# PALLADIUM THEOLOGICUM

The course of scholastic theology after the mind of St. Bonaventure
in seven tomes · Tome V: On the Virtues

by Gaudentius Bontempi of Brescia, O.F.M. Cap.

## TREATISE II — ON CONTRACTS

Latin and English in parallel

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# Prologue

[1] ONE is the bond of perfection by which the faithful, bound to one another, are united to God; but many are the ties and knots by which, as regards temporal advantage, men are bound not so much to one another as entangled in quarrels with one another, and these are contracts: Of the former, namely the contract of Charity, the Seraphic Bonaventure treated most fully; nor indeed does nearly all his work breathe anything else: Of the latter indeed he wove together but little (I confess). For while he was still a young man, on account of his aged wisdom of soul, he had been placed at the head of a Religious order, to which he had attentively presided for eighteen years, soon enrolled among the most eminent Cardinals, assumed to the Alban bishopric, and chosen as coadjutor of the supreme Pontiff, and distracted by various courts until his fiftieth year — in which, the Council of Lyons, over which he presided, having been concluded, he died, after he had contracted that famous union of Latins and Greeks — there was no time left over to spend on fully elucidating the contracts of the world; wonderful indeed, how amid so many straits of things and times he completed such outstanding volumes, in which divine and human things alike are wondrously described. Hence I will dispatch this matter more briefly, omitting nothing, however, that either pertains to the essence of contracts or regards the obligation of conscience in so difficult a matter. Moreover, for a fuller treatment, the immense works of Bonacina, Azor, and others are at everyone's hand, who strive to set forth lucidly whatever can intervene in contracts. Above all I shall treat of contract in general; afterwards I shall examine individual contracts in particular, where I shall touch chiefly upon those cases that serve daily practice everywhere; but if any cases occur that are now fallen out of use through desuetude, or rest on useless theory, I shall refer them to be examined by others.

> *UNICUM est perfectionis vinculum, quo fideles, inter se colligati, Deo uniuntur; plures autem sunt nexus, et nodi, quibus quoad temporale emolumentum homines non tam sibi mutuo obligantur quam inter se litigiis implicantur, et hi sunt contractus: De priori, quippe Charitatis contractu, fusissime tractavit Seraphicus Bonaventura; nec aliud fere omnia eius opera redolent: De posterioribus quidem paucula (fateor) contexuit. Cum enim adhuc Iuvenis ob senilem animi sapientiam fuerit Religionis clavo praepositus, cui decem et octo annos sollicitus assederat, mox inter eminentissimos Cardinales conscriptus, ad Episcopatum Albanensem assumptus, et in summi Pontificis coadiutorem adscitus, variisque distentus curiis ad annum quinquagesimum, quo, absoluto Lugdunensi Concilio, cui praefuit, obiit, postquam celebrem illam Latinorum, et Graecorum unionem contraxerit; ultra tempus non suppetebat, quod elucidandis plene saeculi contractibus impenderet; mirum sane, quomodo inter tot rerum, et temporum Angustias, tam egregia volumina, quibus Divina, simul et humana mirifice describuntur, absolverit: Hinc ego ab hac materia brevius me expediam, nihil tamen praemittens, quod vel ad contractuum essentiam, spectet, vel conscientiae obligationem in tam difficili re respiciat: Caeterum pro fusiori tractatu cuique prae manibus sunt Bonacinae, Azorii, aliorumque immensa fere opera, qui, quicquid contractibus intervenire queat, dillucide promere satagunt. Inprimis autem de contractu in genere agam; postea singulos in specie contractus examinabo, ubi eos potissimum casus attingam, qui quotidianae praxi ubique terrarum inserviunt; si qui autem casus occurrant, iam desuetudine absoleti, aut inutili Theoria nixi, eos aliis discutiendos remittam.*

