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# DEVELOPMENT BY THE MEDIIEVAL CANONISTS OF THE CONCEPT OF EQUITY

WILLIAM F. CAHILL\*

VERY MANY CLERGYMEN sat as judges of the King's Court from the time Henry II established it as a judicial body distinct from the Council, until the clergy, in belated obedience to papal commands, withdrew from the bench during the reign of Richard II.<sup>1</sup> Their departure from the Court marked the end of "the creative age of our medieval law."<sup>2</sup> From the reign of Henry III until that of Henry VIII, nearly all the Chancellors and most of their Masters were priests or bishops.<sup>3</sup> In this period, the Chancery was transformed from an executive bureau to a judicial organ complementing the law courts.

The philosophy of law which these men learned in their clerical studies, and the canonical system in which they had their first experiences as lawyers, must have influenced their conduct as judges in the King's Court. The influence must have had greater effect in the Chancery, where it was not so strongly opposed by the pressures of class and national customs, sheriff's routine, the magnate's resentments and the legislature's jealousies.

Further, the ecclesiastic acting as Chancellor was operating in his own line of country. The canonical judge, the bishop of a diocese, or the delegate of the diocesan bishop or of the Pope, enjoyed powers and felt concerns which were broader than those of a judge whose chief business was to resolve controversy between contenders. He was charged to look after the welfare of the community and the salvation of the souls of individual men. Sin, the conscious breach of the rules of virtue, was to him the greatest of evils, and so he had to give much attention to the intent, the good faith or bad faith, with which men acted.

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<sup>1</sup> SPENCE, *THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY* 107, 113-15; and see *Decretalium Gregorii IX*, c. 3, X, "*Ne clerici vel monachi secularibus negotiis se immisceant*," II, 50.

<sup>2</sup> 1 POLLOCK & MAITLAND, *THE HISTORY OF ENGLISH LAW* 133 (2d ed. 1899).

<sup>3</sup> SPENCE, *op. cit. supra* note 1, at 347.

Yet he had to maintain the good order of the external community of Christians, so that he must limit the immunities of good faith when it trespassed upon good order. He had some share in the legislative



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power of the Church, but it was more significant that he had power to dispense individuals from their duty to observe many of the Church's laws. He had executive power to act on his own motion and to compel obedience by penalties. He was not only permitted, but even urged, to avoid formalities in procedure.

It seems to me that no other single aspect of the medieval ecclesiastic's character had so much effect upon his thought and conduct in the Chancery as did his philosophy of equity. His notion of what equity is, and of how it ought to be used in administering the law, was, I think, most fundamental in his development of the Chancery jurisprudence. All of the rest of the lore and practice he learned in the Church and brought to the Chancery was ancillary to this philosophy.

To trace, even briefly, the churchman's

concept of equity, we shall have to begin with Hildebrand's reform of Church discipline after he became Pope Gregory VII in 1073, and go forward to Thomas Aquinas' teaching and writing, between 1254 and 1274. In this period, which runs roughly from the time of the Conquest to the early years of Edward I, a philosophy of equity and law was developed by the canonists and formulated definitively by St. Thomas.

Gregory himself, almost immediately after he began his reform of the Church, perceived that the decrees of reform might have the effect of stopping, in most of Europe, the chief works of the Church. If the decrees had been enforced strictly, which excluded from exercise of the ministry priests whose ordinations or whose ordaining prelates were tainted with simony, or whose appointments to ecclesiastical office had been made by lay lords, or whose lives were stained by concubinage, few parish priests would have retained authorization to preach the Gospel or to administer the Sacraments. Men would lack teachers of God's truth and ministers of His grace. An untainted cleric could "scarcely be found," for those which the decrees would exclude from exercise of the ministry were innumerable.<sup>4</sup>

The decrees were not always rigorously applied. Penitent and reformed concubines were absolved, men validly but unlawfully ordained, and men who had received lay investiture were left in charge of parishes, and the bishops forbore to censure laymen who received the Sacraments, in good faith or out of necessity, from the hands of priests censured by the

