VI.

The Canon Law in England.¹⁾

By

H. W. C. Davis, M. A.,

Fellow of Balliol College, Oxford.

I.

The controversy which I have been invited to review is one which begins with an essay, published by Stubbs in 1883, on *The Law administered in the Courts of the English Church between the Conquest and the Reformation.*²⁾

Subsequently, in his *Lectures on Medieval and Modern History* (1886), the great historian developed some of his arguments in further detail. In both works he argued that the English Church had consistently maintained an eclectic attitude towards the canon law of Rome, adopting only so much of it as harmonised with the case-law of her own courts. This theory was challenged by F. W. Maitland in a series of special studies, which were ultimately collected under the title *Roman Canon Law in the Church of England* (1898). Maitland took as the starting-point of his investigations the works of the English canonists, John de Athona, William Lyndwood and John de Burgh. He argued that these writers take for granted the whole of the Roman canon law, allow to the Pope a plenitude of legislative power, and treat the legislation of the English Church as valid only in so far as it conforms to the *Jus Commune*. Maitland pointed out that some of the evidence upon which Stubbs had relied was irrelevant; the fact that King or Parliament from time to time defied the Pope did not prove that the English clergy claimed autonomy for their church. He

¹⁾ Paper read before the fourth section of the International Historical Congress, 1913. — ²⁾ Printed as an appendix to the official 'Report of the Historical Courts Commission' (London 1883).

also accused his opponent (with good reason) of misrepresenting the character of those parts of the *Corpus Juris Canonici* which are posterior to the *Decretum*. It was erroneous to represent the *Decretals*, the *Sext* and the *Clementines* as „unauthoritative text-books“. Moreover the real question at issue was the attitude of English ecclesiastical judges towards an admittedly authentic pronouncement of the Pope. Stubbs hardly attempted to answer this attack, although he took notice of it in the second edition of his *Lectures* (1900). Admitting that Maitland had convicted him of certain errors, he nevertheless pleaded for further consideration of his main hypothesis.

There are in fact two lines of argument by which Maitland's criticisms might be parried. We might argue that the English canonists were insincere in their exaltation of the Papal power, that their principles were not faithfully applied in the courts of the English Church, and that the clergy were always sympathetic to the lay power when the latter resisted Papal usurpations. This view might be supported by reference to the controversial writings of the York Anonymus (lately edited by H. Böhmer)¹⁾, and of Robert Grosseteste; but it is a view which, if methodically tested, will be found to rest upon isolated scraps of evidence, sheer misinterpretations and unwarrantable conjectures.²⁾ Or, secondly, the defence might take this form: the customs of the medieval English Church were so numerous, so important, so contrary to the *Jus Commune*, that while the supremacy of the *Jus Commune* was recognised in principle, in fact it contributed only a small element to the body of rules which governed the life of the English Church. Both lines of argument have been followed by the latest partisan of Stubbs, the Rev. Arthur Ogle, whose work has attracted some attention chiefly because he accuses Maitland of handling the English canonists too superficially, and of ignoring their excessive respect for English custom.³⁾ To the subject of

¹⁾ *Libelli de Lite*, III, 642—687; *Kirche und Staat in England und in der Normandie* (Leipzig 1899), pp. 177—269, 436—497. — ²⁾ See my article, *England and Rome in the Middle Ages in the Church Quarterly Review*, 1903, pp. 118—142. — ³⁾ *The Canon Law in Mediaeval England* (London 1912).

custom I shall return in the latter part of this essay. But first it is necessary to say something on the subject of the sources. Some of the problems, and not the least important, which the controversy has suggested, have been definitely laid to rest. Others however remain which can only be solved when the evidence has been more thoroughly collected and reviewed. It is improbable that future research will invalidate the positive conclusions of Maitland. But there were some points of great interest and importance which he deliberately abstained from handling, on the ground that the available evidence was insufficient. These points might well be elucidated by the discovery of new materials.

II.

The printed materials are scanty. The great collection of David Wilkins contains the constitutions of the provincial synods of York and Canterbury.¹⁾ The ecclesiastical legislation of the Anglo-Saxon period (up to 870 A. D.) has been more critically edited by Haddan and Stubbs²⁾, but a revision of the later portion of Wilkins' work is much to be desired. The commentary of John de Athona (floruit 1333—1348) upon the legatine constitutions of Otho and Ottobon, and the *Provinciale* (1430) of William Lyndwood, were last edited in the seventeenth century³⁾; but the manuscripts of which the anonymous editor made use are in places obviously interpolated by commentators of a later date. A number of useful documents are indicated in the *Calendars of Entries in the Papal Registers relating to Great Britain and Ireland*, edited for the *Rolls Series* by W. H. Bliss, C. Johnson, and J. A. Twemlow; but the documents themselves have still to be systematically examined from the legal point of view. New ground was broken when Maitland published⁴⁾ certain fragments of the *Summa* of William of Drogheda, who lectured at Oxford in the second

