MEDIAEVAL STUDIES

Volume XXXIII
1971

PONTIFICAL INSTITUTE OF MEDIAEVAL STUDIES
TORONTO, CANADA
The Constitutional Law of the College of Cardinals: Hostiensis to Joannes Andreae

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I. — HOSTIENSIS

Unlike the modern Codex, the medieval Corpus Iuris Canonici contained no title De sanctae Romanae ecclesiae cardinalibus. Hence this topic had no established place in canonist commentary to make it subject to some regular scrutiny by anyone who taught canon law or wrote about it. This gap did not mean however that canonists ignored the matter completely, but it does mean that their comments were spasmodic, to be discovered in scattered, somewhat unsystematized form. There were of course certain contexts which attracted comment on the cardinalate. The College of Cardinals had made its way in the world, so to say, through its position as the body which elected the pope. Hence it was the electoral law which tended to act as the focussing agent. Gratian had made Nicholas II's electoral decree of 1059 In nomine Domini, D. 23 c. 1 and allocated D. 79 to other problems connected with papal election and vacancy. In the Decretales it was the Third Lateran Council's electoral canon Licet de vitanda logically placed in the title De electione et electi potestate which attracted attention. But there were numerous other places where decretists might choose to say something about the cardinalate — D. 40 c. 6 the famous Si papa concerning the judgment of an heretical pope was a favourite place. Also relevant were any canons which treated of the papal power to decide

1 Canons 230-41.
4 1.6.6.
controverted matters of faith or to issue universal laws. In the Decretales the conventional formula, constantly recurring, that a decision had been made de fratrum nostrorum consilio, was a standing temptation to speculate on its precise meaning and thence to consider the constitutional relationship of pope and cardinals and how the supreme authority was or should be apportioned between them. Thus there had accumulated, perhaps somewhat haphazardly, over a period of a century or so, a stock of canonist argumentation to which any canonist was heir, who might wish to treat more thoroughly of problems concerning the College.

Nevertheless the major decretalists of the decades round mid-thirteenth century took no special interest in the College. Neither did Hostiensis in his Summa which had already been written when he became a cardinal in 1262. In his Apparatus or Lectura however, completed shortly before his death in 1271, there is to be discovered the most detailed analysis of the cardinalate that had yet appeared, one destined to be of great influence on the legal tradition of the future.

It is not difficult to suggest reasons why Hostiensis should discover an interest in the College of Cardinals between the composition of his Summa and of his Apparatus. No doubt his interest had been enhanced through becoming a member of the College. No doubt too the increased attention he gave to the cardinalate was due to that very thoroughness which characterized the way Hostiensis went about his task of expounding the Decretals. Hostiensis was unquestionably one of the most prolific of thirteenth century writers about the theory and practice of papal monarchy and the status of the College of Cardinals formed a natural part of his study of papal authority. But there can be little doubt too that events themselves had disposed him to undertake a more rigorous examination of a number of problems concerning the College. At the time of his death (25 Oct. 1271), the apostolic see had just emerged from a vacancy of nearly three years.

It was not the first time within living memory that vacancy had been intolerably protracted. Such crises inevitably made questions about the government of the Church during vacancies, and of the necessity for electoral reform, very real ones. Further, they brought the College into disrepute. Hostiensis said specifically that he felt it necessary to defend it against those critics (unfortunately not named) who he said were seeking

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to reduce its authority to virtually nothing. What Hostiensis wrote about the cardinalate was informed throughout by close contact with actualities, like so many of his other juridical analyses.

Hostiensis was no more systematic about the presentation of his contribution to this vein of canonist thought than had been his predecessors. The first task must therefore be to search through the Apparatus and assemble all the relevant material and the second, to classify it. There are some fourteen glosses in the Apparatus which treat directly of the College. It seems reasonable to divide them into three main types.

Firstly there are a number of quite conventional thoughts about the nature of the College and the cardinalate, significant for the historian as the ordinary stock commonplaces of papal practice and of canonist theory. Second comes a group of four particular problems. One concerning the disciplining of errant cardinals, was suggested by a decretal on the alleged deposition of a cardinal for non-residence in his titular church. A second, about whether the College was in law really a collegium, arose from contemporary criticism. Also of strictly contemporary origin were the two further problems: possible remedies for an electoral deadlock and the power of the College during vacancy. The final class comprises material relevant to the general question of what constituted, for Hostiensis, the constitutional relationship of pope and cardinals. Was his view 'monarchic' or 'oligarchic'?

'Today', said Hostiensis, 'the Roman Church holds that there is no dignity higher than the cardinalate'. This is because of its special position in relation to the papacy. The cardinals get their name from this special relationship; as the pope is the cardo of all the churches, so those who assist him in his responsibility for the universal Church are cardinales. As the Roman senate was said to be a part of the emperor's body so was the College of Cardinals part of the pope's body. The pope was their special head, they his especial members. He should love them as himself while their obligation to obey him is stricter than anyone else's. The College is a senate of especial advisers and assistants and without its counsel he ought to do little or nothing. These unexceptionable generalities had for the most part long been common property. They are not in themselves in any way a curtailment of papal power. For evidence that it is possible to define the College of Cardinals as a senatus and to dignify the cardinals as the especial advisers and assistants of the pope without any oligarchic implications, one need look no further than c. 230 of the modern Codex Iuris Canonici.

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8 Assembled in the Appendix to this article.

9 'S. R. E. Cardinalea Senatum Romani Pontificis constituant eademque in regenda Ecclesia praecipui consiliarii et adiutores assistunt'.

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An especial mark of the cardinals’ superiority over other ecclesiastical dignitaries was in their exemption from the jurisdiction of anyone save the pope and their brother cardinals. In 1352 the College as a whole tried to establish the principle that the pope could not legally depose a cardinal without the consent of the College. Could the great weight of Hostiensis’s authority be claimed for this view? It could certainly be found in the Apparatus, but not as his own view. It was customary, said Hostiensis, for the pope to consult the cardinals before excommunicating one of them. But some people, he continued, went on further to argue that this consultation was of necessity, that he could not excommunicate without the consent of the other cardinals. Hostiensis, following the glossa ordinaria, did not believe this. Such penalties were a matter for the plenitude of power which belonged to the pope alone and Hostiensis was not attempting to limit it.

Hostiensis envisaged three possible solutions to the problem of how to resolve an electoral deadlock. One possibility was the introduction of additional clergy to assist the College to come to a decision. This he rejected on the grounds that law and usage reserved election to the cardinals alone and this principle should be adhered to. Another possibility, which had been suggested nearly a century earlier by Huguccio, was for the cardinals themselves to create sufficient new cardinals to break the impasse. This might be justified on a general principle, quod in maior conceditur licitum esse videtur et in minori; if the cardinals can make the higher dignity, a pope, it would seem they must be able to make a lesser one. But this proposition raised large questions about the power of the cardinals during vacancy. These Hostiensis was to tackle elsewhere. For the moment he

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11 Appendix, no. 6. Pierre d’Ailly was in error in asserting: ‘Unde Hostiensis et post eum quidam canonistae teneuunt quod in casu quo depositio cardinalis immineret facienda, generale concilium foret congregandum’. Tractatus de materia concilii generalis, ed. F. Oakley in Appendix III of his The Political Thought of Pierre d’Ailly (Yale, 1964) 328. The Colonna cardinals had held this opinion, cf. n. 13 below.

12 3.4.2. s.v. ab omnibus.

13 The Colonna cardinals, deposed by Boniface VIII, were to vehemently oppose this view on the grounds that the cardinals could not fulfil their proper function if ‘sub colore plenitudinis potestatis’ they could be easily silenced and claimed that cardinals could only be deposed in a council, H. Denifle, “Die Denkschriften der Colonna gegen Bonifaz VIII und der Cardinale gegen die Colonna”, Arch. Lit. Kirchengesch. 5 (1889) 522.

14 Appendix, no 3.
was content to reject Huguccio's opinion with an analogy of a type Hostiensis used quite commonly. A cathedral chapter had the power to create a bishop but it was forbidden in law to create a rector. Hostiensis was thus driven back to the first possibility he had put forward; that a type of legalized violence should be used to coerce the cardinals into early agreement. The suggestion that the secular arm should be invoked to place the cardinals in close confinement until they agreed was no new one in canonist thought. At least two of the early decretalists, Alanus Anglicus and Tancred, had canvassed this solution and so too had the glossa ordinaria. These jurists apparently saw only one serious legal objection: it gave the secular power authority over the spiritual power. But as Hostiensis pointed out, there was nothing objectionable in the principle that the secular power could supplement the shortcomings of the ecclesiastical power, providing this were done de licencia ecclesiae. Hence he strongly recommended the adoption of the conclave principle, paternity of which idea he ascribed to Tancred, and added as a rather draconian touch of his own, that the cardinals should if need be, be starved into agreement.

When the pope dies where does his sovereignty lie, who has plenitude of power? Hostiensis's answer to his own question prompted the most detailed of his disquisitions on the cardinalate.

It must be admitted that his discussion of this question was not altogether free of ambiguities and loose-ends. But his general position is clear enough. He posited the axiom that the Roman Church never dies ('Romana ecclesia censetur ecclesia que nunquam moritur'), and argued that in a vacancy the College was the surviving part of it and concluded that therefore the plenitude of power must reside with the College. But did the College have the power in the same way as the pope or, in other words, could the College exercise the same jurisdiction as the pope did when he was alive? Hostiensis was clear that it could not: 'I believe' he said, 'that the cardinals have no authority to concern themselves with those cases specially reserved to the

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17 Appendix, no. 13.
pope’. Hostiensis tried to solve his dilemma with a distinction. A decre-
tal of Innocent III concerned with infant baptism had spoken of one school
of theological opinion which held that the virtues were infused in an infant
by its baptism quo ad habitum but not until it reached adult age, quo ad usum. 17
Hostiensis tried to put this phraseology at the service of his present problem:
the cardinals might be said to have the plenitude of power during vacancy
habitum but not usu. It was not perhaps a very clarificatory distinction in
the new context.

Hostiensis was however more convincing when he treated of the pro-
blem in its particular applications; what, if anything, of papal jurisdiction
might the cardinals exercise in practice during vacancy?

Hostiensis found that certain governmental processes continued during
vacancy. The office of penitentiary did not fall vacant on the death of a
pope nor did a papal legateship lapse. The cardinals acted in the pope’s
place when prelates-elect came to the curia for the prescribed canonical
confirmation. But he was particularly concerned with establishing that
the College had the authority to act in cases of ‘great, evident and imminent
necessity’. He argued that the cardinals did in practice exercise such
a power and that what was established custom should in this context be
accepted as a reliable guide to what should be the law, particularly when
the law already allowed such a power to collegiate bodies of lesser status.
This pragmatic argument was supported by a theological one argued with
a wealth of scriptural quotation. Christ’s promise to be with the Church
all days was not less applicable when the apostolic see was vacant. The
College was the visible evidence that God did not intend to leave his Church
without a shepherd. Under the headship of Christ the Roman Church
lived on in the College of Cardinals.