<sup>4</sup> See BRYN, *DE DISPENSATIONE IN IURE CANONICO* 63 (Bruges, 1925).

decrees. Gregory's successor, Urban II, wrote, "Ecclesiastical authorities judge many things strictly according to the tenor of the canons; they patiently tolerate many things because of the need of the times, and they exercise restraint by passing over many things on account of people's characters."<sup>5</sup> Precedent for the policy of applying the law less than strictly was found in the writings of the Fathers of the Church who had urged indulgence toward those who wished to return to the Church after having lapsed into heresy or apostasy.<sup>6</sup>

Two men who had been Urban's friends before his elevation to the Papacy were among the canonists whose writings, at the beginning of the twelfth century, were influential in implementing the reform commenced by Hildebrand. They were lawyers and gave reasoned form to the policy of moderating the law in its application. In their doctrine, equity is equated with mercy. If the reason for the Church's existence is to save men's souls, the administrators of Church law must not, in their concern for the welfare of the Church as a body, lose sight of the need to save the weak and the necessitous. Bernaldus of Constance, writing just before 1100, found the weakness of men a good cause for softening the harshness of the canons. He urged attention to the bad effects of strictly enforcing discipline when delinquents were very numerous, and he pointed to the common canonical practice of lessening penalties when a delinquent confessed

spontaneously.<sup>7</sup> Ives, Bishop of Chartres from 1091 to 1116, advised that rigor and mercy be balanced according to need, so that the strong be not enervated by indulgence, nor the weak broken by severity.<sup>8</sup>

In the time of Bernaldus and Ives, the systematic study of Roman Law was undertaken in the school of Bologna. Irnerius and the other founders of that school were not sterile or timeless antiquarians. They, and their students, had had their formative education in the liberal arts and in theology, as did all of their contemporaries. Thus they brought to their study of Roman Law the humanizing and rationalizing attitudes of the theological schools of their time. Because they were acutely aware that the civilization in which they lived needed a common system of law, they studied Roman Law for the purpose of filling that need.<sup>9</sup> Their theological background shows itself in their effort to organize their studies upon an all-inclusive and logically consecutive scheme. In constructing that scheme, they developed a concept of equity that was broader and yet more precise than the equity-mercy concept of the Gregorian reformers.

Irnerius puts such a scheme at the head of his treatise. He announces that he will first discuss the business of equity and justice, treating those virtues in two aspects: equity and justice not enacted into law and, then, equity and justice violated after being so enacted. Next he will speak of the law itself, and finally of those things,

<sup>5</sup> P. JAFFE, *REGESTA PONTIFICUM ROMANORUM* n. 5383 (2d ed. Berlin, 1888).

<sup>6</sup> See Cyprianus, *Epistola ad Antoniarum*, 3 Migne, *PATROLOGIA LATINA* 780 [hereinafter cited as M.L.]; Augustine, *Commentary on the Epistle to the Galatians*, ch. 2, v. 5, 20 M.L. 359.

<sup>7</sup> Bernaldus, *De Vitanda*, 148 M.L. 1180, 1185-86, 1186s.

<sup>8</sup> *Epistola* 214, 162 M.L. 217.

<sup>9</sup> Fornier, *Un Tourant de l'Histoire du Droit 1060-1140*, 41 *NOUVELLE REVUE HISTORIQUE DE DROIT FRANCAIS ET ETRANGER* 129, 130 (1917).

like custom, which are taken for law.<sup>10</sup> Equity not yet enacted is natural law. The law itself is equity reduced to writing. He notes that the law is sometimes inequitable and even unjust. In such case, he says, the law has no force and must be immediately abrogated by the lawmaker. He is emphatic that the equitable reform of the law is the exclusive function of the lawmaker. "The interpretation that reconciles these differences (between equity and law), making equity into law, is reserved to the princes only."<sup>11</sup> Though Irnerius' reservation to the princes of power to revise and even to interpret the law in accordance with equity seems to have been stated absolutely, he may not have intended it so, for he does not discuss the problem of how, if at all, equity enters into the act of judging a case under the law.