¹⁾ *Concilia Magnae Britanniae et Hiberniae* (London 1737). —

²⁾ *Councils and Ecclesiastical Documents relating to Great Britain and Ireland*, vol. III (1878). — ³⁾ *Provinciale seu Constitutiones Angliae* (Oxford 1679). — ⁴⁾ *English Historical Review* XII, p. 645.

quarter of the thirteenth century and enjoyed some reputation as an authority upon procedure. From William of Drogheda we learn that, in the reign of Henry III., the episcopal courts were generally neglected by litigants; and that most ecclesiastical suits of importance began with the "impetration" of a papal writ appointing judges-delegate, who sometimes at least received instructions on the point of law from Rome. Under such conditions it may seem unlikely that native custom would receive generous treatment. On the other hand the judges-delegate were usually Englishmen, who might be expected to show as much favour to custom as they dared. It would therefore be interesting to bring together and to examine, in their legal aspect, the extant records of cases heard by judges-delegate. We should then be in a better position to estimate the real importance of English custom as a factor modifying the *Jus Commune*. Another much-needed work is a critical edition of the many rescripts relating to English law-suits which are incompletely or corruptly cited in the *Decretals*.¹⁾

Last but not least we need more light upon the laws and customs which ruled the daily life of the English parish clergy. These are not much discussed by contemporary judges and jurists, who treat them as matters of common knowledge. They were so once, but they are not so now. What were the rules which it behoved the English priest to remember when he baptised, when he solemnised a marriage, when he heard confessions and gave absolution? Were these rules derived from provincial and diocesan legislation, from the findings of English law-courts, from local usage? Or was he expected to be familiar with the canon-law of Rome?

The materials for answering this question have still to be thoroughly examined. Not a few manuals were composed, in the fourteenth and fifteenth centuries for the practical guidance of the parish-priest. Some had an international circulation. The *Manipulus Curatorum*, for example, was the work of a Spaniard, Guido de Monte Rocherii, who

¹⁾ Cf. the remarks of Maitland in *Roman Canon Law* p. 122.

wrote at Teruel in Aragon (1333) and dedicated his work to Bishop Raimund Gaston of Valencia; but by the year 1476 it had been printed in Holland, in Piedmont, at Essling and Augsburg, at Paris and at Rome.¹⁾ In the fifteenth century it circulated in manuscript among the English clergy; there is a copy in the library of New College, Oxford (MS. 304). It was printed at London in 1502, and two more editions appeared there in 1508. The English clergy could therefore afford to put their trust in a manual which, even as edited for the English market, contains no references to English local custom. Still it is true that they preferred the work of an Englishman, when it was obtainable; and from an early date such works were written for their use.

Of these the most popular has been used by Maitland.²⁾ It is entitled *Pupilla Oculi*; it was printed in 1510 by William Bretton, but had circulated in manuscript long before that date. In Bretton's edition the author is stated to have been one John de Burgh, who appears as Chancellor of the University of Cambridge in 1384, and was also rector of Colingham. This attribution is confirmed by the colophon of one of the earliest manuscripts (Corpus, Oxford, Ms. 162). The work bears, in the printed edition, the date 1385; which is to some extent confirmed by internal evidence. The writer makes systematic use of the constitutions of the English Primates from Stephen Langton downwards; and the latest which he quotes is of the year 1378. This, he says, has according to some people been revoked (fo. 57), which sounds like the remark of a country rector, now remote from authentic sources of information. As the earliest MSS. belong to the last years of the fourteenth century, the traditional date of the work cannot be far wrong.³⁾

But John de Burgh was not the first Englishman to compose such a manual. In his preface he acknowledges

¹⁾ Several of these editions exist in the Bodleian Library; the rest are noted by J. G. T. Graesse *Trésor de Livres Rares et Précieux* (Dresden 1859), s. v. *Monterocherii*. — ²⁾ *Roman Canon Law*, p. 40. —

³⁾ The *Pupilla Oculi* exists in the following Oxford MSS., all of the late 14th or early 15th century; Balliol MS. 120, Magdalen MS. 110; Corpus Christi MS. 162; Exeter MS. 41; Brasenose MS. 14.

