est forfaitable et sa enherdance serra trie lou la terre est come il ad este sovent foitz fait [23] de aherdance [23] as enemys le Roi en escoce. Et [24] si un [25] home soit mescreant sa terre est forfaitable et le seigneur [26] auera par voie deschet et resoun le voet quar si un [27] home soit hors de la [28] foy [29] son lige seigneur [30] sa terre est forfaitable ergo [31] a multo forciori lou [32] un home [32] est [33] encontra le soveraign [33] dieu et ce jura BELKNAP pur ley. Pourquoi, *Burgh*,[34] respondez.

[35] Et post *Burgh* dit que [35] lesglise se voida en tems levesque qui mort

has counted of a voidance of the church through miscreance of a cardinal at the court of Rome which thing is not triable here, and he demanded judgment as above.

BELKNAP, C. J. I tell you the Court will certainly have cognizance of this plea, and I will prove it by reason, for all the Court Christian is one court, and if a man in the Arches here in the land be charged with a certain crime for which he is deprivable, and appeal to the court of Rome and be deprived there, then that deprivation is triable in the King's Court just as if he had been deprived in the Arches, for it is all one court. And if a man be adherent to the king's enemies in France his land is forfeitable and his adherence shall be tried where the land is, as has often been done in the case of adherence to the king's enemies in Scotland. And if a man be miscreant his land is forfeitable and the lord shall have it by way of escheat; and reason requires it, for if a man be out of the faith of his liege lord his land is forfeitable, therefore *a multo fortiori* where he is against the sovereign God; (and BELKNAP swore that this was the law). And so, *Burgh*, answer.

And afterwards *Burgh* said that the church became void in the time

[19] cieinz, par que jugement si la court voille conustre. F.
[20] de la. F.
[21] Om. F.
[22] Om. F.
[23] des adherauntz. F.
[24] sir, par ma foy—added in F.
[25] Om. F.
[26] ceo—added in F.
[27] Om. F.
[28] Om. F.
[29] de—added in F.
[30] Roy—added in F.
[31] Om. F.
[32] il. F.
[33] hors de foy de. F.
[34] Brugh. F.
[35] Brugh, sir. F.

est, et nous fumus parson enparsone en tems mesme cesti Evesque del provision [36] Gregoire le XI^e [36] etc. saunz ceo que lesglise se voida par mescreantise le Cardinall ut supra esteantz les temporalties en la mayn le Roi. Prest, etc. Et alii e contra pro Rege. Et venire facias agarde al viscounte [37] de visneto [37] ou lesglise fut et nient al evesque de Duresme ne a son Senescal ne baille. Et dit fut que mescreantise serra trie lou lesglise est, et privacion fait al [38] court de Rome auxi, etc.[39]

of the late bishop and we were parson imparsonee in his time, too, by provision of Gregory XI., etc., without this that the church became void by the miscreance of the cardinal *ut supra* while the temporalities were in the king's hands. Ready, etc. And the others for the king said the contrary. And *venire facias* was awarded to the sheriff of the vicinity where the church was, and not to the bishop of Durham, his steward or bailiff. And it was said that miscreance shall be tried where the church is, and deprivation at the court of Rome similarly, etc.[40]

First of all let us examine the chronology of the king's claim. His title could only arise while the see was vacant and the temporalities in his hands—that is, between May 6 and October 23, 1381. If Wearmouth church did not become or continue to be vacant during this period, then the king's case falls immediately. The cause of the vacancy he alleges, however, took place three years previously, for Robert was elected pope September 20, was crowned on October 31,[41] and was excommunicated and declared a heretic in December, 1378.[42] If his miscreance caused the vacancy of the church then it had occurred before the beginning of the new year, 1379. But the see of Durham (patron of the living) did not fall vacant until two and a half years afterwards: only if Wearmouth church remained unfilled either by pope or bishop during those two and a half years could the king claim a presentation. On the face of it, this is extremely unlikely. The impedient's story, on the other hand, is simple and consistent. He asserts that he has been parson imparsonee ever since his provision by Gregory XI.[43]—who died March 28, 1378, more than

[36] le Pape. F.

[37] del counte. F.

[38] del. F.

[39] et ceo appert par cest ple icy par le jugement etc. quod nota. F.

[40] and this appears from this plea by the judgment, so note well. F.

[41] Eubel, I. 26.