Two of Irnerius' immediate successors as teachers at Bologna took opposite views on this question. Bulgarus excluded equity from the act of judging, but Martin Gosia took the line that equity should enter into judgment as an expression or application of the purposefulness of the law.<sup>12</sup> Vacarius, who also had been a disciple of Irnerius, taught Roman Law in England in 1139, having been invited by Thomas à Becket, Henry II's Chancellor.<sup>13</sup> His statement on the general relation of law and equity is quite broad. "We say that even rude equity, where it is clear, is to be preferred to law."

But in discussing a particular case, he seems to lean to the side of Bulgarus and the formalists. "The interpretation of the judge, though it resolves the case between the parties, should not attempt to reconcile equity and law for fear of prejudicing the cases of others."<sup>14</sup>

Irnerius' formulation of a general scheme relating law and equity had an effect almost immediately upon the canonists' writings. Gratian completed his *Decretum* in the early forties of the twelfth century.<sup>15</sup> He accepts the general division of law and equity proposed by Irnerius, though he does not follow precisely its terminology.<sup>16</sup> In treating the question of whether the supreme lawmaker of the Church could make an effective law in disregard of equity, he clearly follows a principle we have heard announced by Irnerius. The Pope cannot give a privilege which would make one person rich by reducing others to misery.<sup>17</sup> On the place of equity in judgment, he is with the Gosiani, as the followers of Martin came to be known. Gratian says, "a sentence contrary to equity has the same force as a law which would oblige the subjects to do evil, for obedience is not due to prelates in matters that are illicit."<sup>18</sup>

Yet when Gratian addressed himself directly to the problem of a judge using equity to correct the law, his thought seems to have paralleled that of Vacarius. "These things are to be considered when the law is made, for once the law has been enacted,

<sup>10</sup> See KANTOROWICZ, *STUDIES IN THE GLOSSATORS OF THE ROMAN LAW* 234 (1938).

<sup>11</sup> See quotations of Irnerius in VINODOGRAFF, *DIRITTO ROMANO NELL'EUROPA MEDIOVALE* 111 (2d ed. Riccobono Italian transl., Milan, 1950).

<sup>12</sup> See KANTOROWICZ, *op. cit. supra* note 10, at 100.

<sup>13</sup> Holland, *The Activity of Magister Vacarius in England*, 2 *COLLECTANEA OF OXFORD HISTORICAL SOCIETY* 139.

<sup>14</sup> SELDEN SOCIETY, *VACARIUS, LIBER PAUPERUM* 16 (De Zulfeta ed. 1929).

<sup>15</sup> STICKLER, 1 *HISTORIA IURIS CANONICI* 204 (Turin, 1950).

<sup>16</sup> GRATIAN, *DECRETUM*, *Dist. I*, 1-3.

<sup>17</sup> *Cau.* 25, 1, dictum p. c. 16.

<sup>18</sup> *Cau.* 11, 3, dictum p. c. 90.

it is not permissible to judge concerning them, but judgment must be made according to the law."<sup>19</sup> In another place he says clearly that a sentence contrary to the written law has no force,<sup>20</sup> though he of course saves the case where the law gives discretion to the judge.<sup>21</sup>

The influence of the "equity-mercy" concept, which had been elaborated by Bernaldus and Ives, is seen throughout the *Decretum*. Gratian, however, explicitly refers the concept to Isidore of Seville, a Bishop in the seventh century, to whom was attributed one of the most extensive of the early collections of Church laws. Isidore had said that one applying the canons must construe them with an eye to person, place, time and other circumstances of the case at hand.<sup>22</sup> Gratian was not content to recite general doctrines on the relation of equity to the law. He employed the equity concept as a tool to accomplish the tasks he had set for himself: to compile the decrees systematically, according to their subject matter, and to reconcile decrees whose sense seemed discordant, so that those who used his compilation might be able to choose and understand the canonical provision which should be applied in a given case. Compilations made before the *Decretum* were arranged on scarcely any other basis than simple chronology, and offered little, if any, help to a counsellor or a judge who had to fit the law to a case.