Thus Hostiensis’s final position about the authority of the cardinals
during vacancy was that while certain routine functions were continued
by them they had no power of jurisdiction in cases needing the pope’s per-
sonal action. They did, however, have a discretionary power to act in emer-
gency situations.

An insistent theme constantly recurring in Hostiensis’s analysis of the
position of the College of Cardinals was that it shared in papal government.
It judged and ordered the whole world with him; it shared his responsibil-
ity for the common welfare of the whole Church; it formed one body with
him for the tota sollicitudo of Christendom. What was the precise nature of
this sharing? What was Hostiensis’s view of the constitutional relationship

17... nonnullis dicentibus dimitti peccatum et virtutes infundi habentibus illas quo ad usum
donec perueniant ad etatem adultam”, 3.42.3.
of pope and cardinals? Was his view 'oligarchic' or 'monarchic'? Did Hostiensis believe that the pope was under legal obligation to share his sovereignty with the cardinals?

There is one gloss of Hostiensis which might suggest that the answer to this last question is affirmative and modern commentators have read it in this oligarchic sense. This key passage needs very careful reading.

In one of the most important of his decretals about papal authority, Per venerabilem, Innocent III had cited St. Paul in support of the principle of plentudo potestatis: 'Do you not know that we are to judge angels? How much more matters pertaining to this life'. Hostiensis, reading iudicabitis for iudicabimus in the Pauline text, saw here support for the principle of a sharing of power between pope and cardinals:

It is not said 'thou wilt judge' in the singular form but 'you will judge' in the plural, so that not only the pope but also the cardinals should be included in the expression of the plenitude of power.

And again, in a later gloss on the word iudicabitis:

That is to say, thou the pope and you the cardinals. The cardinals therefore share (participant) in the plenitude of power.

These are apparently oligarchic principles. But when studied in the context firstly, of the gloss as a whole and secondly, in the whole perspective of Hostiensis's thought, their force is much modified.

The gloss was on the words 'our brothers' in Innocent III's sentence 'The priests of the Levitical race are our brothers who, according to Levitical law, act as our coadjutors in the discharge of the priestly office'. Hostiensis commented:

'Our brothers' refers therefore to all the bishops who are called to a share of the pastoral charge. Yet it is the cardinals on whose advice (consilium) he acts who are his regular helpers. Thus 'our brothers' is to be understood of them in a particular sense and of the bishops, in a general sense. Between the cardinals and the pope there exists a union of such closeness that it is fitting (debeat) that each should take counsel (communicare) with the other about everything. Just as there is a greater degree of mutuality between a bishop and his chapter than between the bishop and the other churches of his diocese, so the bond between the pope and the college of the Roman Church is much closer and more excellent than that between any other patriarch and his chapter. Yet that patriarch ought (debet) not to settle difficult matters without the advice of his brothers. Since this is so, then it is the more fitting (debeat) for the pope to ask for the counsels of his brothers, for a judgment is the firmer for being

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18 Appendix, no. 8; specifically the words: 'cardinales includerentur etiam in expressione plenitudinis potestatis'.
19 Tierney, Foundations 150-1; G. Le Bras, Institutions ecclésiastiques 347.
sought from many. Hence it is said here that they are his coadjutors in the
discharge of the priestly office; they are called cardinales from cardo, as if rul-
ers of the world with the pope. Hence it is not said 'thou wilt judge' in the
singular form but 'you will judge' in the plural, so that not only the pope but
also the cardinals should be included in the expression of the plenitude of
power.

There is no word here to say that it was obligatory on the pope to share
his power. His language must be noted carefully. What the pope looked
for from the cardinals was consilium not consensus. When he spoke of other
prelates consulting their brethren, by using the verb debere, he was saying
that a patriarch was under obligation to consult his brothers. He was ac-
tually repeating what the law said about the necessity for a prelate to
consult his chapter. But when he applied this principle by analogy to the
papacy the word debet became dect. What was obligatory for the one was
merely appropriate or fitting for the other. This is altogether consistent
with Hostiensis's usual way of discussing possible limitations of papal power:
'it is fitting that the pope should not use the plenitude of power too often';
'it is fitting that he should rarely depart from the established law'. Hoc
enim dect nos, licet non astringat was his consistent maxim. In addition to
these considerations one very significant text must be taken into consid-
eration. Hostiensis stated categorically in an emphatically personal way
that he confessed unhesitatingly that he believed the plenitude of power
was the pope's alone, that he did not intend to say anything against this
view and referred his readers to two contexts where he had formulated very
forceful statements of papal personal sovereignty. I do not think there
can be any doubt whatsoever that this is his definitive view. It is perfectly
consistent with what he had to say about the desirability and fittingness or
decentia of the pope consulting the cardinals. Whatever flirtations he made
or might seem to have made with oligarchic opinions must be read in its
light.

There is one final feature of Hostiensis's analysis of cardinalitial power
which calls for comment. Several times Hostiensis used the relationship

20 Cf. Glossa ordinaria, nota ad 3.10.4; 'Item prelatus negotia ecclesie sue de consilio fratrum
suorum facere debet, et precipue huiusmodi specialia (scil. institutiones et destitutiones); aliter
enim facta non tenent'.
21 Apparatus 1.21.2 s.v. dispensare non licet.
22 Apparatus 3.8.3 s.v. qui secundum plenitudinem potestatis. This text and that cited in the pre-
ceding note are published in my article mentioned in n. 7 above.
23 Loc. cit.
24 'Quicquid tamen dicitur, hoc de plano fateor quod in solum popam plenitudo residet potestatis,
supra de usu pal. Ad honorem (1.8.4), contra scribere non intendo, ut patet in eo quod notatur
infra, de conces. preben. Proposuit (3.8.4)'. The two glosses cited are published art. cit. 180-1,
183-4.
of bishop and cathedral chapter to clarify and illustrate what he was saying about the relationship of pope and cardinals. This was of course an obvious analogy to make. The procedure for papal elections had been to an extent based on that of capitular election; both college of cardinals and cathedral chapters were faced with some problems of similar type during vacancy; both bodies were expected to assist their head, at least to the extent of giving counsel. Was there any wider significance in this analogy? There was a title in the Decretales rubricated De his quae fiunt a prelato sine consensu capituli. Did the analogy apply here for it to be argued that there were in fact things that the pope could not do without consent of his ‘chapter’?

The problem of the rights of chapters against their bishops formed a difficult section of canonist theory. The whole issue was governed so much by local custom which varied very considerably even within the same country, that it was far from easy to establish what were the norms of the matter. Hostiensis had already done much, in his Summa, to reduce this complicated issue to something like order.

At the basis of the systematization he accomplished, lay an important but simple distinction. Hostiensis noted that it was common for the words consensus and consilium to be used at least sometimes interchangeably. But he thought this was wrong and that there was a sharp distinction between them. The former was obligatory in the sense that an action done without consensus was invalid. The latter, though eminently desirable, was not binding on the superior. Thus Hostiensis could go on to distinguish between matters where consensus was required and matters where consilium should be sought. In the former category were all those matters — concerning benefices, property, fiscal obligations, capitular revenues and so forth — which pertained to the chapter in its own right. Into the second category fell pretty well everything else in diocesan government which did not touch the status of the chapter itself.

35 3.10.
37 ‘Alii dicunt quod consilium requiritur, id est consensus: et his verbis consilium et consensum promiscue utuntur et secundum ipsos nulla est differentia inter consensus et consilium... ed. cit., col. 802.
38 ‘Sed quae est differentia inter consensum et consilium? Respondeo, ubi consensus requiritur, non valet quod agitur, nisi consensus habeatur... si vero expectetur, potest sequi consilium si vult is qui ipsum requirit: si non vult, non habet necesse.’ ed. cit., col. 801.
39 ‘Ideo regulariter in omnibus clericorum negotiis et ecclesiis debet canonicorum consilium requirere, ut cum eis peragat et praetractet et que statuende fuerint, statuat, errata corrigat, deformata reformet, evellenda dissipet et evellat, infra eodem, Quanto (3.10.5), et maxime in his que tangunt ipsos, infra eodem c. fin. (3.10.10)’ ed. cit., cols. 801-2.
listed the individual occasions when a bishop should take the advice of
his chapter and the list fills a column of a printed folio volume. He phrased
his conclusion in the words of Solomon as advice to a bishop or to any ec-
clesiastical superior: ‘Do thou nothing without counsel and thou shalt not
repent when thou hast done’ (Eccles. 32: 24). Putting the matter briefly,
he ended, using an aphorism he also applied to the papacy: a prelate should
do little or nothing (parum aut nihil) without the advice of his brothers.

Examining all that Hostiensis had to say about the participation of the
cardinals in papal government with this distinction between consilium and
consensus which Hostiensis had made so carefully, no context can be found
where he spoke of the need of any cardinalitial consensus for any papal act.
Of course, as has been seen, he insisted on the fittingness of a pope, no less
than a bishop, taking consilium before he acted. The conclusion is inesca-
pable. There were strict limits to the degree to which Hostiensis considered
the bishop-chapter relationship transferable to the pope-cardinals relation-
ship. His view of papal authority cannot be explained satisfactorily in
terms of any alleged ‘normal rules of corporation law’.

It is time to offer some conclusions. As so often, the negatives come the
easiest. All those interpretations which in one shape or another present
Hostiensis as a protagonist of some view of the supreme ecclesiastical power
less monarchic than aristocratic seem to me erroneous. Hostiensis did not
postulate that the consent of the College of Cardinals was a necessary pre-
condition of papal decisions. He had no intention of reducing the pope to
the position of primus inter pares according to some alleged corporation theo-
ry. Of course he had a high opinion of the importance of the College but
it was not different in kind from that professed by the popes of his age them-
selves. His view of the College did no injury to the personal authority of
the pope. Nor did it do any injury to the authority of bishops, as some later
writers were to do, in claiming Apostolic origins for the cardinalate. If
later writers were to foist paternity of cardinalitial oligarchic theories on to
Hostiensis, they had misread him.

What then was the significance of Hostiensis’s contribution to the stock
of thinking about the College of Cardinals? If it was perhaps modest, it
was nevertheless real enough. Hostiensis was already dead when Gregory X
in 1274 undertook the reform of the papal electoral system and the juristic
discussion which must have gone into the framing of the canon Ubi periculum\(^2\)
which promulgated the new procedure remains unknown. It is therefore
impossible to say how far Hostiensis influenced that canon. But it can be

\(^2\) VI* 1.6.3. Hostiensis was firmly of the opinion that just such a new constitution was needed,
cf. Appendix, no. 3.
said that *Ubi periculum* gave official form to two ideas for which Hostiensis had argued especially forcefully: the conclave principle and the principle that during papal vacancies the cardinals had the power to act in emergency situations.  