[42] Raynaldus, VII. 362.

[43] As early as 1363 and 1366 Peter Galoun was petitioning the pope for preferment in the diocese of Durham (*Cal. Pap. Reg., Petitions,* I. 434, 520). But I have been unable to find the provisions of Cardinal Robert and Peter Galoun to the church of Wearmouth in the *Calendars.* From these documents we learn incidentally that Peter was *alias* "de Castro", and a master of arts. A certain Gervase de Castro had been bishop of Bangor from 1367 to 1370, on the appointment of Urban V. (not Urban III., as Le Neve, I. 99).

three years before the temporalities of the see of Durham fell into the king's hands. The Year Book tells us nothing of the verdict, but from the fact that Peter Galoun received a royal ratification of his estate in the church, it would seem that the crown experienced some difficulty in establishing so uncertain a claim, and so compromised the action.

What of the law? A number of interesting and important points are raised, which, however, are not so easily solved. First of all, what was the nature of the vacancy alleged by the crown?

To answer this, it is necessary to refer once more to general political history. Selden once remarked (more in jest than earnest) that Urban VI. was the only pope with a parliamentary title,[44] for at the Parliament of Gloucester the king laid the facts of the Great Schism before the assembled prelates and magnates, who after due deliberation passed a statute acknowledging the title of Urban, and enacting that all the benefices of the rebel cardinals—Clement and his party—were to be seized into the king's hands and the fruits paid to him until further orders.[45] Moreover, the statute was immediately enforced, for we read that two cardinals received restitution of their goods and benefices taken under the statute when they had convinced the government of their adherence to the right side in the schism.[46] So far all is clear, but it must be added that the motives of the government were not unmixed. England was at war with France: Clement was the nominee of the French faction among the cardinals, and so England had naturally supported Urban and proscribed Clement. Then, too, there is abundant evidence that the crown had been accustomed to derive considerable income from the benefices held by Frenchmen during times of war. The statute, it is true, covers its clauses of confiscation with a decent cloak of religion and denounces the Clementine cardinals as rebels and schismatics,[47] but the royal letters patent which soon afterwards appeared show that a different view could be taken. Now Urban VI. had declared Clement and his supporters to be deprived of their benefices, and had appropriated two-thirds of their income to the papal *camera* and the remainder to the improvement of the benefices. Already, then, the king's statute and the pope's bull were in conflict over the disposition of the spoils, and an obvious opportunity existed for the king

[44] Selden, *Table Talk*, CVI. 9.

[45] Stat. 2 Ric. II., st. 1, c. 7. For the text of the manifestos issued by the rival parties, see Walsingham, I. 382 ff., who implies (*ibid.*, p. 380) that their respective nuncios came to the Parliament.

[46] Rymer, VII. 208.

[47] The Commons in the Gloucester Parliament, however, were most concerned at the vast sums of ecclesiastical revenue sent abroad. *Rot. Parl.*, III. 46 (70).

to show his devotion to the true pontiff—and it is here that the more immediate motives of the king find frank expression. Letters patent issued July 6, 1379, recited the statute of the Parliament of Gloucester, and further related that the king had followed the practice of his predecessors in the matter of benefices held by adherents of his enemy of France and had confiscated them to the treasury (*Aerrario nostro fiscali jussimus applicari*); nevertheless, Urban had sought to apply their revenues to his own and the churches' needs, and so the king, moved by the extreme poverty of the Holy Father, conceded his request, and, although by the law of the land these sums were notoriously confiscated, yet the king graciously allowed the papal agents to collect them until Michaelmas of the following year.[48] In short, the statute had hastily assumed that the fruits of ecclesiastical benefices forfeited for schism would go to the crown: Urban's bull appropriated them to the requirements of the papacy; and in face of that claim the king felt a change of front necessary if he was to retain the spoils. Consequently we find the insistence that the Clementine cardinals are not only schismatics but also adherents to France. The attempt of the pope to secure the profits for himself is set aside and it is only by way of charity that he is permitted to collect them for just twelve months—a period which was subsequently extended for similar short terms,[49] although at times a particular benefice would be excepted from the concession and retained in the king's hand.[50] Finally, the letters patent seriously misrepresent the statute of the Gloucester Parliament by alleging that it extends to all benefices held by Frenchmen.[51]

We can now examine the vacancy alleged by the crown with a view to determining its nature. The simplest course would have been to plead that the vacancy was by deprivation; but there were difficulties there, for the very bull containing the sentence also contained the reservation of the profits to the papal *camera* (which the king had so brusquely set aside), with the understanding doubtless that when the benefices were ultimately filled it would be by papal provision. Moreover, it would have been extremely awkward for the crown to have to prove a voidance by the production of a papal bull, seeing that subjects were stringently forbidden to bring papal documents into the king's court.[52] Clearly, then, deprivation by papal

[48] Rymer, VII. 222.