obligations to anonymous predecessors, and in particular to the author of a treatise called *Oculus Sacerdotis*, which had won exceptional popularity. The *Oculus* is extant in a considerable number of manuscripts, and its vogue is further proved by the fact that parts of it were translated into English rhymed verse for the benefit of the illiterate. By copyists and librarians it has sometimes been confounded with the *Pupilla Oculi*, which is the less surprising since the two works have much material in common. But it is a work of earlier date, and emanates from a less scientific school of jurisprudence. The author is diffuse, given to repetitions and incapable of arranging his subject in an orderly fashion. It is no wonder that he was eclipsed by John de Burgh, whose work ran through a number of editions, while the *Oculus* remained unprinted. But the *Oculus* none the less deserves our attention. The author knew his subject; and he was in particular an authority on the penitential system, to which he devotes a large proportion of his space. He describes himself as in *officio penitentiarii constitutus*; his hostile references to the pretensions of the regular orders suggest that he belonged to the ranks of the secular clergy. The bibliographer, Bale, gives his name as William de Pagula, says that he was vicar of Winkfield (co. Berks), and dates him c. 1350. The internal evidence of the work points to a slightly earlier date. The author shows no knowledge of the work of John de Athona, which was composed before 1348; or of the penal legislation of Archbishop Stratford, issued in 1341. Stratford's constitutions he would certainly have noticed if he had known them, for he gives a catalogue of offences which, under provincial constitutions, are punishable with excommunication. On the other hand he gives the text of the *Carta de Foresta*, as confirmed by Edward I in 1301. His work therefore belongs to the period 1301—1341.¹⁾

¹⁾ Several MSS. of his work exist in Oxford libraries. Three at least are of the fourteenth century: Balliol MS. 83; New College MS. 292; Trinity MS. 18. The Balliol copy was given by Richard Bole, Archdeacon of Ely (d. 1477); a proof that the work was still esteemed a hundred years after it was written.

Both these works contain a mixture of theology, casuistry and law. John de Burgh is a better jurist than his predecessor; for he wrote after Archbishop Stratford and John de Athona had founded a more critical school of canonists, and had set the example of collecting the materials. In the *Pupilla Oculi* the provincial constitutions are more systematically quoted than in the *Oculus Sacerdotis*. But both writers adopt the same attitude to these constitutions, treating them as bye-laws which ought to be studied in the province for which they were issued. Both cite as their main authorities the decretals and the standard foreign canonists. Both show a wholesome respect for the Pope's prerogative. The *Pupilla Oculi* gives a long list of offences for which absolution must be sought in the Roman Curia (Balliol MS. 83, fo. 19); and is careful to point out that excommunications imposed by provincial synods have less serious consequences than those which are imposed by the canons (ib. fo. 18 b). John de Burgh notices that the modern formula of baptism has been imposed by Rome on all the Latin churches.¹) Both, it is true, show themselves willing to recognise English custom when they come across it. The *Oculus* quotes Peckham's constitution *Quum Malum* (of 1279) as regulating the times and seasons of baptism (Balliol MS. fo. 33). John de Burgh says that the proper method of immersion in baptism is fixed by the custom of each church; the priest who departs from the local custom is guilty of a serious fault (fo. 6). He also remarks that the ordinary in each English diocese prescribes new saints' days as he thinks fit (fo. 122). But, the English customs which they notice are neither very numerous nor very important. In dealing with the important question of marriage they are entirely guided by foreign authorities — a fact to which it will be necessary to recur.

On the whole these works corroborate the conclusions of Maitland. They lead us to suppose that, in the points which we should call important, the English Church differed

¹) fo. 5 (ed. Bretton): "*Ecclesia Romana aliam formam instituit ... et ad istam totam ecclesiam Latinam obligavit*".

little from those of France and Spain and Italy. But it is still desirable that the books of this class should be sifted carefully for traces of English custom. We have only dealt with two of the most important; there are others which would repay comparative study.¹⁾

III.

Let us now return to the theory of Stubbs, and to the arguments of his most recent defender, Mr. Ogle. The latter takes it for granted that his illustrious master had good reasons for embracing a theory which he defended in two separate publications. And there is no doubt that Stubbs was moved by considerations which he does not expressly mention. Unrivalled in the critical analysis of historical texts, he was not infrequently uncritical in his attitude towards legal tradition. This has been noticed by those who have followed his investigations into manorial origins. There he took as his starting point the definition of the manor which was current among seventeenth-century lawyers. Similarly, in writing of the courts-Christian, he too hastily endorsed the tradition which he found in vogue among the ecclesiastical judges of his own day. This tradition was admirably formulated in a judgment²⁾ (1844) of Sir Robert Phillimore, with which Stubbs must have been acquainted:

“The peculiar character of the English People and the English Church is also strongly shown in their determination not to admit the general body of the Canon Law into these realms, but only such portions of it as were consistent with the Constitution, the Common Law and the peculiar usages of the Anglican Church. The rules of the Canon Law were principally introduced into this country, and considerably modified in their introduction, through the medium of English provincial constitutions.”