More measurable than his influence on actual legislation was his influence on later canonist theory. The mark of his thought is strong on fourteenth century commentary. In particular, Cardinal Jean Lemoine, Guido de Baysio and Joannes Andreae made his analysis of the vacancy problem the basis of their own thinking on the matter. Very striking was the debt owed by Joannes Andreae to Hostiensis. The bulk of the glosses Hostiensis wrote on the cardinalate in this *Apparatus* passed almost unchanged into the *Novella* on the *Decretales* of Joannes Andreae, his most important book and one of the great reference books for canonists. Thereby the voice of Hostiensis was certain to be heard for as long as men continued to turn to the great medieval jurists for authoritative guidance. His significance then lies less in the evolution of some abstract heterodox ecclesiology than in the discussion and solution in the service of papal monarchy of the particularities of juristic problems as they were encountered in practice.

II. — From *"Ubi periculum"* to *"Ne Romani"*

The period between the death of Hostiensis (1271) and the promulgation of *Liber Sextus* (1298) was as eventful as any in the life of the College of Cardinals before the Great Schism and Conciliar Movement. At the Second Council of Lyons in 1274, Gregory X found his cardinals, or some of them, doing their best to block his projected reform of the electoral system and was forced to counter-lobby among the Fathers of the Council to achieve his end. Even though *Ubi periculum* was promulgated with the support of a General Council, its future was by no means secure and at least one more protracted vacancy had to be endured before its procedures were accepted as standard practice. In 1289, Nicholas IV issued the impor-
tant constitution Coelestis altitudo in favour of the cardinals, systematizing and regularizing their rights in the different sources of income of the Roman Church. In 1294, Celestine V brought his anxious tenure of the Apostolic See to an end by abdication. The legal formalities of this unprecedented event were conducted in closest association with the College and the formal act of cession itself was performed and accepted coram collegio. In 1297, Cardinals James and Peter Colonna, having professed their belief that a pope was not free to abdicate and that Boniface VIII had not been canonically elected, were solemnly excommunicated and expelled from the College. Their bitter polemic in their own defence included a number of claims which were unambiguously oligarchic. They asserted that cardinals might be tried only in general council and that from the very beginnings of the Church they had been instituted as joint rulers and judges with the pope, charged to resist him should he abuse the plenitude of power. They were established, it was claimed, non ut consiliarii voluntarii sed necessarii potius: counsellors whose consent the pope was obliged to seek.

The law governing ecclesiastical institutions reflects their history and something of these events was mirrored, though perhaps somewhat darkly, in canonical science. The publication of the Sext in 1298 was the most important event in the history of canon law since 1234. After the promulgation of the Gregorian Decretales important legislation continued to appear, not least in two general councils, and was naturally brought into use in the schools and courts. The Sext was designed to meet a long and strongly felt need that the various collections of post-Gregorian laws should be replaced by a definitive new codification. Appearing after two decades of incident in the history of the College of Cardinals, it contained several items very relevant to any analysis of the nature and authority of that institution.

Three laws were of first importance. Ubi periculum had important things to say about the authority of the College in times of vacancy. Boniface VIII's Quoniam aliqui defined de consilio et assensu fratrums suorum that a pope was free to abdicate. His Ad succidendos passed sentence on the Colonnas and expressly forbade the cardinals to lift that sentence during vacancy. In addition, a further decretal of Boniface VIII was a penal code against any

54 Magnum Bullarium, III foś. 52-53.
56 L. Möhler, Die Kardinäle Jacob und Peter Colonna (Paderborn, 1914).
57 Denifle, "Die Denkschriften der Colonna" 522. Cf. also: 'Porro cum in quibusetlibet arduis peragendis, maxime in alienationibus rerum ecclesiae, etiam verus pontifex cardinalium consilia petere et socii consensus nichilominus consueverit et etiam tenetur..." ibid. 521.
58 VI* 1.6.3. § 1.
59 VI* 1.7.1.
60 VI* 5.3.1.
who maltreated or threatened cardinals.\footnote{VI• 5.9.5.} Finally there was a generous scattering of references to decisions being taken with the consilium of the cardinals, while a decretal of Nicholas III spoke of them as those \textit{qui sibi in executione officii sacerdotalis coadiutores assistunt}.\footnote{VI• 1.6.17.} All in all, for the commentators coming to expound this new collection there was some interesting new material on the question of cardinalitial authority awaiting their scrutiny.

It would be very generally conceded that in tracing the evolution of cardinalitial theory the name of Cardinal Jean Lemoine is a significant one. Yet no agreement has been reached on the precise nature of his contribution. Interpretations of his views on the cardinals' powers have oscillated. Sägmüller read him as one of the most passionate champions of the right of the College of Cardinals to a joint share in the government of the Church, an advocate of a constitutional papacy.\footnote{J. B. Sägmüller, \textit{Die Thätigkeit und Stellung der Kardinale bis Papst Bonifaz VIII} (Freiburg, 1896) esp. 222-27. For criticism of this author's handling of canonist sources concerning the cardinalate, Tierney, \textit{Foundations} 186.} Finke, pointing out that Lemoine was also a passionate champion of papal sovereignty, thought that to extract a theory of a constitutional papacy from the brief, ambiguous and incomplete treatment of the whole subject of the cardinalate was to go too far.\footnote{H. Finke, \textit{Aus den Tagen Bonifaz VIII} (Münster, 1902) 196.} For him Jean Lemoine was but an upholder of the position the cardinals had already achieved. Scholz has contrived to give the impression of agreeing with both these authors. While stating his broad agreement with Finke, he nevertheless bracketed Lemoine with the rebel Colonna cardinals in maintaining that the pope was bound to consult the cardinals in any exercise of the \textit{plenitude potestatis} and made him a leading figure in his chapter, 'Die oligarchische Opposition im Kardinals kolleg'.\footnote{R. Scholz, \textit{Die Publicistik zur Zeit Philippes des Schönen} (Stuttgart, 1903) 190-207 esp. 194-8.} Jean Rivière followed Finke in refusing to see any sort of interpretation of the papacy as a constitutional monarchy in the 'quelques phrases incidentes' where the Cardinal upheld the rights of the College.\footnote{J. Rivière, \textit{La problème de l'Eglise et de l'État au temps de Philippe le Bel} (Louvain, 1926) 358-9.} More recently, however, the pendulum has swung back towards Sägmüller's view. Brian Tierney has presented a new intellectual portrait of Lemoine as the author of a 'manifesto' in favour of an enhanced authority for the cardinals, propounding views which were 'really novel', very extreme and sharply at variance with the opinions of most other contemporary canonists. In his view, Jean Lemoine made the pope, 'simply an agent of the cardinals'.\footnote{Tierney, \textit{Foundations} 180-90.
Lemoine wrote about the cardinals in no more than three quite short glosses and they treated of only two issues, the significance of the formula de fratrum nostrorum consilio and the authority of the College, sede vacante. Judged in comparison with Hostiensis, his examination of these problems was no great juristic feat either in breadth or depth. But it is nevertheless of very special interest. For he discussed them in terms of problems which had in fact arisen in the course of his personal experience as a member of the College. His analysis must be seen as an attempt to theorize from actual cases. He wrote, as he made abundantly clear, of what he knew had happened.

His disquisition on the precise juristic value of the formula de fratrum nostrorum consilio sprang directly from two papal decisions he had witnessed.

The first case had arisen in the aftermath of the abdication of Celestine V. During his pontificate (said Lemoine) he had appointed many abbots, bishops and high ecclesiastical dignitaries without taking the advice of his cardinals. This procedure being called in question before his successor Boniface VIII, Jean Lemoine had in consistory offered it as his opinion (which he had obviously learned from Hostiensis) that it would be fitting if the pope did not ignore what popes had ordered should be observed by others. There were canons which ordered bishops and other superiors not to act, at least in major matters, without the advice of their brothers, otherwise what was done was invalid. I know, said Lemoine, that the collations in question were invalidated on the particular grounds that it was the practice for major business to be discussed and decided with the advice of the cardinals, which had not been the case here.

Jean Lemoine had experience also of a second and similar case. Benedict XI suspended certain constitutions which Boniface VIII had promulgated for towns in the March, not because of any intrinsic defect but because they had been issued without the advice of the cardinals.48

48 'Quero, an hec (ut il. de fratrum nostrorum consilio) sint uerba voluntatis, congruenzie, decencie vel necessitatis? Scio quod celestinus papa quintus multas abbatiis, episcopatuis et superiores dignitates contulit sine fratrum consilio, et coram successore fuit ine articulus in dubium revocatus, et dixi tunc, decet ut quod papa mandat in suo canone ab aliis observari, illud non negligat: mandat enim quod episcopi, abbates et superiores, saltem in ardua suarum ecclesiarii ordinem de consilio fratrum suorum alias non teneat quod agitur, supra de his quia sunt a prelatis sine sensu capituli, Nouet et c. seq. (3.10.4.5.), et supra de iudici. Cum deputati (2.1.16). Et scio quod dicte collationes fuerunt cassate, presentium quia cettus cardinalium erat in hac possessione quia ardua negocia erant de eorum consilio tractanda et terminanda; et in multis iuribus dicitur 'de fratrum nostrorum consilio', et liet princeps sit solutus legibus, tamen secundum legem ipsum vivere deet, C. de legi. I. Digna (Code 1.17.4), ff. de legatia iii. i. Ex imperfecto (Dig. 32. 1.23), insti. quib. mod. testa. infirment. in fine (Inst. 2.17.§ 8), et optime habetur, ix. d. Iustum (D. 9 c. 2), xii. q. ii. Non liceat, (C. 12 q. 2 c. 20), et 'patere legem, quam tu ipse tuleris' supra,
In the light of these two decisions it is not surprising that Jean Lemoine and other canonists should ask questions about the nature of *consilium*. These popes seemed to be saying, if Jean had his facts right, that it was the equivalent of *consensus*. At any rate these decisions did not fit easily into the orthodox doctrine of *consilium* as propounded by Hostiensis. Lemoine asked therefore whether the taking of *consilium* was a matter of will (voluntas), of agreement (congruentia), of propriety (decentia) or of necessity (necessitas). His solution was ambiguous in that he did not at the end of his gloss indicate which of these four he had established. In discussing Boniface’s decision he leant heavily towards *decentia*; ‘though the prince is not bound by the laws, it is proper (decet) that he should live according to them’. Yet in discussing Benedict’s decision he seemed to show a preference for *necessitas*, though it would be thin evidence on which to place an ‘oligarchic’ interpretation; ‘For defect in the person performing the action or in the prescribed form (in modo necessario) makes the action useless’.