[49] *Ibid.*, pp. 271, 303, 346.

[50] *Ibid.*, p. 289.

[51] This was the petition of the Commons, but the king's reply to it only dealt with those held by the rebel cardinals. *Rot. Parl.*, III. 46 (70, 71).

[52] 30 *Lib. Ass.* 19.

sentence is not the line the royal sergeants will take. The statute of the Gloucester Parliament is even less promising, for it does not go to the length of depriving the rebel cardinals but only seizes their profits into the king's hand—and in our particular case the king wants not the income of the benefice but the opportunity to confer it upon his nominee, for which purpose he must first establish the fact that it has become vacant. Only one course was left, and that was the one that the crown took, namely, to ask the Court of Common Pleas to try whether the antipope Clement VII., rector of Wearmouth, was a miscreant; and if so, to hold that his church was thereby vacant *ipso jure,* and that all these matters lay within its jurisdiction. If this could be done, then the way was clear for the crown to establish its claim to a prerogative presentation in the usual way, if sufficient grounds for such a claim ever existed.

Such an extraordinary suggestion as this must have been received with a vigorous protest, and it is unfortunate that we have only the merest summary of Burgh's plea to the jurisdiction, with the result that it is impossible to say with certainty on what grounds he relied most: did he mean that the Common Pleas cannot try the question of misbelief? Or that a cardinal is beyond their reach? Or that the alleged miscreance would have been triable had it not been laid outside the realm?

The reports available throw no light upon these questions, but it is clear that whatever Burgh's arguments were, they failed to convince the court, and on the contrary, drew from the bench an emphatic assertion of its authority over the present matter. Belknap, C. J., declared that he would prove the jurisdiction of his court from "reason", *i.e.,* from general principles rather than from precedent. He first laid it down that "all Court Christian is one court"—which we may take as the common law's deduction from the canonical dogma that the pope is universal ordinary.[53] From this Belknap draws the corollary that the deprivation of a clerk is equally within the cognizance of the Court of Common Pleas whether the sentence was given in the Court of Arches in London, or in the court of Rome: there is, moreover, some plausibility in his view, for even appeals to Rome were often tried within the realm by papal delegates.[54] Now it has already been remarked that the crown did not allege a deprivation by sentence, but relied on the general rule of the canon law that heresy and schism involved *ipso jure* loss of benefice.[55] Chief Justice Belknap meets this situation by assuming that depriva-

[53] Bracton, f. 412.

[54] Maitland, *Canon Law,* p. 105.

[55] As to the truth of this assumption, see *post,* note 57.

tions whether *de jure* or *de facto* are equally within his principle that the Court of Common Pleas will take cognizance, wherever the cause of deprivation may have been—"for all Court Christian is one court".

The second step in Belknap's argument is to establish the analogy between heresy and treason[56] when these crimes have been committed outside of the realm. He asserts that the trial of treason in such a case will be at the place where the lands of the accused are situated, and from this draws the conclusion that miscreance should likewise be tried where the heretic's benefice lies.

And so Belknap uses some very general principles as a basis for his claim that the Court of Common Pleas can take cognizance of the voidance of Wearmouth church by reason of the misbelief of its rector. There are several points in his speech which invite discussion: his theory that "all Court Christian is one court" and his remarks upon the trial of treason committed outside the realm both deserve investigation, but they would lead us too far from our present subject, and so must be reserved for a more appropriate occasion. Our immediate purpose is best served by calling attention to the fact that even assuming that the miscreance of a clerk involved *de jure* deprivation in canon law,[57] yet the Church most emphatically denied that any trial of such a matter could take place before a lay judge, or that the *de jure* forfeiture of goods could be actually enforced without a *sententia declaratoria* by the ecclesiastical authority.[58] These points of canon law are significantly absent from Belknap's treatment of the situation.