¹⁾ For instance, in Oxford Libraries: the *Manuale Sacerdotis* (Jesus MS. 1); the *Manuale Sacerdotum Parochialium* and the *Directorium Sacerdotum* (Trinity MS. 7). — ²⁾ *Martin v. Maconochie* (L. R. 2 Adm. & Eccl. pp. 150—5).

The second of these propositions rests upon the erroneous belief that the whole law of the English Church is contained in Lyndwood's *Provinciale*, that famous compendium of the English provincial constitutions. This belief, accepted by Stubbs, must be rejected by anyone who reads Lyndwood with moderate attention. The glosses of Lyndwood are far more important than the texts upon which he is commenting; and the glosses imply, in every paragraph, that the Roman canon law is binding upon the English courts-Christian. Lyndwood is careful to explain how narrow is the sphere within which provincial and diocesan synods may legislate:

"Possunt namque archiepiscopi et episcopi constitutiones facere Juris Communis declaratorias et revocatorias; et, ubi poena deficit in jure, possunt poenas apponere et veterem poenam augere. Possunt etiam constitutionibus papalibus addere et eas supplere, et ad correctionem morum statuta facere praeceptoria, prohibitoria et poenalia, dum tamen Jus Commune non subvertant."¹)

The exaggerated importance which Sir Robert Phillimore and his authorities attached to provincial constitutions can only be explained as a corollary of their fundamental assumption that no rescript or decretal was valid until it had been "received". They argued upon a priori grounds that there must have been some definite and constituted authority which received or rejected new papal legislation; and they found it natural to suppose that this work was done by the representative legislatures of the English Church.

But what are the facts which justify this fundamental assumption? Sir Robert Phillimore had evidence of a kind at his disposal; but it is less satisfactory to the scientific historian than to the lawyer in search of the received tradition. He relied upon the obiter dicta of such judicial luminaries as Sir Matthew Hale, who states in his *History of the Common Law* (1679) that:

"All the strength that either the papal or imperial laws have obtained in this kingdom is only because they have been

¹) *Provinciale* p. 70, s. v. Juramento. Cf. pp. 136, 137, 154, 168.

received or admitted, either by consent of parliament, and so are part of the statute law of the kingdom, or else by immemorial usage and custom in some particular cases and courts and not otherwise."

Hale arrived at this conclusion by two converging lines of argument. As a jurist he held that laws come into being either through legislation or through the force of custom; and that no laws are binding upon a community except those which it has made for itself in one or other of these ways. This theory of state-rights had obtained in the English courts since the days of Henry VIII. But furthermore Hale accepted as historical evidence the fantastic picture of the past relations between England and Rome which were current among the judges of Elizabeth and James I., and which had been consecrated by the authority of the great Sir Edward Coke. In the famous *Case of Commendams* (1612) the judges circumstantially described the progress of papal usurpations and concluded that:

"These Decretals being published were not anywhere fully received. In fact they were in part openly rejected by France, England and other countries of Christendom. . . Whence it is evident that they had no binding force except where the people received them. . . And the Bishop of Rome has nothing to do with the interpretation, dispensation or execution of these laws in England, any more than the Master (sic) of New College in Oxford has jurisdiction over King's College in Cambridge by virtue of the fact that the statutes under which King's College is governed were mainly borrowed from the foundation-book of New College."¹)

This and similar lucubrations have, however, no better warrant than some statements, which were inserted by Henry VIII., or his draftsmen, in certain Acts of the Reformation Parliament, to the effect that the Pope's laws have never been recognised in England save by "usage, sufferance and custom".²) If we ask whence Henry VIII. obtained this comfortable doctrine, we have only to go back to the

¹) Sir John Davies' Reports (1674) p. 69 b. — ²) *Statt.* 25 Hen. VIII c. 21; 35 Hen. VIII c. 36.

year 1515, to his first dispute with the English clergy. On that occasion his canonists cited the example of the Greek Church to prove that each national church is sovereign within the sphere of her own jurisdiction; and they appealed to the *Decretum* for the admission that the legislation of the universal church is only binding where it is received. *Jura ecclesiastica quorum contrarium practicatum est per consuetudinem per trecentos annos non ligant nisi recipientes.*¹⁾ Such flimsy arguments hardly call for refutation. To suggest that the English Church stood historically on the same independent footing as the Greek Church was absurd. Gratian never meant to say what is here put into his mouth. His general doctrine is that custom cannot avail against positive law. He comits himself in one place to the dictum: *moribus utentium in contrarium nonnullae leges hodie abrogatae sunt.*²⁾ But he is speaking here of customs which obtain throughout the whole Catholic church; nothing is further from his intention than to assert the divine right of a provincial or national custom. He makes his meaning clear immediately afterwards: *haec etsi legibus constituta sunt, tamen quia communi usu approbata non sunt, se non observantes transgressionis res non arguunt.* For us the important fact is that the tradition of the English lawcourts, when traced to the fountain-head, is found to have its source in doctrines of political philosophy, and in misinterpretations of the canon law. The tradition itself is an interesting historical fact; but Stubbs was too hasty in assuming that it rested on a historical basis.