It was again a practical situation actually encountered in the College itself which led Lemoine to his second discussion of an aspect of the College’s power. He stated that ‘in the election of a pope’ he had witnessed the College of Cardinals absolve electors from excommunication *ad cautelam*, in order to avoid the possible occurrence of an impediment to election. The particular circumstances he had in mind remain obscure. The construction of his sentence seems to imply very clearly that it was electors of popes i.e. cardinals he had in mind. The only traceable excommunicated cardinals at this time were the Colonnas and if he was referring to them the absolution must have been to allow them to take part in the election of Benedict XI. But in deposing and excommunicating the Colonnas, Boniface

*De constitut.* Cum omnes (1.2.6), et omnem indecenciam in principe, qui est omnium director, dico impossibilem saltem moris de quo notatur infra, de reg. iur. Nemo (VI* 5.13.6). A beneficiario papa xi. statuta que dedit marchiania bonifaciis pape absque consilio fratrum, quia ardua tangebant, fuerunt suspensa, licet multa iusta fuissent in dictis statutis contenta. Nam defectus in persona facientia vel in modo necessario reddit factum inutile, supra de constitut. *Ecclesia* (1.2.10), ff. de rebus eorum... 1. Magis § si es alienum (Dig. 27.9.5. § 14). *Apparatus* VI* 5.2.4* (ed. Paris, 1535) collated with Pembroke College Cambridge MS 165.

49 ‘Dictur eciam absolutam ista dari eligentibus ne impedimentum elecioni future detur, supra de exceptio. c. Apostolice (2.25.9). Et hec vidi fieri in eleccione summi pontificis per honorabilem cetum cardinalium, pene quem plenitudo potestatis sede vacante residet, de hoc notatur lxix., dist. Nullus pontifex (D. 79 c. 7) et hostiensis notat supra de penis c. Cum ex eo (5.38.14). Sed contra, supra hoc libro de scisma c. 1 (VI* 5.3.1). Solucion: in papa est principalis, in collegio subsidiaria vel dic ibi specialiter est substractum, absurdum enim esset quod capitula ecclesiarium cathedralium, quorum pretia in sollicitudinis partem sunt vocati, haberent in illa parte sollicitudinis, supra hoc libro maiori et obedient. c. 1 (VI* 1.17.1), et cetus cardinalium in tota sollicitudine non haberet.’ *Apparatus* VI* 5.11.2* *ed. cit., ms. cit.*
VIII had expressly forbidden any lifting of penalties during a papal vacancy. If it were the Colonnas that Jean was speaking of, the problem was to find a justification for the action of the College. But omitting the Colonnas from the picture altogether, there was still a practical problem: was the reservation made by Boniface VIII a general rule forbidding the College to absolve from excommunication during vacancy or was it a special case, applicable only in the Colonna sentences? Putting it another way, was Boniface saying that the College did have such a power of absolution *sede vacante* unless there was, as in the case at issue, a specific inhibition?

He was quite clear that in general terms, the College did have power to remit excommunication *sede vacante*. A decretal of Boniface VIII promulgated in *Liber Sextus* allowed this right to cathedral chapters. It was absurd therefore, thought Lemoine, to grant the power to a lesser college and withhold it from the College of Cardinals. But in discussing Boniface’s particular instruction concerning the Colonnas, once again there are signs of indecision.

In one gloss he argued that just as a bishop could not licitly deprive his chapter of its legitimate administration, so a pope might not deprive the College of one of its lawful administrative powers. Yet in another gloss, referring also to this particular issue, he seemed to allow that in a special case the pope could withhold this power. For, like Hostiensis, he recognized that though the plenitude of power resided in some sense in the College during vacancy, the College did not have the plenitude in the same way as the pope had it. Like Hostiensis, Lemoine tried to express the principle that the power did reside while yet in a different way with a distinction. He distinguished between the plenitude of power in *papa principalis* and *in collegio subsidiaria*. It is perhaps no more successful than Hostiensis’s distinction. But it does affirm the point he was making; that the pope could inhibit the cardinals from exercising a power in vacancy that ordinarily they did have.

Thus Jean Lemoine’s analysis of cardinalitial authority scarcely rose above the particularities of the two problems with which he was concerned. His treatment was fragmentary and inconclusive. To read into it any novel or radical general theory of church government is an unwarrantable forcing of the texts. All in all, due allowance made for some ambiguity and hesitation in exposition, Lemoine had not parted company from Hostiensis and the principle that though the established convention of consulting the

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50 *VI* 1.17.1.
51 ‘Et papa sic si habet ad collegium cardinalium sicut alter episcopus respectu sui collegii, cum ergo alter episcopus non possit tollere administrationem legitimam sui capituli nec pape licebit.’ *Apparatus VI* 5.3.1. s.v. *collegium, ed. cit., ms. cit.*
cardinals should be strictly observed as a matter of *decentia*, the plenitude of power was personal to the pope.66

The *Rosarium super Decretum* of Guido de Baysio the Archdeacon is one of the classics of medieval canonistics. But it is disappointingly brief about the cardinalate, reflecting the relative lack of interest in the topic characteristic of Gratian and the decretists. It is also ineffectual, for though some of the problems were raised, none of them was discussed and solved in any very convincing way. The Archdeacon did not discuss the question of the constitutional relationship of pope and cardinals, though he had raised it in a half-hearted rebuttal of an earlier decretist view that general legislation for the universal Church needed the participation of the cardinals.67 He disagreed with Huguccio's view that the College might depose a pope for heresy, without probing further into the rôle of the cardinals in emergency situations.68 He disagreed too with Huguccio's opinion that the College had the power to create cardinals during a vacancy,69 though he shelved the general question of power *sede vacante* by referring his reader to Hostiensis's discussion of it.70 All this did not amount to any major discussion of the subject of the cardinalate. At least it showed that the Archdeacon was no enthusiast for cardinalitial claims.

66 Cf. e.g. *Nota quod papa sententiam suam non supposuit correctioni vel emendationi de consilio concilii seu aliorum, sed sue duntaxat emendationi reservavit, sed dicit quod super emendationem sententie sue consilium concilii quereret et hec requisitio non est necessitas sed solenniter tantum. Quia papa sine consilio posset procedere ad sententiam cum habeat plenitudinem potestatis, ii.e. vii. Decreto (C. 216 c. 11), infra de peni. et remissio. Cum ex eo (5.38.14) in fine. Et papa dat robur concilii non eontra, supra de elec. Significasti (1.6.4) op. cit. 2.14.2 ed. cit., r. eil. The context of this gloss is Innocent IV's sentence of deposition passed on Emperor Frederick II at the Council of Lyon in 1246 and Lemoine was here reflecting and expanding Innocent's own gloss. 67 *Dicit Laurentius quod generalem legem universali statu ecclesie condere non potest papa sine cardinallibus sed particularem sic, ar. xi. di. Catholica (D. 11c. 8); sed videtur quod solus papa possit condere canones, ar. xvii di. Constantinus, palea est (D. 96 c. 14), licet sit argumentum contra, C. de le. si imperialis et l. "Humanum". *Rosarium* C. 25 q. 1 c. 6 s.s.v. sunt quidam (ed. 1495). 68 *Scias tamen quod Huguccio scripsit 73 dist. In sinodo, quod cardinales possunt deponere papam proper heresim. Sed hoc iure aliquo non probavit, et ideo non recedet ab eo quod plane dicitur in pre. et loc. Cum ex eo (5.38.14) § ult., ubi disputat de potentia cardinalium vacante sede.* op. cit. D. 79 c. 7.
In his *Apparatus* on the Sext, however, he expressed his views much more positively and forcefully. Whether the change was due to becoming more closely involved with the College on his translation to an important post in the curia or simply because the Sext stimulated his interest in a way that the *Decretum* had not or through dissatisfaction with the way Jean Lemoine had handled the problem must remain a matter for conjecture. But no clarity is wanting in the *Apparatus* as to where he stood concerning the relationship of pope and cardinals.

He employed the conventional formulae deriving from Roman law which Hostiensis had used to describe the dignity and function of the College. It was a part of the pope’s body, forming his senate. The cardinals were his *coadiutores in executione sacerdotalis officii*; this terminology was now known to the law, since its use, after Innocent III, by Nicholas III in a decretal in the Sext. Like both Hostiensis and Jean Lemoine, the Archdeacon did not embark on an excursion about the cardinalate *in se*, but discussed it à *propos* of particular problems.

The first of these was by now an old one but, as the Archdeacon testified that he had often heard it discussed in the curia, it was obviously not yet a settled one. It concerned the meaning of the phrase, ‘de fratum nostrorum consilio’. But for the Archdeacon there was little problem here. No pope was under obligation to seek *consilium*. This would be to contravene many canons which had made the personal sovereignty of the pope clear. But he should use the advice of his brothers, particularly in the more serious matters, the more especially since popes had instructed lesser prelates to do so. As Isidore had said (Jean Lemoine had also given prominence to the same text), it is just for a prince to comply with his own laws.

The other problem which the Archdeacon discussed was a new facet of another much discussed but as yet not completely solved problem: that of

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68 *See note 61.

69 *Sepius vidi in curia queri quid operentur ista verba “de fratum nostrorum consilio”. Dici* *potest quod sunt ad bonam ordinationem pape qui habet uti consilio potissime fratum, unde in mulis iuribus antiquis et noxia dicitur “habito fratum nostrorum consilio”. Sed non quantum ad necessitatem, ut pater 14 q. 4 Nemini (recte C. 17 q. 4 c. 30), ad idem 9 q. 9 Nemo, et capitula ibi sequentes usque ad § ult. (C. 9 q. 3 c. 13-21), 56 di. Apostolica, cum duobus capitulis ibidem sequentibus (D.56 c. 12-14). Sed potissime in magnis negociis tali debet uti consilio, cum alios inferiorum velit ut facere, ut infra de his quod f. a pre. Novit (3.10.4), ad hoc 88 di. c. 1 ver. et quod (not identified), unde dicit Isidorus “iustum est principem legibus obtemperare suis”, 9 dist. iustum, palea est (D. 9 c. 2).* *Apparatus* VI* 1.168 *s.v. consilio.*
the powers of the College during vacancy. It is well known that Gregory X's new electoral decree *Ubi periculum* was only passed after opposition from the cardinals and that it remained unpopular with them. Could they repeal this constitution during a vacancy or change any part of it? We may be sure that this question too was a live one at the time when the Archdeacon was writing about it. Not long afterwards Clement V was to legislate on this very point. The Archdeacon was quite confident that they could not alter a papal law during vacancy. He could not remember, he said, ever having read that the cardinals succeeded during vacancy to the place of the vicar of Christ. The College might be a senate but the senate did not have power to rescind an imperial law. In the absence of any express permission to the contrary, the cardinals must observe *Ubi periculum* in virtue of that unique papal authority to which they were not heirs during vacancy of the apostolic see.