# Disputation I: On Contracts in General

1 TO CONTRACT signifies to draw many into one; hence its first effect is obligation, which is a bond of law by which one is bound to another to do or not to do something, as it is said *§. 1. Institut. de oblig. et l. 1. ff. de pactis.* But for contracting this obligation there is required first that the persons be capable, second that an intention of obligating oneself intervene; then that they be compelled neither by fear nor by fraud. For since a contract is a free act, whatever destroys voluntariness is against it. And nothing is so contrary to this as error or fraud, *l. per errorem, ff. de iurisd. omnium Iud.* And these things, we shall prove, are required for absolute contracts; but there are also others conditional, modified in various ways by Law, about which I shall also inquire; but first something must be said of the Quiddity and Division of Contract.

> *CONTRAHERE sonat plures in unum trahere, unde primus eius effectus est obligatio, quae est Iuris vinculum, quo unus alteri astringitur ad aliquid faciendum, vel non faciendum, ut dicitur* §. 1. Institut. de oblig. et l. 1. ff. de pactis. *Ad hanc autem obligationem contrahendam primo requiritur ut personae sint habiles, secundo ut se obligandi intentio interveniat; deinde ut nec metu, nec dolo adigantur. Cum enim contractus sit actus liber, ei infensum est, quicquid voluntarium perimit; Huic autem nihil tam contrarium est, quam error, aut dolus,* l. per errorem, ff. de iurisd. omnium Iud. *Et haec quidem ad contractus absolutos requiri probabimus; verum sunt et alii conditionales, diversimode a Iure modificati, de quibus etiam inquiram; sed prius de Contractus Quiditate, et Divisione agendum.*

## Question I: What a contract is, and of how many kinds

1 CONTRACT is properly defined by Ulpian in *Leg. Labeo, ff. de verborum signific.*, where he says: *It is an obligation from one side and the other:* the Doctors supply: *Arising from the will and agreement of the parties.* That is, a contract is a pact from which arises an obligation on both sides. Thus St. Bonaventure takes the definition of contract *in 4. dist. 27 passim, and dist. 29 quaest. 2, in fundamentis, in corpore, et ad argumenta.*

> *CONTRACTUS proprie definitur ab Ulpiano* Leg. Labeo, ff. de verborum signific. *ubi ait:* Est ultro, citroque obligatio: *subaudiunt Doctores:* Ex partium voluntate, et pactione insurgens. *Idest contractus est pactum, ex quo oritur utrinque obligatio. Sic accipit definitionem contractus D. Bonaventura* in 4. dist. 27. passim, et dist. 29. quaest. 2. in fundamentis, in corpore, et ad argumenta.

2 THIS definition, or description, is handed down by its effect, that is, by the mutual obligation which results from the pact of the parties, as St. Bonaventure observes, *in the places cited*; wherefore it is rather a causal definition than a formal one, as Bonaventure notes, *in dist. 3. de contract. quaest. 1. puncto 1.*

> *TRADITUR autem haec definitio, sive descriptio per effectum, id est, per mutuam obligationem, quae ex pacto partium resultat, ut advertit D. Bonavent.* locis adductis, *quare est potius definitio causalis, quam formalis, ut notat Bonav.* in dist. 3. de contract. quaest. 1. puncto 1.

3 Yet it can be said, with St. Bonaventure, *4. dist. 27. quaest. 2.*, that the obligation, or bond, of contract is taken in the definition according to the cause in intention, insofar namely as the will, intending the expressly drawn obligation, from both sides is the contract; and then the definition will be essential

through the formal cause, which Suarez also observes, *Lib. primo de voto, cap. 13. num. 11.*, and Fagundez, *Lib. 1. cap. 2.*

> *Potest tamen dici cum D. Bonavent.* 4. dist. 27. quaest. 2. *obligationem, seu ligamen contractus, in definitione sumi secundum causam in intentione, quatenus scilicet voluntas, intendens obligationem retra expressa, ex utraque parte est contractus, et tunc definitio erit essentialis per causam formalem, quod observant etiam Suarez* Lib. primo de voto, cap. 13. num. 11. *Fagundez* Lib. 1. cap. 2.