Nor is this all, for not only the Church but Parliament also stood between the king and Wearmouth church, for in 1350, as the result of a petition of the bishops in Parliament,[59] a statute was made enacting that "whereas the said prelates have prayed remedy because the secular justices accroach to them the cognizance of the voidance of benefices *de jure*, which cognizance and discussion belongeth to the judge of Holy Church and not to lay judge; so the king willeth and

[56] This analogy is familiar in canon law, and has played a large part in the development of heresy; c. 10, X. 5. 7.

[57] The canons seem to inflict degradation rather than simply deprivation as the immediate penalty upon clerical heretics, but commentators go further; *haeretici enim non possunt possidere rem ecclesiae* is the comment of the archdeacon upon c. 1, Dist. VIII.; and Lyndwood, p. 293, gl. *d*, says, *nec possunt* [*haeretici*] *aliquid beneficium ecclesiasticum obtinere*. Degradation and the milder deposition both involve deprivation and must be performed by ecclesiastical authorities. See Zanchinus Ugolinus, *De Haereticis*, c. xviii, § 7.

[58] Lyndwood, p. 293, gl. *confiscata*; c. 19, VI. 5. 2.

[59] *Rot. Parl.*, II. 245.

granteth that the said justices from henceforth receive such challenges made or to be made by any prelates of Holy Church in that behalf, and moreover shall do right and reason thereof".[60] The meaning of the statute we believe to be clear: the king concedes the trial of voidances *de jure* as within the province of the ecclesiastical courts.[61] The alleged voidance of Wearmouth church is *de jure* and so clearly falls within the statute, and should therefore have been tried by the certificate of the ordinary. But nothing of the sort took place; "*venire facias* was awarded to the sheriff" without, as far as we know, any protest by the party or the ordinary. This case is therefore the first of a slender line of authorities extending into the seventeenth century which agree in flouting the statute, which does not seem ever to have been applied—an injustice which the Church resented as late as the reign of Queen Anne.[62]

So clearly was the temper of the bench revealed in Belknap's speech that Burgh refused further controversy, and in accordance with the peculiarly complex pleading appropriate to this action[63] proceeded to set up his own title—"the church became void in the time of the late bishop and we were parson imparsonee in his time, too, by provision of Gregory XI."—by way of "inducement"[64] to his special traverse of that of the king—"without this that the church fell void by the miscreance of the cardinal *ut supra* while the temporalities were in the king's hand; ready". The issue having been duly joined by the king's sergeants, process issued for the summoning of the jury and the report remarks that, although the cause of action lay within the palatinate of the see of Durham, yet the *venire facias* was sent to the sheriff and not to the bishop. The reason is evident—the king will sue in no court but his own, and where he is party his own officers and not those of any subject's franchise will return the writs. As for the jury's verdict nothing is known, save what may be conjectured from the ratification of Peter Galoun's estate which followed.[65]

[60] 25 Edw. III., st. 6, c. 8.

[61] It is only fair to state that Maitland, *Canon Law*, pp. 156–157, has interpreted this statute differently, and that the present writer has given reasons for holding the view expressed in the text in "*Execrabilis* in the Common Pleas: Further Studies", which appeared in *Cambridge Law Journal*, I. 71.

[62] Gibson, *Codex Juris Ecclesiastici*, tit. XXXIV., cap. 1.

[63] See Booth, *Real Actions*, p. 235.

[64] For the forms of special traverse, see Stephen, *Pleading*, pp. 188–192. The necessity of setting up a title in the impedient is explained in the judgment in Elvis *v.* Archbishop of York and others, Hob. 320–321.

[65] Ratification might even follow a judgment for the king; *Registrum Brevium Orig.*, f. 304b.