Gratian's *Decretum* soon became the basic work of all canonical teaching and writing. As the lecturers in theology cast their teaching into the form of comments

upon the Sentences of Peter Lombard, the teachers of canon law commented upon the *Decretum*. And nearly all canonical writing was a record of such comments, called glosses. The glossators or commentators of Gratian's *Decretum* were called "decretists."

Some of the men who distinguished themselves as lecturers on the *Decretum* in the canon law schools of the Continent reached influential positions in England. In the last quarter of the twelfth century, Gilbert de Glanville and Gerard Pucelle, who had been teachers at Paris, held respectively the Sees of Rochester and Coventry.<sup>23</sup> Some of the glosses on Gratian in the Durham Cathedral Manuscript are attributed to Gerard.<sup>24</sup> That canonical literature was current among the English clergy of this period is illustrated by an entry on the Lincoln Cathedral Register. Peter of Paxton, a country parson, had a complete set of canon law treatises down to, and including, the Fourth Lateran Council, which was held in 1215.<sup>25</sup> A good number of Englishmen earned reputé as teachers of the *Decretum* in the Continental schools. Two of the the most famous were Richard de Lacy and one Alan who was called "l'Anglais."

Even yet it is not an easy task to search out the learning of the decretists. When the *Decretum* came to be printed, the editors included only the glosses found in manuscripts easily available to them, so that the writings of most of the decretists

<sup>19</sup> *Dist.* 4, dictum p. c. 2.

<sup>20</sup> *Cau.* 2, 6, dictum p. c. 41.

<sup>21</sup> *Cau.* 2, 5, dictum p. c. 18.

<sup>22</sup> *Dist.* 29, Proem.; *id.*, c. 1.

<sup>23</sup> Kuttner & Rathbone, *Anglo-Norman Canonists of the Twelfth Century*, 7 TRADITIO 277, 289, 300.

<sup>24</sup> Lefebvre, *Gerard Pucelle*, 5 DICTIONNAIRE DU DROIT CANNONIQUE col. 955 (Paris, 1935).

<sup>25</sup> LINCOLN RECORD SOCIETY, 3 REGISTRUM ANTIQUISSIMUM OF THE CATHEDRAL CHURCH OF LINCOLN 164 (Foster & Major ed. 1931-40).

can now be studied only in manuscripts widely scattered throughout Europe. Indeed, it is only in the past twenty years that any adequate effort has been made to catalogue these manuscripts and that effort, pushed by the initiative of one man, Professor Kuttner of the Canon Law School at Washington, has gone forward slowly.

A considerable number of these manuscripts represent the work of Anglo-Norman canonists. Here we find continued the thought of Irnerius and Gratian on the contrasted concepts of "rude equity" and "equity reduced to writing." In describing how custom can come to have the force of law, this caveat is made: "The usage of custom cannot so far prevail that it overcomes reason, that is, rude equity."<sup>26</sup> Another Anglo-Norman warns that the broad statement, "Equity is the law's law," is true only of equity reduced to writing, for rude equity only softens the rigor of the law.<sup>27</sup> Some writers of this school took a rather narrow view of the usefulness of the "equity-mercy" concept. Commenting upon the text of Gratian which says that a just judge carries in one hand justice and in the other mercy, the gloss declares, "This is to be referred to different cases. For one cannot exercise in the same decision both rigor and mercy."<sup>28</sup>

The canonical executives, the same bishops and delegates who sat as judges when occasion demanded, exercised a broad power of dispensation, relaxing an

individual's canonical duties because of hardship or because the relaxation would serve, better than the performance of the duty, the individual's spiritual welfare or the general good of the Church. The common canonical doctrine was that such relaxation of law did not change the law and could not, therefore, establish rules to be followed by persons who found themselves in circumstances similar to those in which a dispensation had been granted in the past, or by judges deciding other cases. Yet one of the Anglo-Norman decretists took the view that these grants of favor did establish such rules.