The Tudors were perhaps on safer ground when they tried to popularise a new conception of the national Church, as a community which was represented for all purposes by the sovereign, and for which the sovereign could legislate at his pleasure, using the assistance either of Parliament or of representative assemblies of the clergy. On such a theory the Acts of Uniformity and Supremacy, for instance, could be represented as acts of the English Church. Ever since

¹⁾ Keilweys Reports (1688) fo. 184. — ²⁾ C. 3 D. 4.

the Reformation it has been the tendency of Anglican historians to carry back this new conception of the Church into the medieval period. The ordinary English churchman, we are told, was better represented by the King and Parliament than by the archbishops and their provincial synods. It was the English Church which in effect issued such measures as the Statutes of Praemunire and Provisors.¹⁾ But such a view of the situation is contrary to the most fundamental ideas of the Middle Ages on the subject of church government. The English clergy repeatedly protested against the statutes of Praemunire, by which they benefited as much as the laity. They were bound to do so. Whatever anomalies they might be compelled to endure for the sake of peace, they could not accept the principle that the laity may legislate for the church. The laity can neither make nor abrogate the canon-law.²⁾ Laymen sometimes claimed the right to commit both of these enormities and could not be restrained. But to yield before superior force is one thing; to condone it is another. The Pope himself, we are told, may be obliged to put up with (*sustinere*) laws or customs which he is powerless to sweep away; *sed talis tolerantia non excusat peccatum, nec dispensationem inducit.*³⁾ This was the attitude which the official teachers of the English Church adopted whenever the canon law was flouted by King or Parliament.

When Henry VIII. or Sir Edward Coke asserted that some canons were not received in England, they usually meant that the lay power did not receive them; that statutes had been passed, or that writs of prohibition had been issued, to restrain their operation. But in the course of time it sometimes happened that a litigant found his profit in contending that this or that rule of canon law, though never repudiated by the English State had never been allowed by the English Church. The plea was occasionally allowed, apparently on the erroneous assumption that the provincial

¹⁾ So Mr. Ogle *Canon Law* pp. 60, 180. — ²⁾ See, for instance, the commentary of Bartol. Brixensis on the passage of Gratian quoted above (c. 3 D. 4). — ³⁾ John de Turrecremata, commenting on the same passage of Gratian.

constitutions, as collected by Lyndwood, contained the whole of the elder law of the English Church. As the result of legal decisions it was possible, at the close of the seventeenth century, for Stillingfleet to compile a list of „non-received“ canons.¹⁾ But in most cases these are canons which the Crown refused to recognise. For example the royal courts refused to recognise legitimation per subsequens matrimonium; but we know from Bracton that the courts-Christian recognised such legitimations for ecclesiastical purposes, quantum ad ordines et ad dignitates.²⁾ What we require, and do not find, is a clear case of a canon rejected by a court-Christian. In 1844 one half of the judges in the House of Lords, the highest court of appeal, thought that they had discovered such a case; they held that a marriage per verba de praesenti had never been accounted as valid by the English Church.³⁾ The fact was, however, that they misunderstood the effect of the provincial constitutions against clandestine marriages. The contracting parties were liable to spiritual penalties, but the marriage held good if the fact of the consensus were fully established. This is expressly stated by Lyndwood⁴⁾, and the doctrine was no innovation of the fifteenth century. John de Burgh states the same doctrine, and explains, as above, the effect of the provincial constitutions.⁵⁾ Earlier still we find the doctrine in the *Oculus Sacerdotis* (Balliol MS. 83 fo. 36).

The theory of „reception“ is not only unsupported by positive evidence. If pressed to the logical conclusion, it produces some absurd results. By whom were canons „received“? The only possible answer is, as we have seen, by provincial synods. But the English Church contained then, as it still contains, two provinces; and our native canonists are positive that one province cannot legislate for another.⁶⁾ Joint councils of the two provinces were sometimes held, but only on the summons of a Papal legate — at all events

¹⁾ Stillingfleet *Ecclesiastical Cases* (1698) p. 356. — ²⁾ Bracton fo. 417 b. — ³⁾ In *The Queen v. Millis* (Reported in 10 Clark & Finnelly, 534—904). — ⁴⁾ *Provinciale* p. 271 s. v. ad hoc; p. 276 s. v. clandestina. — ⁵⁾ *Pupilla Oculi* fo. 97 b—98 b. — ⁶⁾ Lyndwood p. 18 s. v. *Provinciae*. *Pupilla Oculi* fo. 59.