In 1311 Clement V issued the constitution *Ne Romani* to complement, supplement and clarify *Ubi periculum*. The Pope's declared purpose in promulgating it reveals that the Archdeacon's lengthy discussion as to whether the cardinals during vacancy had the power of repealing or modifying *Ubi periculum* was no mere academic exercise but the reflexion of the persistence of opinion within the College hostile to this canon. He declared in quite unambiguous terms that the cardinals had no such right: *lex superioris per inferiorem tolli non potest*. He went on to lay down a principle that endured to the twentieth century, even to the very words in which it was expressed: the cardinals had no power to exercise in vacancy what pertained to the pope in his lifetime, unless they had been specifically permitted to exercise it.

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60 'Quero an istam constitutionem possint tollere, vel in aliqua sua parte renuntiare ipsi domini cardinales?' The gloss is too long to reproduce *in toto*: the argument is based on the forcefully expressed premise: 'Dominorum autem cardinalium potentia est ab homine, nam quicquid possunt habent a papa, et ideo non debent presumere quod eis non videntur esse concessa, ut 25 q. 2. habent a papa, et ideo non debent presumere quod eis non videntur esse concessa, ut 25 q. 2.

61 The Archdeacon replied to his query (previous note): 'Credo quod non. Cardinales sunt apostolici coadutores in executione officii et etiam consultores recti et intrepidii, infra eadem, *Fundamenta* (VI 1.6.17) § Decet namque... nesc unquam memini me legisse quod succedant in loco apostolici, qui est vicarius Christ, ...' *loc. cit.*

62 '... licet senatus possit legem condere, non tamen legem imperiam tollere potest, cum sit minor. Concludi potest quod "decretum religioso ac necessario factum, observetur a nobis", ut dicit Cyprianus, 88 di. c. ult. (D. 88 c. 14)' *loc. cit.*

63 *Ne Romani* (Clem. 1.3.4): '... reprobamus, irritum nihilominus et inane decernentes, quicquid potestatis aut iurisdictionis, ad Romanum, dum vivit, Pontificem pertinentis, (nisi quatenus in
No information is available about the work of the jurists who drafted *Ne Romani*. But its principles sprang naturally from the work of the leading commentators whose views have been considered so far. Hostiensis would have approved of Clement V’s reinforcement of the provision that the lay power be permitted to police the cardinals into conclave if they were seeking to abandon the election. His opinion about the power of the College *sedé vacante* to act in cases of great urgency had already been adopted in *Ubi periculum*. *Ne Romani* specified other principles that he had enunciated: withholding of any power of action in cases reserved to the pope personally, the continuity of the office of penitentiary, power to complete the business of prelates-elect and others canonically required to present themselves at the apostolic see. The conformity of *Ne Romani* and the Archdeacon’s teaching was in the matter of whether the cardinals could alter the law governing elections during vacancy. Continuity with Jean Lemoine’s work is to be seen in that provision of *Ne Romani* which allowed excommunicated cardinals to participate in papal elections, in order to avoid future dissension and possible schism.

The theory of the cardinalate evolved in the classical period of medieval canon law was rounded off by *Ne Romani*. Thereafter, though the subject continued to be discussed, there was not much of any great substance to be added. It remained for later writers to ponder the principles of law enshrined in *Ubi periculum* and *Ne Romani* in the light of the work of Hostiensis, the Archdeacon and Jean Lemoine.

III. — The Period of John XXII and Joannes Andraeae

Jesselin de Cassagnes (otherwise Zenzelinus de Cassanis) completed in 1325 an authoritative *Apparatus* on the *Extravagantes* of John XXII. This small collection did not contain any great wealth of material concerning the cardinalate. Nevertheless this canonist found quite a bit to say on the subject, possibly because he was dedicating his work to a cardinal patron, and what he wrote constitutes, for the historian, the next stage in the evolution of canonist thought on the topic.

constitutione praedicta permititur) coetus ipse duxerit eadem vacante ecclesia exercendum."


Codex *Iuris Canonici* (Rome, 1917) 658.

Of course much of what he said was by now far from new. The etymology of the word *cardinalis*, the description of the College as a *senatus*, a part of the pope's body and of the cardinals as *patricii* were stock articles of the canonist vocabulary. Familiar also in substance, though not without some originality in the expression was his emphasis on the need for deliberation before decisions were taken.

One very characteristic feature of earlier canonist writing was notably absent; *Ne Romani* had obviously made it unnecessary to prolong further discussion of jurisdiction *sedevacante*. One feature was quite new — a list, of nine entries, of the special privileges enjoyed by cardinals. New also was Jesselin's discussion of whether cardinals of recent creation, that is to say, created at Avignon, could rightly be described as cardinals of the Roman Church. Neither of these features was of first importance in analysing cardinalitial power. More interesting was his recording of the opinion of some that the episcopal dignity was greater than that of the cardinalate.

The most significant thing that Jesselin had to say was his emphatic rejection of any notion that the pope was under obligation to seek the *consilium* of the cardinals. The *Apparatus* as a whole is characterized by a marked insistence on papal sovereignty, not, it must be noticed, the sovereignty of the 'Roman Church' or the 'Apostolic See' but of the pope personally. It is he to whom pertains the *declaratio* of disputed articles of faith.

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65 3.1 s.v. cardinalibus (ed. Paris 1561) col. 38.
66 Ibid. s.v. circa nos col. 39.
67 Ibid. s.v. sublimitatem eorum col. 41.
68 Ibid. s.v. deliberatione col. 43.
69 Ibid. s.v. sublimitatem eorum col. 41-2.
70 Ibid. s.v. Roman ecclesia cols. 38-9.
71 "... licet per aliquos dici consuecerit quod episcopalis dignitas sit maior quam dignitas cardinalis," 5.1 s.v. alia superiori col. 70.
72 'Collige hic principem ecclesie Christique vicarium posse etiam super fide catholica declaracionem facere, ut dixi supra in glossa tanguam (not identified); potest etiam articulum fidei facere si sumatur articulus non proprie sed large pro illo quod credere oportet, cum prier ex precepto ecclesie necessario non oporteret. Patet exemplo in hoc decreta (John XXII's *Cum inter nonnullor*) ...' 13.4 s.v. declaratorums col. 631. Cf. also: 'Cum ad solum Petrum et eius successores spectet super fide et declarationem aliquam facere...,' 14.5 s.v. quod falsum est col. 173. Significant too, in the light of the Archdeacon's hesitation (n. 53 above), is the firm assertion: 'Qualis est papa quisolus genera... canones condere potest, xvi dist. 'c. Regula (D. 17 c. 2) et multis capitulis sequentibus.' 14.3 s.v. Ad conditorem canonum col. 138.
one may hold him to account.\(^{12}\) He personally is solus princeps ecclesie,\(^{13}\) sole holder of the plenitude of power.\(^{14}\) In view of these declarations it is not surprising that there is no trace of oligarchic thinking in his concept of the relationship of pope and cardinals: ‘The pope uses the advice of the cardinals as he wishes, not because he is bound of necessity to seek such advice’.\(^{16}\)

Since Jesselin’s Apparatus achieved the status of glossa ordinaria it may be confidently assumed that these views were acceptable as representative of canonist opinion and were influential on its future formation. To complete this sketch of the evolution of canonist thought about the cardinalate it remains to examine a more influential writer of the highest calibre, Joannes Andreae.

With his death in 1348, some two centuries after the appearance of the Decretum, it is customary for historians of canon law to see the completion of the classical period of medieval canon law.\(^{77}\) In the major works of his mature years, particularly the Novella on the Decretales, on which he worked throughout most of his academic life, and its completion with the Novella on the Sext, was the culmination of that period. For these works were not merely the product of an outstanding juridical mind. They were also something of a canonist encyclopaedia, storing an immense array of glosses quarried with huge erudition from scores of sources to supplement the glossae ordinariae.

There is an astonishing amount of Hostiensis’s Apparatus to be found in

\(^{12}\) ‘... licet inferioriores prelati iura unius ecclesie in aliam sine certa solemnitate transferre non possunt, extra. de. re. eccles. non alie. c. 1 (4.13.1) papa tamen gaudens plenitudine potestatis, ii.q. vi. c Decreto (2 q. 66. 11). Extra de usu pal. c. Ad honorem (1.8.4), ix. q. ult. c. Cuncta per mundum et c. Per principale (9 q. 3c. 18, 21). Hoc facere potest, nec est qui audeat dicere, domine cur ita facias de poe. dist. iii. § Persona, sum in iis que de iure sunt positio, possit pro libito super his dispensare, extra de conces. preben. c. Proposuit (3.8.4).’

\(^{13}\) 1.1 s.v. plenitudine col. 10.

\(^{14}\) ‘Unde ceteri episcopi quo ad que sunt de efficacia consecrationis vel ordinis, tanta gaudent potestate quanta gaudent papa, licet quo ad alia episcopi sibi pares non possint dici, cum dicantur vocati in parrem sollicitudinis: ipse vero solus in plenitudinem potestatis, ii.q. vi. Decreto et c. seq. (2 q. 6. c. 11.12), extra de usu pal. c. Ad honorem (1.8.4).’

\(^{15}\) 5.1 s.v. coepiscoporum col. 65. Again, there was nothing new about this gloss.

\(^{16}\) ‘De ipsorum consilio. scilicet cardinalium, quorum consilio papa utitur, quia vult, ut hic vides; non autem ad hoc de necessitatis tenetur, ut notatur extra de re judicata, Ad apostolice lib. vi (VIe 2.14.4. Cf. Jean Lemoine’s gloss on this canon of Innocent IV, above n. 52); vocatus enim est in plenitudinem potestatis ii.q.vi. c. Decreto (2 q. 6 c. 11), extra. de usu pal. Ad honorem (1.8.4).’

\(^{77}\) 3.1 s.v. de ipsorum consilio cols. 43-4.

\(^{78}\) On the man and his work see now S. Kuttner, Johannis Andreae. In quinque decretalium libros novella commentaria (Turin, 1963) Introduction v-xiv.
the Novella on the Gregoriana. The precise amount of Joannes Andreae's debt to Hostiensis as a dominant shaping influence has not been examined by any modern critic of his work. It is certain that it was the most important single ingredient in his view of the papal power in both its ecclesiastical and political aspects.