As we have seen, the statute of the Gloucester Parliament made some show of confiscating the goods as well as of sequestrating the benefices of the Clementine cardinals on the ground of their rebellion against Urban VI. True, the crown receded from this position later, when the manifold inconveniences of such a step became apparent, but all the same it has been forever put upon the statute roll that the king had presumed to confiscate the goods of certain exalted heretics. Due allowance of course must be made for the fact that these heretics were also alien enemies and that the Commons were mainly interested in this aspect of the case, but, as we have shown from the subsequent letters patent administering the provisions of the statute, the crown was not unwilling to make the charge of schism—if only in a preamble. Moreover, in the matter of Wearmouth church the crown saw fit to base its claim upon that misbelief and schism of which the *fama publica* accused its rector. And so Chief Justice Belknap was moved to make some remarks upon the general question of the loss of property for heresy, with the discussion of which we will conclude this paper. We willingly concede that they are *obiter dicta* and that strictly they are immaterial to the question involved in the case, but nevertheless they still remain of very great interest. The miscreant's lands are forfeit and the lord shall have them as his escheat; such is the case in treason, and all the more does it apply where the treason is against the Sovereign of all earthly lords. This is Belknap's dogma, and the surprised reporter tells us that he swore it was the law. Can it be that the justice's vehemence must be referred to the lack of better authority?

On the Continent the loss of goods and chattels for heresy was no novelty by the time of our case.[66] Gratian stated the principle and vouched St. Augustine for it,[67] and legislation of the emperors enacted it.[68] Provincial councils, especially in the south of France and other regions where heresy was prevalent, systematized the law with every refinement which the greed of secular and clerical lords could devise, with the result that their combined ferocity laid waste the richest and most flourishing province of France. By the time of the fourteenth century therefore there had accumulated a large mass of case law upon the subject, considerable legislation, and several

[66] See Havet, *Oeuvres*, II. 117–180; Lee, "Confiscation for Heresy", in *Eng. Hist. Rev.*, II. 235–259; Pollock and Maitland, II. 544; Tanon, *Histoire des Tribunaux de l'Inquisition*, pp. 523–539.

[67] Gratian, c. 4, C. 23, q. 7.

[68] For Justinian, see *Cod.* I. 5; *Cambridge Med. Hist.*, II. 107–108; *cf. Summa Rolandi* (ed. Thaner), p. 96; for Frederick II.'s famous constitution *Commissi*, see *M. G. H., Leges*, II. 196, 281, etc., and c. 18, VI. 5. 2.

treatises in which the law and procedure applicable to heretics were expounded with admirable clearness and skill.

In England things were vastly different. Until the rise of the Lollards the country had been conspicuous among the realms of Europe for its devotion to the Faith. Such misbelievers as did exist were few and insignificant and their possessions too poor to be worth the trouble of dispute. Consequently there is no trace in England of the bitter conflict over the spoils between the secular and ecclesiastical authorities which was so striking a feature of the Continental situation. The few slight references to heresy in English records are soon told. In 1166 the Assize of Clarendon ordered that the houses of all who harbored Patarini should be plucked up and taken outside the town and burnt.[69] There is no suggestion that there were native Patarini in England and this penalty is imposed on all who sheltered them, without alleging that such persons were not themselves orthodox. A few scattered cases occur of condemnation for heresy and on one or two occasions the death penalty was exacted,[70] but we find no mention of the fate of the miscreants' lands and chattels. Hale[71] asserts that in two cases of the reign of Henry III. heretics have been condemned to the loss of goods, and as the rolls he refers to have been printed since he (and later Maitland) discussed them it is now possible to speak of them with more confidence.

The first case is that of Ernald of Périgord. On June 11, 1236, a mandate issued to the warden of Boston Fair for the arrest of all the wines and chattels of Ernald within his jurisdiction, the king having learned that he had been convicted of heresy. They were to be valued by good and lawful men and the wines delivered to John Colemere or his attorney to be held by him to the king's use and at the king's orders, "notwithstanding anyone who might claim on behalf of the mayor of Bordeaux or anyone else that the aforesaid wines and chattels were his, or offer to warrant them as his, more especially since the goods of condemned persons which are found within his realm and power are due to the king". Somewhat similar orders were given to the sheriff of Norfolk and Suffolk, while John Gisorz, citizen of London, was ordered to withhold a debt of ninety-six pounds which he owed to Ernald, and to keep the money to the king's use and subject to the king's commands. Finally instructions were given to Colemere to serve the mandates and to dispose of the wines according to instructions to be sent him later.[72] It should be stated

[69] For Continental analogies, see Tanon, *op. cit.*, p. 519.

[70] Pollock and Maitland, II. 547–548.

[71] Hale, *Pleas of the Crown*, I. 394.