this is true of the period which produced the chief, the permanently recognised legislation of the English Church. Can we imagine such bodies deliberating, before a legate, whether Papal laws shall or shall not be received? It is as unthinkable as the suggestion of Stubbs that the constitutions of these pan-Anglican synods required to be recognised by the synods of the two provinces sitting separately. And again, if the development of English Canon-law depended on the activity of provincial synods, we must suppose that each of the two English provinces possessed a separate system of canon law; and, further, that the province of York had very little law at all. We must in fact vindicate the independence of the Anglican Church by destroying her unity.¹⁾

Stubbs failed to appreciate these difficulties. Another difficulty, however, he did anticipate and answer by a theory for which he seems to be solely responsible. In Lyndwood's time the English canonists recognised no provincial constitutions of an earlier date than the primacy of Stephen Langton. Could it be supposed that the English Church remained in a lawless condition from de Norman Conquest to the date of the Council of Oxford (1222)? Stubbs replies that in this period the English Church was ruled by the judge-made law of her own courts — a system analogous to the Common Law of the Curia Regis. This hypothesis had the merit of squaring with his general theory that national development is a process in which foreign influences have played a comparatively small part. It had the defect of being purely hypothetical. For where is the evidence that such a body of ecclesiastical precedents was recorded and cited? It is unknown to John de Athona and to Lyndwood, who only cite the decisions of the Roman Rota. In the fifteenth century the English Church could boast of some peculiar customs. But these customs were presumed to rest on immemorial usage. It would be useless, or worse, to name

¹⁾ Probably Stubbs was influenced by a mistaken idea of the importance of the promulgation of canons. Archbishops and bishops were required to promulgate the legislation of the Pope; but Lyndwood, like his continental brethren, insists that promulgation is not an indispensable formality. (*Provinciale* p. 19. s. v. *publicam notionem*.)

a date at which, a judge by whom, they had been acknowledged. This English case-law, if it existed, was carefully concealed from view by those who were conversant with it.

Mr. Ogle though proclaiming himself a loyal follower of Stubbs, deserts the original position of his master, and argues that the independence of the medieval Anglican Church is proved: a) by certain cases in which, as he alleges, a decretal is set aside by a provincial constitution; b) by certain English customs which he regards as incompatible with the *Jus Commune*. It does not seem that he has made good either of his point; but it is necessary that we should justify this contention by reviewing the evidence upon which he chiefly relies.

The provincial constitutions which he cites are three in number; two of them were issued by Archbishop Peckham (1279—1292) and the third by Archbishop Stratford (1333—1348).

a) In 1279 Peckham published the constitution *Audistis*¹⁾ against pluralists. He explains that he is endeavouring to reconcile a decree of the fourth Lateran Council (1215) with a legatine constitution of Ottobuoni (1268). The net effect of those two ordinances, literally interpreted, was to deprive the pluralist of all benefices. Peckham, rather sophistically, argues that he is fulfilling the true intention of either ordinance (*mentem constitutionum . . . clarius advertentes*) if he condemns existing pluralists to forfeit all benefices except the last. This was an audacious step; he justifies himself to Pope Nicholas III.²⁾, by saying that the strict rule against pluralism had been generally disregarded in England, and that he could not suddenly enforce it without mitigation. The strict rule was contained in the decree *Ordinarii Locorum*, which had been issued at the Council of Lyons in 1274; and this decree Peckham had carefully refrained from quoting on the point in question. How Peckham justified the suppression we can only guess; but it is worth noticing that *Ordinarii Locorum* is in effect a re-enactment of previous legislation; it deprives the pluralist of all benefices that he holds unlawfully; and Peckham

¹⁾ Wilkins II, 33. — ²⁾ Peckham's *Registrum* I, 137.

may have argued that this did not necessarily mean all benefices for which no dispensation could be produced. In any case Peckham was guilty of irregular conduct. How his explanations were received by the Curia we do not know; Nicholas III. was probably dead before they reached their destination, and there is no reference to the subject in the correspondence of his successor, Martin IV. But in 1281, in another provincial synod, Peckham made amends for his fault, by promulgating the whole of the decrees of Lyons (including *Ordinarii Locorum*) and by reminding the synod that disobedience to the Papal law is as the sin of idolatry and witchcraft. If they think these laws unsuitable to England, their only remedy is to petition the Pope for some relaxation.¹⁾ Whether made spontaneously or under compulsion, this is a clear confession that the Anglican Church has no power to pick and choose among the Pope's enactments; and we may fairly say that the Archbishop was in 1281 doing public penance for the indiscretion of 1279.