4 From these you have that a pact extends more widely than strict contract. A pact is defined: *It is the agreement and consent of two or more into the same thing.* For in a pact an obligation can result from one side only, as in donations, where only the donor is obligated to give, not the donee to accept. Then, by force of a bare pact, a promise arises in the order of truth, not of justice; but in a contract an obligation of commutative justice arises, as St. Bonaventure teaches, *4. dist. 29. loco citato.*

> *Ex his habes pactum latius patere rigoroso contractu. Definitur autem pactum:* Est duorum, aut plurium in idem placitum, et consensus. *In pacto enim potest resultare obligatio solum ex altera parte, ut in donationibus, solus donans obligatur dare, non vero donatarius accipere. Deinde oritur ex vi pacti nudi promissio in ratione veritatis, non iustitiae: In contractu vero oritur obligatio iustitiae commutativae, ut docet D. Bonavent.* 4. dist. 29. loco citato.

5 HENCE also you have by what name certain conventions are called in which results the obligation of one party or parties from some office, for example of a Tutor, Curator, or steward; these, however, are called quasi-contracts. The definition is given by Fagundez, *de contract. Lib. 1. cap. 2.: A quasi-contract is an obligation by which someone is bound to another not from any contract or wrongdoing, but from some office or act lawful and honest, even though no express will of either party intervenes.*

> *HINC etiam habes, quo nomine appellentur aliquae conventiones, in quibus resultat obligatio partis, vel partium, ex officio aliquo, puta Tutoris, Curatoris, aut villici; dicuntur autem quasi contractus. Definitur vero apud Fagundez* de contract. Lib. 1. cap. 2. Quasi contractus est obligatio, qua quis ligatur alteri, non ex aliquo contractu, aut maleficio, sed ex aliquo officio, vel facto licito, et honesto, licet non interveniat expressa voluntas utriusque.

6 THEREFORE IT IS MOST CERTAIN that in contracts the consent of both parties is necessary, as the Holy Doctor often repeats, *in 4. dist. 27. 28. et 29.*, Molina, *Tom. 2. disp. 254.*, Lessius, *Tom. 1. Lib. 2. cap. 17. dub. 2.*, Azor., *part. 3. lib. 6. cap. 2.*, Bonacina, *de contract. in genere, disp. 3. quaest. 1. puncto 2.*, Sanchez, *Lib. primo de matrim. disp. 8. et lib. 4. decal. cap. 1.*, Suarez, *tomo 2. de relig. lib. 2. de iuram. cap. 7.*, Fagundez, *Lib. 1. cap. 2. num. 2.*, Tannerus, *disp. 4. quaest. 7. dub. 1.*

> *CERTISSIMUM est igitur, in contractibus necessarium esse consensum utriusque partis, ut saepe repetit S. Doctor* in 4. dist. 27. 28. et 29. *Molina* Tom. 2. disp. 254. *Lessius* Tom. 1. Lib. 2. cap. 17. dub. 2. *Azor.* part. 3. lib. 6. cap. 2. *Bonacina* de contract. in genere, disp. 3. quaest. 1. puncto 2. *Sanchez* Lib. primo de matrim. disp. 8. et lib. 4. decal. cap. 1. *Suarez* tomo 2. de relig. lib. 2. de iuram. cap. 7. *Fagundez* Lib. 1. cap. 2. num. 2. *Tannerus* disp. 4. quaest. 7. dub. 1.

7 THERE ARE MANY kinds of contracts, as St. Bonaventure teaches, *in the places cited, and in speculo animae, cap. 1. 2. et 4.*

> *MULTA sunt genera contractuum, ut docet D. Bonavent.* locis adductis, et in speculo animae, cap. 1. 2. et 4.