[72] *Calendar of Close Rolls, 1234–1237*, p. 359; *cf. ibid.*, p. 294.

that Colemere was keeper of the king's wines and that the Close Rolls bear many memoranda of his official activities, one of which throws fresh light upon the case which was not available to Hale and Maitland. On July 24 following, Colemere was ordered to pay the freight upon ninety casks of wine, the property of "Ernisius de Peregord convicted of heresy and detained at Bordeaux".[73] Ernald is therefore at Bordeaux and we may conjecture that his conviction took place there also. It must be allowed, however, that it was perfectly possible for a heretic to be condemned in his absence[74] and that no legal considerations would prevent a court in England from convicting him of heresy while he was in Bordeaux. The facts that he was from Périgord and that the mayor of Bordeaux was expected to claim his goods strongly indicate that his conviction was in Bordeaux too. But in any case we believe that to be immaterial for our purposes, for the records show beyond all doubt that the king claimed to be entitled to the chattels of a heretic irrespective of the place of his conviction; it is sufficient for the chattels to have been found within the realm and power of the king—a truly remarkable doctrine. At first one is tempted to explain it by the fact that Henry III. was not only king of England but also duke of Aquitaine, but there are difficulties in the way: it seems that a proportion of the forfeiture in Aquitaine went not to the duke but to the mayor of Bordeaux, for how else can we account for his claim? Towns frequently substantiated such rights against their feudal and ecclesiastical neighbors in France.[75] But, taking it as it stands, we believe that the king's position is in perfect accord with canon law, for that system had very peculiar views upon the matter. The so-called forfeiture for heresy is in reality no forfeiture at all in the usual sense of the word. It is not a penal sentence enacted by an avenging sovereign and declared by its courts. Its nature is much more subtle than that. Readers of St. Augustine will recall the mystical sense in which he uses the word "justice" and the endless controversies throughout the Middle Ages on the nature and basis of property. And in Gratian[76] we find that it is this very idea which is responsible for the peculiarities of the law of heresy. The passage from St. Augustine's *Epistles* there preserved argues that the heretic cannot possess the Spirit of Justice, but is completely severed from the divine source of all law and order. Property exists solely in virtue of this principle. The moment a man has become a heretic his own rebellious thought has put to flight the

[73] *Ibid.*, p. 293.
[74] Zanchinus Ugolinus, c. ix.
[75] Lee, in *Eng. Hist. Rev.*, II. 241 ff.
[76] C. 4, C. 23, q. 7.

Spirit of Justice and he is left without a single point of contact with society. He has no rights, no property,[77] no family.[78] And so the *dominium* of ninety casks of wine at Boston Fair vanished as soon as Ernald entertained a heretical thought, and the sovereign of the place became entitled to them.

General considerations therefore support the king's contention against the mayor of Bordeaux. But the *non obstante* in the royal mandate is not confined to claims by the mayor but applies to claims of all other persons, even those who are willing to "warrant" the goods as their own, that is to say, who can prove their title according to the law and custom of fairs. In other words, the king claims the forfeiture notwithstanding the claims of *bona fide* purchasers for value in open market. Once more we must think of the condition of a man whose heresy has bereft him of the Spirit of Justice. Clearly he is so completely outside of the Divine order of things that legal relations with the just are impossible. He can make no contract,[79] can give no title. Even if his heresy is so well concealed that not a soul in the world suspects him, nevertheless he has lost *dominium*, and all his transactions are void. He may have died to all appearances a true Catholic, yet even after his death the inquisitor may try him and find him guilty, and then the declaratory sentence will authorize the application of the logical results of this doctrine; all the property of the heretic will be forfeit into whosesoever hands it may have come and by whatever means.[80] And so with Ernald's wines. Even if they have changed hands several times so that the last owner can vouch to warranty the one from whom he bought them, it will not avail against the inexorable metaphysic of the canonists.[81] Fortunately for such purchasers Ernald finally purged himself of heresy and so in due course the king superseded his mandates and allowed him to continue his business.[82] One thing is clear from the case, and that is that the king was well acquainted with the canon law of for-

77 "Statim commisso scelere, id est cum incidunt in errorem seu heresim, perdunt ipsi omnia sua bona", Zanchinus Ugolinus, c. xviii, § 4; consequently a heretic cannot be subjected to a money fine, *id.*, c. xix, § 1.

78 Gratian, cc. 7, 8, C. 28, q. 1.

79 "Fiunt infames et intestabiles active et passive, nec habent alicuius rei commercium", Zanchinus Ugolinus, c. xviii, § 3.