b) Peckham's legislation about the times of baptism professes to be an interpretation of two legatine constitutions. Mr. Ogle thinks that Peckham was in effect annulling the constitutions which he professes to explain. The facts lend no support to this view. The old rule of the Latin Church was that baptisms should only be celebrated at Easter and Pentecost, except in cases of urgent necessity.²⁾ But in the thirteenth century this was interpreted (e. g. by St. Thomas) as meaning that those were the proper seasons for "solemn" baptism; but that children should normally be baptised as soon as possible after birth. Otho and Ottobon make no attempt to set aside this interpretation, which had been universally accepted in their time. They denounce a current English superstition that Easter and Pentecost are unlucky times for baptism; and they ordain that parish-priests shall encourage parents to reserve their children for the two solemn baptisms. What Peckham did was to make it compulsory that children born within eight days of either festival should be baptised at that festival; but at the same time to state

¹⁾ Wilkins II, 51. — ²⁾ cc. 12, 16 D 4 de cons.

expressly that in all other cases parents might do as they pleased. He recognises, more explicitly than Otho and Ottobon, the received interpretation of the law; but his only innovation is to provide more effectively than they had done for the "solemnity" of the two great baptismal seasons.

c) Stratford, in the constitution *Licet Bonae Memoriae*¹⁾, forbids even the regular clergy to farm out their tithes to laymen. Lyndwood remarks that this appears to conflict with a rescript of Innocent III., *Vestra nobis relatio*²⁾, which permits the religious to do this very thing. On the other hand Stratford had in his favour a general ordinance of Alexander III., *Quamvis sit grave*³⁾ which forbids the granting of tithes to laymen. Lyndwood succeeds, by some ingenious interpretations, in reconciling the two apparently discordant texts; and then finds a sense for Stratford's constitution which will spare him the necessity of repudiating it. Stratford had obviously made bad law. But need we suspect him of anything worse than an unconscious blunder?

Let us now consider the alleged mass of English customs irreconcilable with the *Jus Commune*. It may be admitted that Lyndwood's doctrine of the nature and validity of custom is logically inconsistent with an Austinian theory of sovereignty. But the doctrine is not peculiar to Lyndwood, not of English origin. It is to be found in the Roman canon law. First there is Gratian's dictum, which we have already quoted, and which was commonly used to defend any universally accepted custom. Secondly we have a ruling of Innocent III. that a laudable custom, which is to the advantage of a particular church, ought to be upheld.⁴⁾ Thirdly there is the statement of Gregory IX. that a custom may stand, even against positive law, if it be reasonable and has been prescribed for as the law requires.⁵⁾ In regard to custom the policy of Rome was statesmanlike, but not strictly logical. It would have been impossible to extirpate every custom which ran counter to positive law. The Latin world could not be made to fast on Sundays during Lent.⁶⁾ Every-

¹⁾ *Provinc. Constitutiones*, p. 44 (Oxford edition). — ²⁾ c. 2 X. III, 18. — ³⁾ c. 17 X. III, 30. — ⁴⁾ c. 42 X. V, 3. — ⁵⁾ c. 11 X. I, 4. — ⁶⁾ c. 6 D. 4.

where the rule that no ordinary save a bishop might deal with a criminous clerk was set aside by custom.¹⁾ A place had to be found for custom in the Papal jurisprudence. The growth of custom was inevitable, and on the whole it was best to tolerate all local customs which were not flagrantly against general principles, or flagrantly inimical to the Pope's prerogative. No custom, it was held, could avail against a decretal; but from any decretal there might be a dispensation. Boniface VIII. goes to the length of saying that, as the Pope is very likely to be ignorant of the customs and privileges of particular places and individuals, he must not be presumed to have annulled them by a law in which they are not expressly mentioned.²⁾

I cannot find that the English canonists go beyond their continental brethren, or beyond the Popes, in their tolerance of custom. Lyndwood is severe on law-breakers, real or supposed, not sparing even Peckham. Both he and John de Athona mention some curious cases of *leges non acceptatae*: a legatine constitution about clerical costume; another about judges-delegate; and two laws, one legatine the other papal, providing for the strict seclusion of nuns.³⁾ In all these cases it is clearly their view that non-acceptance is pure disobedience, and that the offenders have only gone free through the negligence of the bishops who should enforce the law. John de Athona discusses the general question; under what circumstances may a law be disobeyed. He answers: only when observance would lead to scandal or to greater sin.⁴⁾ His attitude could not be more correct.

But are they always willing to stretch a point in favour of a custom which they find established, and to prove, at any cost, by any kind of sophistry, that it agrees with the *Jus Commune*? This seems to be the view of Mr. Ogle. I cannot see, however, that his examples prove his point. Of the customs peculiar to England which are justified by Lyndwood, some obviously fall under the rule of Innocent III.