It was no less significant in his analysis of the status of the cardinalate. His opinion was based directly and almost exclusively on Hostiensis. Some of the glosses in which Hostiensis set out his views are to be found in the Novella substantially unchanged. Another is there but very considerably shortened. Another, that concerning the need to introduce the claque principle into papal elections, was now redundant and therefore omitted. Most of the points contained in the remaining glosses are to be found in the others which were included. Joannes Andreae was a skilful editor.

There were of course fewer commentators on whom to draw for material on Liber Sextus. No one canonist dominates his Novella on the Sext as Hostiensis does the other Novella. In any case, Joannes Andreae was one of the earliest commentators on the Sext and with his Apparatus accepted as its glossa ordinaria, he was already its most authoritative interpreter even before he wrote this second work on the same collection.

However he had very little to say on the cardinalate as such in this book. What he did say of a general nature concerning the constitutional relationship of pope and cardinals he said à propos of Jean Lemoine's comments about the invalidation of Celestine V's appointments by Boniface VIII, allegedly because they had been made without consultation with the cardinals. This explanation of the invalidation astonished Joannes Andreae and he found it difficult to believe that this had really been Boniface's reason. He could easily accept, however, that Jean Lemoine was right when he said that it was an established convention that grave matters should be examined and settled with the advice of the cardinals. He accepted too the principle that it was fitting that the pope should not ignore a precept enjoined by

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78 I.e. nos. 5, 7, 9-12 of the Appendix below.
79 No. 8. Joannes has compressed Hostiensis' long gloss into two sentences — the first is the same as Hostiensis' opening sentence. The second: 'specialiter tamen hoc uidetur de cardinalibus intelligendum quibus decet papa omnia communicare.'
80 Or, as with the important problem of whether the College succeeded to papal jurisdiction in a vacancy, the reader is referred to the Apparatus ad Librum Sextum. In this work (5.3.1 s.v. sede vacante) Joannes Andreae discussed the question according to the arguments of Hostiensis, basically agreed with him and added references to the relevant legislation issued since Hostiensis wrote. In the later work, he was content to add to his reference to the Apparatus discussion, the comment that the problem 'est hodie expeditum per clementinam, de schism. Ne Romani (1.3.2) in prin. (Nov. Greg. 5.38.14 s.v. plenitudinem obtinet potestatis).
canon law on lesser prelates, namely that they ought to consult their brethren; though the prince is absolute (legibus solutus) he yet should (decect) live according to the law.\footnote{\textit{\textsc{\textquotesingle}Dicit hic Ioannes Monachus quod cetus cardinalium est in hac questione quod ardua negotia ipsius consilio tractentur et terminentur et decect quod papa non negligent quod suo canone mandat per suis subditos observari irritans contra factum, de his q. f. a pre. Novit et c. Quanto (3.10.4, 5), licet princeps solutus sit legibus, decect eum secundum leges vivere C. de leg. Digna vox et pati legem etc., de const. Cum omnes (1.2.6) dicit enim quod omnis indecentia a principe, qui director est omnium est impossibilitas saltem moris de qua impossibilitate remittit infra de re. iu. Nemo (VI*5.13.6). Narrat ipse quod quia Celestinus multas abbatias, episcopatus et superiores dignitates contulerat sine consilio fratum, coram successorem fuit satia de hoc tractatum et quod supra dicta sunt allegata et propter illam oppositionem collegii dicit collationes fuisse cassatas. Hoc ultimum admiror et difficulter credo Bonifacii id fecisse nisi forsan non expeditos id est, quorum litere adhecrant in cancellaria. Item ipse Ioannes Monachus posuit additionem in qua dicit per Benedictum papam XI fuisse suspenda quod Bonifaciis absque fratum consilio dederat Marchioni, quia tangebant ardua, licet multa valde iusta essent illis dicens quod defectus in persona facientis vel in modo necessario factum reddit inutillem...\textit{\textsc{\textquotesingle}Novella in Sextum} (ed. Venice, 1581) 5.2.4 s.v. consilio fo. 136\textsuperscript{a}.}}

In this latter, well-known Romanist maxim, used in one form or another by Hostiensis, Jean Lemoine, Guide de Baysio and Joannes Andreae, lay the basic principle which for canonists governed the relationship of pope and cardinals. The pope was sovereign, he should exercise his sovereignty with\footnote{\textit{\textsc{\textquotesingle}Dicit hic Ioannes Monachus quod cetus cardinalium est in hac questione quod ardua negotia ipsius consilio tractentur et terminentur et decect quod papa non negligent quod suo canone mandat per suis subditos observari irritans contra factum, de his q. f. a pre. Novit et c. Quanto (3.10.4, 5), licet princeps solutus sit legibus, decect eum secundum leges vivere C. de leg. Digna vox et pati legem etc., de const. Cum omnes (1.2.6) dicit enim quod omnis indecentia a principe, qui director est omnium est impossibilitas saltem moris de qua impossibilitate remittit infra de re. iu. Nemo (VI*5.13.6). Narrat ipse quod quia Celestinus multas abbatias, episcopatus et superiores dignitates contulerat sine consilio fratum, coram successorem fuit satia de hoc tractatum et quod supra dicta sunt allegata et propter illam oppositionem collegii dicit collationes fuisse cassatas. Hoc ultimum admiror et difficulter credo Bonifacii id fecisse nisi forsan non expeditos id est, quorum litere adhecrant in cancellaria. Item ipse Ioannes Monachus posuit additionem in qua dicit per Benedictum papam XI fuisse suspenda quod Bonifaciis absque fratum consilio dederat Marchioni, quia tangebant ardua, licet multa valde iusta essent illis dicens quod defectus in persona facientis vel in modo necessario factum reddit inutillem...\textit{\textsc{\textquotesingle}Novella in Sextum} (ed. Venice, 1581) 5.2.4 s.v. consilio fo. 136\textsuperscript{a}.} \textit{decentia}. An important part of this governmental virtue was consultation with his advisers and assistants who shared with him the day to day burden of Church government. But \textit{decentia} was not \textit{necessitas}; this consultation was not legally necessary. For the pope to choose to ignore his brethren might be imprudent but it was not a violation of the law of the Church. The canonist tradition from Hostiensis to Joannes Andreae was in general agreement that papal government was monarchic and not oligarchic. A difference of emphasis may be discerned between on the one hand, Hostiensis and Jean Lemoine and on the other, Guido de Baysio and Jesselin de Cassagnes. The former were not inclined to minimize the importance of the institution in which they served. They emphasized therefore everything that enhanced its dignity — its intimate connexion with the papacy, its participation \textit{de facto} in the major decision-making processes of the Roman Church, the customary observance of the convention by which they were consulted on major matters. They made as much of its status as they could short of making cardinalitial \textit{consilium} a \textit{consensus} and therefore legally obligatory. The two latter canonists did not disagree with any of this but were very much more emphatic in making it clear that the collaboration of the College was not necessary to validate any papal act nor did it succeed to the primacy during vacancy. Between these differences of emphasis, Joannes Andreae,
faithful follower of Hostiensis, inclined to the former. But whatever the difference in emphasis or in detail, the canonist tradition had evolved in general agreement, a coherent doctrine on the cardinalate and its inter-relationship with the pope. It produced two major demonstrations. First, that it was possible to maintain that the College ruled the Church as a substitute for papal government during vacancy without conceding that the College succeeded in any particular to that sovereignty conceded to the pope personally. Second, that it was possible to maintain that the College was a senate holding an especial advisory and coadjutory position without giving this body authority to limit papal power. It was in short, not a theory of curial constitutionalism. That is my main conclusion here. The canonist tradition in the period under consideration did not harbour within itself such an ecclesiological aberration as the oligarchic theory. We must look elsewhere for the genesis and development of that theory.

APPENDIX

Texts from the Apparatus of Hostiensis concerning the College of Cardinals (Edit. Paris, 1512 and Venice, 1581)

1. 1.5.3 s.v. ecclesie generali

Et nota hic quod cardinales communem impendunt sollicitudinem pro statu ecclesie generalis sicut et papa, quod dic ut notatur supra in salutatione prohemii s.v. seruus.

2. 1.6.6 s.v. inter cardinales

Ad quos solos hodie de consuetudine iam obtenta spectat electio summi pontificis, excluso imperatore et eius nunciusi, quamuis olim fuerit secus obtentum, ut patet liii. dist. § Verum et c. preced. et sequen. Et primo episcopi cardinales inter se super dist. § Quod episcoporum superest nisi unus? In nomine domini (D. 23 c.1). Quid si nullus episcoporum superest nisi unus? Respondere, admittet alios et tractet cum eis, arg. in eo quod legitur et notatur infra codem Ne pro defectu § fi. Hodie tamen hie praerogativa episcopis non seruat, immo sunt de consuetudine omnes pares, et eliguntur de triplici ordine scrutatores, de quo legitur et notatur infra de tempore ordin. Si archiepiscopus § fi. (D. 11.6), et c. Si quis pecunia (D. 79 c. 1, 5, 9). Alii dicunt quod concilium esset congrugandum et per ipsum universalis ecclesie prouidendum, ar. lxv. dist. c.ii. et iii. et in eo quod legitur et notatur infra de tempore ordin. Si archiepiscopus § fi. (1.11.6), et cleruc et populus romanus debent concilium convocare, argumentum
optimum lkv. dist. Si forte (D. 65 c. 9). Solutio, etsi hoc secundum sit forsae iustius, primum tamen videtur leuius et commodius, quia periculum est in mora, arg. Supra eodem cap. rr. i, infra eodem Non pro defecctu (1.6.41) et adde quod notatur infra de renun. Nisi cum pridem (1.9.10) § propter maliciam.