80 *Id.*, c. xxiv, § 1.

81 Certain of his wines in fact were arrested although in the hands of purchasers; *Cal. Pat., 1232–1247*, p. 149.

82 *Cal. Close, 1234–1237*, p. 485; *Cal. Pat., 1232–1247*, pp. 175, 193. It will be of interest to note that Ernald was a man of note in his own country; he was one of a commission who received half of all the rents and issues of Bordeaux as security for a debt of 6000 marks, for five years. *Cal. Pat., 1232–1247*, p. 49.

feiture for heresy, and was prepared to take advantage of it in England if he could find the goods of heretics within his realm.

The second case mentioned by Hale occurred a few years later and concerned another merchant from the south of France. The slight details that we have correspond closely with the case of Ernald, and so further discussion is unnecessary.[83] Enough has been said to show that there is a certain amount of precedent for the forfeiture of chattels in England for heresy. Belknap however does not mention the loss of chattels, but asserts that the heretic's lands will escheat to his lord, and of this proposition we know no earlier statement in English law. Indeed until now it has been believed that the first mention of forfeiture of lands for heresy was in the statute of 1414;[84] this dictum of Belknap's will therefore carry the history of the penalty a generation earlier than the statute.

It is such questions as these, then, which are raised by a consideration of *Triall 54* in the *Graund Abridgement* of Sir Anthony Fitzherbert, and it is surely not without interest to tell the story of how the rector of Wearmouth became cardinal, pope, and miscreant, how a sheriff's jury was summoned to say whether his church was thereby vacant—in spite of canon law and royal statute, and how Chief Justice Belknap more than thirty years before the famous statute of Henry V. declared from the bench that a heretic forfeited his land, "and swore that this was the law".

THEODORE F. T. PLUCKNETT.

[83] *Cal. Close, 1237–1242*, p. 368.

[84] 2 Hen. V., st. 1, c. 7; Hale, *Pleas of the Crown*, I. 394; Makower, *Const. Hist.*, p. 188.

CANNING AND THE CONFERENCES OF THE FOUR ALLIED GOVERNMENTS AT PARIS, 1823–1826

DURING the time of that extremely interesting experiment in international direction and control known as the era of Congressional Government in Europe (1815–1822), various organizations arose to meet the need. There were the congresses proper, first at Vienna, and then the series of periodic reunions at Aix-la-Chapelle (1818), Troppau (1820), Laybach (1821), ending with the Congress of Verona (1822), when England definitely broke away from the system. Connected with these were other subsidiary conferences on the German Confederation at Frankfurt, conferences on the slave trade at London, and commissions such as those on liquidation of claims, etc. Finally, there was the Ambassadors' Conference of the Four Powers at Paris (after 1818 often including a representative of France), which executed certain important details of the treaties and occupied itself also with cognate matters such as mediation between Spain and her colonies, regulation of ceremonial, adjustments of boundary disputes, and the decision of matters like the residence and claims of Joseph, Lucien, and Jerome Bonaparte and Madame Murat. Their general scope and meaning has recently been analyzed by high authorities, and it is needless to dwell upon them here.[1] They all were of importance in promoting international co-operation and in prolonging the period of collective control. But they all ceased about the end of 1822.

What, however, is less generally known is that attempts were made to prolong the Ambassadors' Conference of Paris from 1823 right down till 1826, and that the decisions of this body (from which England was excluded) had a great influence on European policy, because its members frequently took decisions on their own responsibility, in view of the remoteness of Metternich at Vienna and of Alexander at St. Petersburg. It was, for a time, possible that England might

[1] See Sir E. Satow, *Cambridge Historical Journal*, October, 1923, pp. 23–50; *cf.* also C. K. Webster, "The Congress of Vienna", in *Cambridge History of British Foreign Policy*, I. 500–518, and Alison Phillips, *ibid.*, II. 1–43. It is worth pointing out that a strong attempt was made in 1819 to extend the Ambassadors' Conference to include all important matters. It was resisted with great vigor by Castlereagh (see his letter to Wellington, Sept. 11, 1819, in Wellington, *Despatches, Correspondence, and Memoranda*, 1867, I. 75–76). The project therefore collapsed and the Ambassadors' Conference at Paris remained limited to formal or technical business arising out of the Treaty of Vienna.