When by dispensation the Canons settle a matter contrary to the rule of the common law, they do not always state whether or not this is to be taken as an example for other cases. I believe that the dispensation becomes common law [sometimes]. . . . The matter is otherwise, however, where there is added [in the dispensing canon] a clause forbidding that the like be done in the future . . . ; yet, I would also consider whether the cause for which the dispensation was given be perpetual or temporary only. . . .<sup>29</sup>

As time passed after Gratian had made his compilation, new canonical decrees issued from Rome, and it was necessary for one who wished to know the law of the Church to add knowledge of these new "decretal letters" to the basic learning he had gained from the Decretum and its glossators. Professor Kuttner finds that of the twenty-seven reported primitive collections of the decretals, fifteen are of English origin.<sup>30</sup>

In September of 1234, St. Raymond

<sup>26</sup> *Rhetorica Ecclesiastica*, (Wahrmund ed.) QUELLEN ZUR GESCHICHTE DES ROMANISCH-KANONISCHEN PROCESSES IN MITTENALTER, I, iv, 35.

<sup>27</sup> *DECRETUM GRATIANI CUM GLOSSA ANONYMA*, Durham Cathedral Ms. C. II, fol. 49 — comment upon *Dist.* 50, 25, v. *indulgentie*.

<sup>28</sup> *DECRETUM GRATIANI CUM GLOSSA ANONYMA*, Caius College, Cambridge, Cod. Ms. 676, fol. 28 — comment upon *Dist.* 45, 10.

<sup>29</sup> *SUMMA, Et est sciendum*, GLOSSAE STUTTGARDIENSES, Cod. Ms. Rouen Bibl. Municip. 710 (E. 29), fol. 136 — comment upon *Cau.* 1, 7, 20.

<sup>30</sup> Kuttner, *Projected Corpus of Twelfth Century Decretal Letters*, 6 TRADITIO 345, 351 (1949).

of Penafort completed the compilation of such decretal letters which Pope Gregory IX had ordered four years before. Gregory had this work published as an official compilation, thus enacting, for the first time, a systematic, self-consistent, and fairly complete body of currently effective canon law. This work must have gotten an early notice in England. Henry of Susa who, under the title of Cardinal Hostiensis, was to achieve fame as a commentator on the new collection of Decretals, was at the court of Henry III from 1236 to 1244. He came in the train of Queen Eleanor but later assisted the King himself in some canonical business. He must have talked canonical shop with the people in Henry's Chancery.

The Decretals of Gregory IX contain no general disquisition on law and equity, but the men who lectured on them and made written commentaries incorporated the established doctrines of the Decretum and the decretists, and they looked back also to the glossators of the Roman Law. Hostiensis indicates that the quarrel begun among the Romanists of Bologna had continued and had spread to involve the canonists. He opposes Martin Gosia to John Bassiani who, at the end of the twelfth century, had developed the teaching of Bulgarus, Martin's direct opponent. Hostiensis says:

For Martin was a spiritual man and, as far as he could in his time, always held to the divine law against the rigor of the civil law. But John did not savor the things of the spirit, and like an animal gave nearly all of his attention to temporal things and the rigor of the civil law. Wherefore he and his followers, of whom there are many in this day, reject spiritual opinions and say, "This is the captious equity of Martin". But whether they

like it or lump it, the law must follow this equity wherever danger to souls is in question. . . . If the pagan gave effect to the natural equity of the law of reason, what should a Christian do with the equity of the natural law that is contained in the Law [of Moses] and the Gospel?<sup>31</sup>

One of the distinctive contributions that St. Thomas Aquinas made to the teaching of morals was his adoption and adaptation of Aristotle's treatment of the virtues. In the Philosopher's work<sup>32</sup> he found that two distinct virtues are said to govern the act of judgment. There is *synesis*, which helps one to judge rightly according to the principles which are called "the common rules" because they are quite closely related to the matter in hand. And there is *gnome*, which helps one to shape his judgment upon higher principles. This latter, said Thomas, imports a kind of perspicacity in judgment.<sup>33</sup>