3. 1.6.6 s.v. nullatenus assumatur

Quid ergo si due partes nullo modo consentiunt? Inucetur brachium seculare, ut plerumque fieri consuevit. Ar. ad hoc, xvii. di. Nec licuit (D. 17 c. 4), xxiii. q. v. De liguribus (C. 23 q. 5 c. 43), et ponatur in conclavi donec concordent sicut fuit factum ut fertur in electione domini Honorii iii. apud perusium, secundum Tancredum. Vel vocentur religiosi et clerici cum eodem, bxix. di. § i et c. seq. (D. 79 dict. Grat., c. 1). Nam et episcopi, cleris uniurnus et senatus et populus ad hoc sunt vocandi, bxiii. di. Quia sancta (D.63, c. 28); sed illud abit in desuetudinem, bxiii. di. § Verum et c. seq. (D. 63 dict. Grat., c. 29), et hec constitutio solis cardinalibus hoc reseruat cui standum est, ut notatur supra § i super verbo, a duabus partibus. Sed nuncuid cardinales possunt alios creare cardinales cum quibus concordarent? Sic, cum enim possint creare papam quod plus est, multo fortius cardinales quod minus est, sicut notat Huguccio, bxix di. Nullus (D. 79 c. 7) et facit pro ipso, infra qui finit le. c. Per venerabilem (4.17.13); non tamen hoc semper sequitur. Ar. Ecce enim capitulum creat episcopum et tamen non possunt creare rectorem, quod minus est, sede vacante, infra ne se. va. Illa (3.9.2). Recurre ergo ad glossam Tancredi ut ponantur in conclavi, xxiii. q. v. De liguribus (C. 23 q. 5 c. 43) in fine, et eis cibaria subtrahantur quousque concordauerint, sicut fit tota die, ar. v.q.v. Non omnis (C. 5 q. 5 c. 2) et xxiii. q. iii. Nimium sunt inquieti (C. 23 q. 4 c. 37)... Sunt etiam causas in quibus layci jurisdictionem habent in clericos, puta quando deest alius qui iusticiam reddat, ut legitur et notatur secundum Johannem, xxiii. q. v. Principes (C. 23 q. 5 c. 20), hii et alii causis, infra de sentent. excomm. Ut fame § fi. (5.39.35). Nota hodie tamen quod nec pro defecctu etiam iusticie alius clericus ad seculare judicii trahi debet, ut infra de iudicii Qualiter (2.1.17), nec inuitus etiam in loco aliquo detinentur, infra de sentent. excom. Nuper (5.39.29), nisi ad requisitionem ecclesie hoc fiat, infra de iudicii. Cum non ab homine (2.1.19), infra de re. eccle. non alie. c. fi. in prin. (3.13.12), infra de clerici. excom. ca. ii. in fine. (3.27.2). Quare satis est euidens quod per constitutionem novam esset circa hoc prouidendum.

4. 1.24.2 s.v. cardinalium

i. ecclesiam principaliter regentium... sic dicti a cardine, quia sicut cardine regitur ostium, ita per istos regi debet officium ecclesie; inde dicti sunt cardinales quia per eos regitur totus mundus, inde papa cardo omnium ecclesiarum appellatur, xxv. q.i. § His ita (C. 25 q. 1 II Pars § 1)...

5. 2.24.4 s.v. Romanoe

Per hoc verbum nolunt intelligere cardinales quod et ad eas fidelitatis promissio extendatur, quia papa et ipsi romanam ecclesiam constituunt, arg. infra de ver. sig. Cum clerici (5.40.19), et pars corporis domini pape sunt C. ad legem. iul. maiesta. et argu. infra de his qui. fi. a prela. Nouit et c. Quanto (3.10.4, 5).

6. 3.4.2 s.v. In synodo

Nota hic in ammitione cardinalis synodum congregatam, et super ea totius synodi concessum fuisse habitum, immo ipsa synodus depositionem fecit ut infra sequitur
secundum dominum nostrum (Innocencium) quod dicit papa per se non potest ipsum
deponere, sed et plures testes requiruntur ad eum conuincendum, quam si de alio
ergeritas et facit ad hoc clericorum romane ecclesie priulegium speciale, vel ut
improbitas inuidiosa seu maliciose impetranantium refrenetur, ii. q. iii. Presul et

c. Nullam et § seq. Nec mirum (C. 2 q. 4 c. 2, 3). Cum enim hec in inferioribus subditi-

diligenter observaunda sint quamuis minoribus, diligentius tamen in prelatis, tan-
quam maioribus infra de accu. Qualiter ii §ii. in prin. (5.2.24), extra. domini nostri de

sent. exco. Quia periculosum [(= VIo 5.11.4)]. Diligentissime igitur in cardinalibus
tanquam maximis qui et precipua prerogatia letantur, extra domini nostri de offi-

lega. Officii §i ubi de hoc [= VIo 1.15.1]. Sunt enim cardinales pars corporis domini

pape qui super omnes est nec ab aliis iudicatur, ix. q. iii. Aliorum et c. seq. (C. 9

q. 3 c. 14, 15), sed et cum eo orbem iudicant et disponunt, unde et satis equum est

quod sicut sunt participes laboris, sic et aliquid sentiant priulegii singularis ar. C.
ad l. iul. maius. Quisquis (C. 9.8.5) vi. q. i. § verum 1. siquis cum miltibus (C. 6

q. 1 Pars IVa) et in dicta extra. Officii [= VIo 1.15.1] et supra de prescrip. Cum non

ilecat in prin. (2.26.12) cum suis concordantis. Inde est quod papa non consueuit,

neg etiam potest secundum quosdam, aliquem de cardinalibus excommunicare vel ei

aliquod preceptum facere sine aliorum suorum fratum consilio et consenso, ad quod

spectat ar. quod legitur et notatur supra de offi. ordi. Irrefragabili §excessus (1.31.13)

et infra de excess. prela. c.i. Sed et dicunt quod cardinales non incurrunt aliquam

sententiam canonis vel aliam generalem, nisi in canone vel sententia de ipsis specialis

mentio habeatur, ar. in eo quod legitur et notatur, extra. domini nostri de sen. exco.

Quia periculosum (= VIo 5.11.4) et quia cum in specie non faceret hoc papa ut pre-
misum est, nec in genere hoc facere velle intelligitur, ar. in eo quod legitur et notatur

supra de offi. lega. Quod post translationem (1.30.4), exemplum de canone, xxiii. di.

In nomine domini (D. 23 c. 1) et supra de elec. c. Licet de vitanda discordia (1.6.6)

ubi de hoc. Alii vero contrarium tenent. Quicquid tamen dicunt, hoc de plano fa-

tubi de hoc. Alii vero contrarium tenent. Quicquid tamen dicunt, hoc de plano fa-

7. 3.5.19 s.v. episcopi Preeslinensis

sed et maior est cardinalis, inquantum est pars corporis generalis vicariiues sueti, Christi,

vi. q. i. Verum § i si quis cum miltibus. Unde et habent tales quandoam prerogatium

pre alii, ut notatur extra. domini nostri de of. leg. Officii [= VIo 1.15.1] et supra de

offi. leg. Excommunicatis (1.30.9).... Hoc tamen hodie tenet romana ecclesie quod

supra de offi. lega. Quod pot post translationem (1.30.4), exemplum de canone, xxiii. di.

In nomine domini (D. 23 c. 1) et supra de elec. c. Licet de vitanda discordia (1.6.6)

supra de ofi. lega. Quod post translationem (1.30.4), exemplum de canone, xxiii. di.

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supra de ofi. lega. Quod pot post translationem (1.30.4), exemplum de canone, xxiii. di.

8. 4.17.13 s.v. frater nostri

ergo omnes episcopi, infra de crimi. fal. Quam graui (5.20.6) qui et vocati sunt

in partem sollicitudinis, supra de usu pal. Ad honorem (1.8.4). Cardinales tamen

continue ei assistent de quorum consilio procedit, supra de postula. prela. Bone i.

(1.5.4), supra de elect. In genesi, in fine et c. Ecclesia. ii. (1.6.55, 57) in fine, et de

ipsis hoc specialiter est intelligendum, sed de alius generaliter. Inter cardinales

quippe et papam tanta est unio ut sibi adinuicem omnia communicare deceat, sicut
enim inter episcopum et captilum suum maior est communio quam inter eundem episcopum et ceteras ecclesias sue dyoesis, ut supra, de testamen. Requisisti § secus autem est (3.26.15), sic multo magis et multo excellentius maior est unio inter papam et collegium romanum ecclesie quam etiam inter aliquem alium patriarcharum et captilum suum, quod dico ut notatur infra, de privile. Antiqua rn. i. (5.33.23) et tamen patriarcha sine consilio fratrum non debet ardua expedire, ut patet in his quse leguntur et notantur supra, de his quse fiunt a prela. Novit (3.10.4) et c. Quanto (C. 5). Multo fortius ergo decet papam consilia fratrum suorum requirere, nam et firmius est iudicium quod a pluribus queritur, xx. dist. De quibus (D. 20 c. 3) ideo et dicitur hic quod in executione sacerdotalis officii sibi coadjuiores existunt. Unde et dicti sunt cardinales a cardine quasi cum papa mundum regentes, ut et notatur supra, de off. archipresby. ca. ii, circa principium (1.24.2). Unde et dictum est non 'iudicabitis' in singulari, sed 'iudicabitis' in plurali, ut non solum papa sed et cardinales includerentur etiam in expressione plenitudinis potestatis, infra eo. para. v. fi., de quo tamen dic ut plene notatur infra, de peniten. Cum ex eo (5.38.14) § fi.

9. id. s. v. Iudicabitis
scilicet, tu papa et cardinales. Participant ergo cardinales plenitudini potestatis, ut et notatur supra eo. par. ver. sunt autem.

10. 5.6.17 s. v. sancta Romana ecclesie
Nota contra illos qui dicunt quod cardinales non habent ius capiti siue collegii, sed potius iure singulorum consentur tanquam homines a diversis mundi partibus singulariter vocati et in singulis ecclesias sibi commissis intitulati, licet et dyaconi non dicantur habere titulum, ut in precedente glossa. Unde nec habent archam communem nec syndicum nec similia quae universitas habere consueuit siue collegium, ff. quod cuiuscunque universitas no men l. ii (D. 3.4.1) et notatur infra de excess. prela. Dilecta (5.31.14). Et inter hec duo iura scilicet universitatis et singularitatis magna differentia est, ut patet in eo quod notatur supra de consti. Cum omnes rn. i (1.2.6).
Sed errant euidenter qui talia autumnant presumendo. Nam et de facto ita est quod antea fuerant cardinales, quam eis alius titulus assignetur, et hac consideratione habita cardinales dicuntur simpliciter nulla alia ecclesia expressa, xxiii. di. In nomine domini (D. 23 c. 1) et lxxix. di. Oportebat et c. seq. (D. 79 c. 3). Cuius ergo ecclesie dicentur tune temporis cardinales? Utique non alterius quam romanae cuius et semper cardinales sunt, ut hic expresse dicitur, et extravag. domini nostri de re iudici. Sacrosanctas § et ut ad presas v. perpetrauit, ad idem lxxix. di. Si quis ex episopis (D. 79 c. 5). Sed et archam communem habent quo ad seruitia communia, et cameralium speciale loco sindici qui et oblati equaliter duidit inter eos. Sunt et simul congregati, et ad tractatus communes totius mundi expediendos communiere conueniunt tota die, et similiter iuris eligendi habent quod ex iure congregationsis non singularitatis competit, ut patet in eo quod legitur et notatur supra de elec. c. i. etc. Licet et c. Quia propter (1.6.1, 6, 42). Quinimmo et sacrum collegium vulgariter et communiter nominatur. Unde et tale habendum est ar. ff. de fiuli. l. i. nn. i. et no. supra de sponsa. Ex litterias (4.1.7). Nam et nomen debent esse consona rebus, ut patet in eo quod legitur et notatur supra de preben. Cum secundum apostolum (3.5.16). Et in iure dicitur ecclesie romanе gremium, xxiii. di. In nomine domini, circa medium ibi 'eligatur autem de ipsius ecclesie gremio'. Estque summum et excellens collegium super omnia alia unitum adeo cum papa, quod cum ipso unum et idem est, ut patet in eo quod legitim et notatur infra de priui. Antiqua rn. i,
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(5.33.23) de peni. Cum ex eo § fl. (5.38.14) et supra que fil. sint leg. Per uenerabilem § rationibus v. sunt autem (4.17.13). Sed et collegarum appellationone continentur hi qui eiusdem potestatis sint, ff. de ver. sig. 1. Collegarum vi. carta, et accedit ff. de collegi. illicitis l. unica et 1. greca iibi posita (D. 47.22.1)

11. 5.31.8 s.v. ita

Sed nec papa hunc vel alios casus sibi specialiter reseruatos, ut in premissis casibus, consueuit expedire sine consilio fratrum suorum, id est cardinalium, nec istud potest facere de potestate ordinaria, ar. supra de his que fiunt a prelatis, Novit (3.10.4), licet secus sit de absoluta, de conces. pre. Proposuit (3.8.4).