8 THEY ARE DIVIDED into Nominated and Unnominated. A nominated contract is one which has its proper name, as Lease, Hiring, Sale, Deposit, and Settlement.

*DIVIDUNTUR in Nominatos, et Innominatos. Nominatus contractus est, qui proprium nomen habet, ut Locatio, Conductio, Venditio, Depositum, et Transactio.*

9 UNNOMINATED contracts are those which lack a proper name, and they are reduced almost to these four modes: *Do, ut des, e.g.* Give me a horse, that you give me wheat. *Do, ut facias:* I give you wheat, that you till my field. *Facio, ut facias, e.g.* I till your field, that you build me a house. *Facio, ut des.* I till your field, that you give me wheat. These are treated in *L. ge. Naturalis, ff. de praescriptis verbis.* But these contracts are regulated according to the Nominated ones.

*INNOMINATI contractus sunt, qui carent nomine proprio, et fere ad hos quatuor modos reducuntur:* Do, ut des, v. g. *Da equum, ut des triticum.* Do, ut facias: *Do triticum, ut colas agrum.* Facio, ut facias, v. g. *Colo tibi agrum, ut domum mihi aedifices.* Facio, ut des. *Colo tibi agrum, ut des mihi triticum. De his agitur* L. ge. Naturalis, ff. de praescriptis verbis. *Hi vero contractus regulantur iuxta Nominatos.*

10 NOMINATED contracts are divided into contracts of good faith and of strict law.

*NOMINATI dividuntur in Contractus bonae fidei, et stricti iuris.*

11 CONTRACTS OF GOOD FAITH are those in which Judges decide not so much in the rigor of law and pact as from equity and good.

*CONTRACTUS bonae fidei sunt, in quibus Iudices decernunt non tam in rigore iuris, et pactionis, quam ex aequo, et bono.*

12 CONTRACTS OF STRICT LAW are those in which judges proceed by the rigor of law.

*CONTRACTUS vero stricti iuris dicuntur, in quibus iudices procedunt rigore iuris.*

13 CONTRACTS OF GOOD FAITH are Purchase, Sale, Lease, Hiring, Procuratorship, or Mandate for the management of affairs, Deposit, Loan for use, Insurance, Partnership, Guardianship, Pledging, the right of dividing an estate among heirs, division of common property among several. Likewise when a thing is given to someone that he may return it, or its price. But the other contracts, as Emphyteusis, *quaest. 5. num. 32.*, and Exchanges, are of strict law, as Rebellius teaches, *2. part. lib. 1. quaest. 2.*, Molina, *Tom. 2. de iustitia, disput. 259.*, Valascus, *de emphyt. quaest. 5.*, Fagundez, *cap. 1. num. 8.*, who, against others, approve this division not only in the external forum but also in the forum of the soul.

*CONTRACTUS bonae fidei sunt Emptio, Venditio, Locatio, Conductio, Procuratio, seu negotiorum gestorum Mandatum, Depositum, Commodatum, Assecuratio, Societas, Tutela, Pignoratio, Ius dividendae facultatis inter haeredes, divisio rei communis inter diversos. Item quando alicui datur res ut illam reddat, vel pretium eius. Caeteri vero contractus, ut Emphytheusis* quaest. 5. num. 32. *et Permutationes, sunt stricti iuris, ut docent Rebellius* 2. part. lib. 1. quaest. 2. *Molina* Tom. 2. de iustitia, disput. 259. *Valascus* de emphyt. quaest. 5. *Fagundez* cap. 1. num. 8. *qui contra alios approbant hanc divisionem, non modo in foro externo, sed etiam in foro animae.*

14 BUT WHETHER betrothals ought to be reckoned among contracts of strict law; Sanchez, *Lib. 1. de matrim. disp. 64. num. 3.*, supposes, as certain, that they are of good faith, from which it can be inferred that betrothals to which fraud gave occasion are invalid, because contracts of good faith to which fraud gave occasion are invalid; and this seems to be the mind of St. Bonaventure, *in 4. dist. 27. dub. 2. litterali.*