¹⁾ Lyndwood *Provinciale*, p. 17, s. v. *Inquirere*. — ²⁾ c. 1 in VI^o. I, 2. — ³⁾ Ayton, p. 37 s. v. *Cappis Clausis*; p. 55 s. v. *Faciant Observari*; p. 123 s. v. *Committantur*; Lyndwood, p. 212 s. v. *Cum Socia*. — ⁴⁾ Ayton p. 37 s. v. *Cappis Clausis*.

It is laudable and to the advantage of the church that in England the parishioners should undertake the responsibility, elsewhere left to the rector, of keeping the nave in repair. The same apology can be made for the custom by which testamentary causes are, in England, reserved to the courts-Christian. That the Use of Sarum should be followed in the southern province, is consonant with the rule of Gregory IX.; it is a custom of old standing, and it is reasonable since the Bishop of Salisbury is *ex officio* the precentor of Canterbury Cathedral. In England the procurations of archdeacons are fixed by custom at a lower figure than the decretal *Vas Electionis*¹⁾ allows; but the tariff of *Vas Electionis* is a maximum tariff. It may be anomalous that in England the feast-day of St. Sylvester is usurped by Thomas the Martyr. But this is hardly a revolution, since in any case the day is observed with the same honour. The Decretal *Conquestus*²⁾ leaves to the bishop of every diocese a considerable liberty in settling major feast-days. More serious perhaps is the custom under which, if an English rector dies between Ladyday and Michaelmas, the tithes that are due at Michaelmas may go to the payment of his legacies. But a custom of this kind is admitted and tolerated by the decretal *Suscepti Regiminis*³⁾; Lyndwood's chief doubt is whether the English custom had obtained long enough to be legitimate. He thinks it should hold good, so long as it is interpreted in accordance with that Decretal. And this appears to be the common sense decision.

I do not wish to underrate the multiplicity or the value of the customs which the English Church enjoyed before the Reformation. "The custom of this realm", says Peckham⁴⁾ "is distinct from all others in many points"; so distinct that the Pope may well be asked to modify his legislation, to suit the special case of England. John de Stratford, in like manner, states that Popes and Kings have endowed the English Church with many special privileges, liberties and immunities.⁵⁾ Some of these privileges were extremely

¹⁾ c. 1 Extrav. comm. III, 10. — ²⁾ c. 5 X. II, 9. — ³⁾ c. 2 Extrav. Joh. XXII, 1. — ⁴⁾ Council of Lambeth, 1281. — ⁵⁾ Council of London, 1342.

valuable, while they continued: for instance the "privilege of England", which Henry III. and Edward I. claimed in virtue of an express grant from the Holy See: the privilege that no Englishman should be cited by Papal letters to appear at Rome. Valuable also was the custom which gave to the Archbishop of Canterbury the commission of a *Legatus Natus*. But it remains to be proved that these and many less important customs were inconsistent with the *Jus Commune*: or that, when inconsistent, they were condoned by Roman judges.

Further, is it necessary to argue that the individuality of the English Church consisted in the possession of special laws or customs, which must seem trivial to any thinking man, however important they may be to the ecclesiastical lawyer? In the sphere of clerical discipline and privilege the Pope's legislation was undoubtedly important; but, so far as faith and morals were concerned, the Church enjoyed a rigid constitution. The law and custom of Rome only affected details of church-government; the law and custom of ecclesiastical provinces was concerned with even smaller details. We may compare the medieval Church of England to a regiment in an army. The regiment has a history, a corporate spirit, a tradition, an individuality. But these are very imperfectly expressed in the special laws and customs of the regiment, which may be of infinitesimal consequence.

Note. Since the above article was printed, the import of Peckham's constitution *Audistis* has been fully discussed by Mr. W. T. Waugh (*Eng. Hist. Rev.* pp. 625—635). He argues that Peckham interpreted *Ordinarii Locorum* with strict accuracy, so far as existing pluralists were concerned, though Lyndwood is of the opposite opinion. D.

Außerdem vgl. jetzt auch noch Julius Hatschek, *Englische Verfassungsgeschichte bis zum Regierungsantritt der Königin Victoria*, *Handbuch der mittelalterlichen und neueren Geschichte*, herausgegeben von G. v. Below und F. Meinecke, München und Berlin 1913 S. 156, 186 ff., ein Werk, das auch sonst die kirchliche Rechts- und Verfassungsgeschichte Englands — vor allem das anglonormannische Eigenkirchenrecht und die Entwicklung des englischen Staatskirchentums — in den Bereich seiner Darstellung zieht. St.