12. 5.33.23 s.v. sibi fidelitatis et obedientia iuramento

Scilicet Romano pontifici omnes immediate pape subiectos prestare pape obedientiam. Subiectos vero mediate, non a primo dicto excipit diaconos et presbyteros cardinales, qui etsi subsint immediate, tamen sibi non prestant obedientiam. A secundo dicto excipit confirmatos, vel consecratos per papam, qui etsi subsint mediate, illam prestant, et de hoc dixi de ec. penultimum (1.30.9) per que patet quod cardinales ad obedientiam pape plus aliis se reputare debent, et papa cardinales diligere, ut selpum. Sed nunquid episcopi cardinales qui iurant, sit exclusi ab hac unitate eadem mutare, dicas quod non, sed iurant tanquam cenontes, non tanquam cardinales. Et per hoc arguitur quod parum vel nihil debet papa facere sine consilio fratrum suorum...

13. 5.38.14 s.v. plenitudinem obtinet potestatis

Alii vero vocati sunt in partem sollicitudinis, supra de usu pal. Ad honorem (1.8.4). Sed pone papam mortuum, quero penes quem resideret hec potestas? Resp. utique penes romanam ecclesiam que mori non potest, xii. q. ii Liberti (C. 12 q. 2 c. 65) nec unquam potest esse nulla,xxiiiiii. q. i. Pudenda,ad finem (C. 24 q. 1 c. 33); dormitat tamen exercitium donec caput creetur cui competit, argumentum optimum, C. de cura. fur. 1. pe. ad finem (C. 5.70.6), sic et multoties habet quis jurisdictionem, sed non exercitium, ut patet supra de rescriptis Pastoralis § fl. (1.3.14). Sed nunquid collegium cardinalium habet jurisdictiorem pape et etiam exercitium ipsius? Hu-guccio et Johannes (Teutonicus) notant de hoc,bxix. di. Nullus. ii. (D. 79 c. 7) sicut placet. Sed tu teneas quod sic, saltem in his in quibus de grandi necessitate evidenti et imminenti prouideri oportet, tum quia alia inferiora collegia hoc habent, ut patet in eo quod legitur et notatur supra de ma. et obed. His que etc. et c. Cum olim (1.33.11, 14), tum et quia sic utuntur cardinales, ar. supra de elec. Venerabilem § obiectioni v. quod autem et sequem. (1.6.34) et de transl. epi. Quanto rn. i. ad finem, et in eo quod legitur et notatur supra de of. ord. Irrefragabili § excelsus, et de fo.
compe. Cum contingat (2.2.13) nam et beata consuetudo est attenda in talibus, xvii. di. Multis, ad finem (D. 17 c. 5) tum et quia alius index non superest, supra de elect. Licet et xxiii. di. In nomine domini ibi "quia sedes apostolica", in quo casu multa conceduntur quia alias non concederentur, ut patet supra eodem capitulo in principio et C. et decur. 1. Generaliter li. x, ff. de his q. in fraud. cre. Ait pretor (D. 428.1) $ nec debitoem, ff. de of. proconsul. Menumisse (D. 1.16.10), in auten. de administr. $ illud autem, coll. vii. (Nov. 95 c. 1 § 2) et ut diff. iudii. § in ciuitatibus coll. vii. (Nov. 86 c. 7) tum quia necessitas legem non habet, de reg. iur. Quod non est licitum (5.41.4), tum quia verisimile est quod filio dei placeat hic intellectus, ne ecclesiaram videatur reliquisse sine pastore, extra. domini nostri de homici. Pro humani [= VI.5.4.1], non obtat quod aliqui dicunt quod cardinales sunt sine capite, quia hoc non est verum, immo habent caput ecclesiae proprium et generale, scilicet Christus, Col. (1.18): 'Et ipse est caput corporis ecclesiae qui est principium, primogenitus ex mortuis: ut sit in omnibus ipse primatum tenens'. Ephe. (1.22-3): 'et ipsum dedit caput supra omnem ecclesiam qui est corpus ipsius', unde et cardinalibus suis et atem vacante: sed et valde est absurdum sentire quod illa ecclesiae capite careat quod caput est aliarum, ii. q. vii. Beati (C. 2 q. 7 c. 37), immo etiam nec est longe ab heresi, de of. or. Quoniam in plerisque (1.31.14), nec obtat quod hoc non sit specialiter iure expressum, ut patet ff. de legibus, Non possunt (D. 1.3.12) et xx. di. De quibus (D. 20 c. 3) et supra de seculisum, Certificari (3.28.9) et in eo quod notatur infra eadem glosa v. sed et in iure et seq. Sed nec obtat quod non sit sedes apostolica sine papa, ut patet in eo quod legitur et notatur infra ti. i. quod de his, in fine et ar. vii. q. i. Scire debes (C. 7 q. 1 c. 7). Item non obtat quod dicunt aliqui ex hoc posse scisma et scandalum et vacante sedes diuturnam suscitari, quia hoc possit esse verum si indestincte concederetur. Sed potest restringi hoc ad necessaria vel utilia ecclesia sectarum publicum quibus omnino est providendum, ut patet vii. q. i. Scias (C. 7 q. 1 c. 35) et supra de elec. In causis, in fine (1.6.30) cum suis concordantissi; causant ergo ne nimiis laxent habenas, ar. in eo quod legitur et notatur ff. de of. proconsul. Nec quem § ubi decreta et § ubi plano, et sequentibus (D. 1.16.9 §§ 1, 3 et seq) et addit quod notatur supra de priuili. Antiqua mn. i. Sed et in iure expresse lego quattuor, quorum duo vacante sede ad officium cardinalium spectant, duo vero ad potestatem eorum. Ad officium spectat primo ut corpus mortui sepehant ante quem de elec- tione tractent, bxxix. di. Nullus. ii. (D. 79 c. 7). Secundo quod canonice futurum eligi- bxxix. di. Si quis pecunia (D. 79 c. 9), per quod potest quod potestas ipsorum eminens c. 1) tum quia maior est pena que in ecclesia dei, xxiii. q. iii. Corripiantur, in principio (C. 24 q. 3 c. 17). Unde et maiorem penam possunt ex potestate ordinaria inligere, ergo et minorem, ar. supra qui filii sint le. Per venerabilem mn. i (4.17, 13) et de decidus, Ex parte. iii. (3.30.27). Spectaret et ad potestatem secundum scilicet quod episcopi cardinales proculubio vicem metropolitani obtinent, bxxii. di. In nomine domini (D. 23 c. 1) nec potest hunc restringi ad consecrationem de qua ibi sequitur, immo generaliter loquitur et ex generem speciem infert ut ibi probatur ex vi littere, et exponi oportet metropoli, id est, pape, quia nec alius posset esse metro-
politatus romane ecclesie ut et ibi colligi potest; ergo illum potestatem illum iurisdictionem habere videntur per totam christianitatem quam et papa, nam et ipsa metropolitanus est, ut patet in eo quod legitur et notatur supra, de of. vicar. Tuam, nec queras in omnibus iis expressum quia multa suppleantur, quod dic ut legitur et notatur supra, de celebr. mis. Cum marthe § 1 (3.41.6). Sed potest dici quod potestatis plenitudinem habitu tamen habent in quantum scilicet romana censetur ecclesia que nunc quam moritur, etiam si unus tantum cardinalis sit superstes, lxv. di. Si forte (D. 65 c. 9) et non usu, sicut supra, de baptismo, Maiores § i. v. fi. (3.42.3). Iurisdictionis vero potestatem habent in exercitio, sicut est supetius prelibatum, saluis forsan his que ratione excellentiae dignitatis et eminentai ac prerogatiue summi pontificis sedi tantum apostolice reseruantur, supra de transl. epi. c. i. (1.7.1) et de of. lega. Quod translationem (1.30.4) de quibus notatur supra, de excess. prela. Sicut unire (5.31.8). Finaliter te concedere oportet quod ad minus illum iurisdictionem habet collegium quam et legatus apostolice sedis, que nec mortuus papa expirat, quod dico ut notatur supra, de restit. in inte. Tum ex literis nn. i. (1.41.5) quia nec duraret nisi collegium sedes apostolica censeretur, non enim gerit vices parietum sed potius personarum ut patet, xciii. di. c. fi. (D. 93 c. 26) et xcviii. di. c. fi. (D. 94 c. 3) et supra de of. del. Sane quia (1.29.11) et ex. domini nostri de of. vica. Romana § fi. [= VI 1.13.1] et adde quod notatur supra qui filii sint le. Per venerabilem § rationibus v. sunt autem sacerdotes, et v. fi. Hec scribo ad confutandos illos qui potestatem cardinalium quasi omnino adnihilare videntur, non ut eorum auctoritatem excellentem intendam precise limitare vel aliquibus certis regulis alligare nam et unus tantum cardinalis dignitas est precelens, ex. domini nostri de of. lega. Officii § fi. [= VI 1.15.1] est tamen contra cardinales id quod notatur supra, ne se. va. c. i. § attendentes, super verbo 'exaudire'.

14. 5.39.26 s.v. Romanam ecclesiam

Id est, papam, quia ubi papa ibi roma et romana ecclesia, vii. q. i. Scire (C. 7 q. 1 c. 7) vel ideo hoc dicit ut det intelligere quod per mortem pape non vacat officium penitentiarie, nec iurisdictione romane ecclesie, ar. in eo quod legitur et notatur supra de hereti. Ad abolendam § i (5.7.9) et de maio. et obed. Cum olim (1.33.14) supra de hereti. Fi. 5.4.1: quamvis putoe quod cardinales et ex. d. n. de homicid. Pro humanis §i [= VI 5.4.1]:

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