*UTRUM vero sponsalia debeant computari inter contractus stricti iuris; Sanchez* Lib. 1. de matrim. disp. 64. num. 3. *supponit, tanquam certum, esse bonae fidei, ex quo potest inferri sponsalia, quibus dolus causam dedit, esse invalida,*

*quia invalidi sunt contractus bonae fidei, quibus dolus causam dedit, et hoc videtur sentire D. Bonavent.* in 4. dist. 27. dub. 2. litterali.

15 NOMINATED contracts are divided into Onerous and Lucrative. Lucrative are those in which something is remitted, promised, or given to someone without any burden or compensation of justice, but merely gratuitously, as donation, acceptilation, loan for use, as to the use of the thing; for although the borrower is bound to restore the thing, yet the use is liberal. Onerous contracts are those on which a burden falls on both sides, as in purchase. To this division are reduced contracts Respective and non-Respective. Respective are those in which obligation results from both sides, and they are proper contracts. Non-respective, in which obligation results from one side only, are less proper, as stipulation and promise.

*DIVIDUNTUR contractus nominati in Onerosos, et Lucrativos. Lucrativi sunt in quibus absque ullo onere, aut recompensatione ex iustitia, sed mere gratis aliquid alicui remittitur, promittitur, vel datur, ut donatio, acceptilatio, commodatum, quo ad usum rei; nam licet commodatarius teneatur restituere rem, tamen usus est liberalis. Onerosi contractus sunt, quibus ex utraque parte onus incumbit, ut in emptione. Ad hanc divisionem reducuntur contractus Respectivi, et non Respectivi. Respectivi sunt, quibus ex utraque parte obligatio resultat, et sunt contractus proprii. Non respectivi, in quibus ex una tantum parte resultat obligatio, ut sunt minus proprii, ut stipulatio, et promissio.*

16 IF contract be taken for pact, it is divided into Bare and Clothed. A bare pact is one in which only the agreement of the parties intervenes and nothing further has been done, and no other foundation is present. Clothed is that which is strengthened by solemnities, or is invested with some circumstance in which it is confirmed by civil law.

*SI contractus accipiatur pro pacto, dividitur in Nudum, et Vestitum. Nudum pactum est, in quo sola intervenit conventio partium, et ad nihil amplius est processum, et nullum aliud fundamentum adest. Vestitum est, quod solemnitatibus roboratur, vel aliqua circumstantia induitur, in qua iure civili roboratur.*

17 IT IS CLOTHED, moreover, in six ways. First in the thing, if it be fulfilled at least on one side. Secondly by words, if stipulation is added. Thirdly by writing, as if by a letter you acknowledged that satisfaction had already been made to you, even if it had not been made, which is called Acceptilation. Fourthly by the specific name of contract; by which reason all contracts which are perfected by consent, indeed all nominated contracts, are clothed, if they are perfect in their kind. Fifthly by oath. Sixthly by coherence with some clothed contract, as if I sell you a house for a thousand gold pieces with the pact that I may still dwell in it, and give you this garment for my dwelling; this accessory pact of itself is a bare pact, yet because it coheres with the sale it is also clothed, because the accessory follows the nature of the principal.

*VESTITUR autem sex modis. Primo in re, si ex altera saltem parte sit impletum. Secundo verbis, si accedat stipulatio. Tertio scriptura, ut si littera fatearis, esse tibi iam satisfactum, etiamsi satisfactum non sit, quod dicitur Acceptilatio. Quarto specifico, nomine contractus; qua ratione omnes contractus, qui consensu perficiuntur, imo omnes contractus nominati, sunt vestiti, si in suo genere sint perfecti. Quinto iuramento. Sexto cohaerentia cum aliquo contractu vestito, ut si vendam tibi domum mille aureis cum pacto, ut illam adhuc inhabitem, et tibi pro inhabitatione dem hanc vestem; hoc pactum accessorium per se est pactum nudum, quia tamen cohaeret cum venditione, est etiam vestitum, quia accessorium sequitur naturam principalis.*