In the judgments of judges, the common rules are, of course, the written laws, the positive or enacted law. These laws determine the rules of justice, either by reciting what is just according to the law of nature, or by authoritatively determining what is just in matters that the natural law leaves indeterminate.<sup>34</sup> Since the judge's task is to decide what is just in a given case, he cannot judge rightly without taking account of the laws which express the common rules of justice.<sup>35</sup> These common rules, as generalizations, must fail to provide for singular or unusual cases, as Aristotle pointed out,<sup>36</sup> but the judge's work is to

<sup>31</sup> HOSTIENSIS, IN PRIMUM LIBRUM DECRETALIU COMMENTARIA, ad X. 1, 43, 9 (Venice, 1581).

<sup>32</sup> ARISTOTLE, ETHICS, 6:11.

<sup>33</sup> AQUINAS, SUMMA THEOLOGICA, II-II, q. 51, art. 4.

<sup>34</sup> *Id.*, II-II, q. 60, art. 5, c.

<sup>35</sup> *Ibid.*

<sup>36</sup> ARISTOTLE, ETHICS, 6:11.



decide what is just in cases each of which is unique, or nearly so, in its component and concomitant circumstances.<sup>37</sup> The common rules clearly fail to help the judge decide cases justly when they are enacted contrary to the requirements of natural law. Since man's will cannot change nature, such enactments are not to be followed in the judge's decisions, for they are not laws, but corruptions of the law.<sup>38</sup> But even laws rightly enacted fail sometimes because they are so phrased that if the judge followed them literally in some cases, his decision would be contrary to natural law. Here, says Thomas, the judge must decide his case by resorting to the equity that the legislator intended, as to a higher principle of decision. Thomas relies upon the dictum of Modestinus, "Neither the reason of the law nor the benignity of equity will permit us, by harsh interpretation, to make burdensome what was put into the law to benefit men."<sup>39</sup>

It is important to note that, for St. Thomas, judicial restraint was not dictated by mere opportunism, but was imposed by a reasoned philosophy. There is no virtue whose acts the law may not require, but the law's requirements must be limited to those virtuous acts which serve directly or indirectly the common welfare.<sup>40</sup> He picks up Aristotle's distinction between the legal duty and the moral duty.<sup>41</sup> The object of the former is a performance or forbearance that some law binds one man to render to another. The latter is imposed by each

man's necessity to be decent and virtuous. Not every moral duty of a man is strictly owed to another man. Some moral duties, like those of honest dealing and fair recompense, are imposed by the necessity of maintaining decency in the community. These are closely related to legal duties and may easily pass over into that type of obligation, because they are owed to others, and because the community's need for decency demands their performance. On the contrary, such moral duties as cordiality and liberality, though they contribute to a greater common decency, are not strict necessities of the human community.<sup>42</sup>

St. Thomas' *Summa Theologica* became a commonplace book for divinity students in England from the middle of the thirteenth century until the Protestant Reformation. Indeed, it seems to have influenced the thinking of such early Protestants as Christopher St. Germain. More English clergymen in that period felt a commitment to the Franciscan and Augustinian schools of theology than to the Dominican school which St. Thomas led. Yet St. Thomas' treatment of the natural virtues, such as justice and equity, was common doctrine in all three schools.

No fair appraisal of the work of the English priests and bishops who developed the distinctive doctrines of the Chancery jurisdiction can fail to take account of the concept of equity and its relation to law which the medieval canonists developed and St. Thomas formulated.

<sup>37</sup> AQUINAS, *SUMMA THEOLOGICA*, II-II, q. 60, art. 5, ad 2.

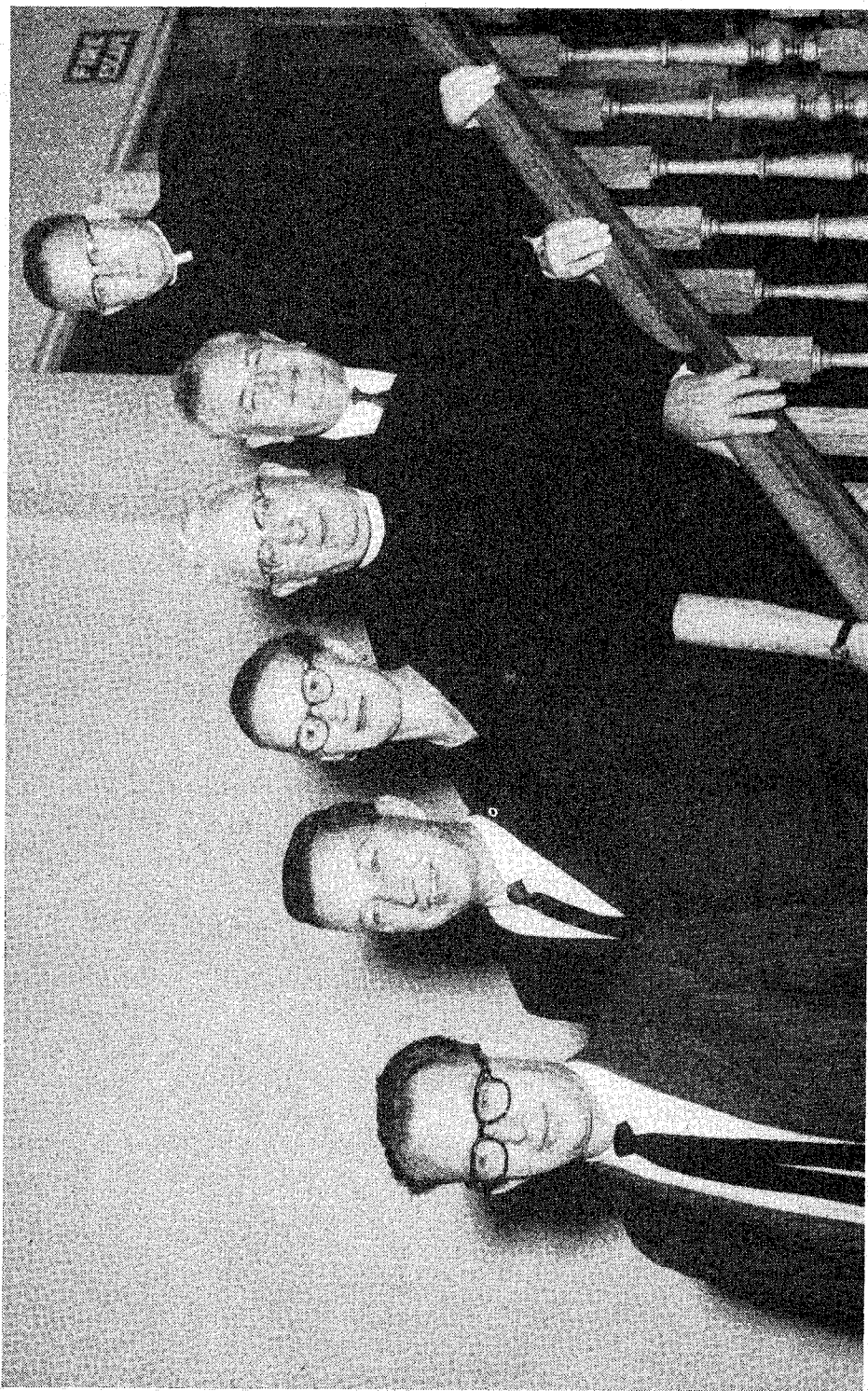
<sup>38</sup> *Id.*, II-II, q. 60, art. 5, ad 1.

<sup>39</sup> DIGEST I, 3, 25.

<sup>40</sup> AQUINAS, *SUMMA THEOLOGICA*, I-II, q. 96, art. 3, c.

<sup>41</sup> *Id.*, II-II, q. 80, art. 1, c, citing ARISTOTLE, *ETHICS*, 8:13.

<sup>42</sup> *Ibid.*



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