18 IT IS DIVIDED also into a Guarentigium contract and a non-Guarentigium one.

*DIVIDITUR etiam in contractum Guarentigium, et non Guarentigium.*

19 A GUARENTIGIUM is one that has execution ready at hand, because of the oath placed in it, or a hypothec, or a public instrument in which the right of executing it is conceded without awaiting the judge's sentence.

> *GUARENTIGIUS est qui paratam habet executionem, propter iuramentum in illo positum, vel hypothecam, vel instrumentum publicum, in quo conceditur ius exequendi illum, non expectata iudicis sententia.*

20 A NON-GUARENTIGIUS is one that lacks these securities. So Molina, *tract. 1. disp. 71.*, Lessius, *Lib. 2. c. 28. dub. 1.*, Fagundez, *cap. 1. in fine.*

> *NON Guarentigius est ille, qui his firmitatibus caret. Ita Molina* tract. 1. disp. 71. *Lessius* Lib. 2. c. 28. dub. 1. *Fagundez* cap. 1. in fine.

## Question II: Whether for the validity of a contract the intention of contracting, and of binding oneself, is required

1 ST. BONAVENTURE DISTINGUISHES, *in 4. dist. 27. art. 2. quaest. 2.*, validity in the Forum of conscience and in the External forum.

> *DISTINGUIT S. Bonaventura* in 4. dist. 27. art. 2. quaest. 2. *de validitate in Foro conscientiae, et in Foro externo.*

2 THEREFORE in the forum of conscience, if you had no intention of contracting — indeed you intended not to contract — the contract does not subsist in the forum of conscience. Nevertheless you will be bound in the same forum for all the damages proceeding from your fraud to the one contracting in good faith, and in the external forum you will be forced to stand to the contract, because the external forum judges only what is external, not hidden intentions. So Sanchez, *Lib. 1. de matrim. disput. 9.*, Tanner., *disp. 4. quaest. 6. 329.*, Fagundez, *lib. 1. de contract. cap. 2. num. 3.*, who say the same much more of vows and other quasi-contracts, which regard the forum of conscience more, because God, who is the searcher of hearts, regards the will more than external acts, *cap. si quandoquidem, 15. quaest. 6.*; nevertheless you are bound for the damages, as I said, and to stand to the contract in the external forum, *cap. cum Apostolica, de rescrip. cap. ex tenore, eodem titulo, ad finem, cap. ex litteris de constitut. Leg. quoties, §. qui dolo, ff. de probat. et 30. quaest. 1. cap. Dictum: Fraus, et dolus nemini debent patrocinari*, as the Holy Doctor argues, *in the place cited.*

> *IGITUR in foro conscientiae, si non habuisti intentionem contrahendi; imo intendisti non contrahere, non subsistit contractus in foro conscientiae. Teneberis tamen in eodem foro omnibus damnis, provenientibus ex tuo dolo, contrahenti bona fide, et in foro externo cogeris stare contractui, quia forum externum solum iudicat externum, non autem occultas intentiones. Ita Sanchez* Lib. 1. de matrim. disput. 9. *Tanner.* disp. 4. quaest. 6. 329. *Fagundez* lib. 1. de contract. cap. 2. num. 3. *qui idem dicunt multo magis de votis, et aliis veluti contractibus, qui forum conscientiae magis respiciunt, quia Deus, qui scrutator est cordium, magis respicit voluntatem, quam actus externos* cap. si quandoquidem, 15. quaest. 6. *teneris tamen de damnis, ut dixi, et in foro externo stare contractui,* cap. cum Apostolica, de rescrip. cap. ex tenore, eodem titulo, ad finem, cap. ex litteris de constitut. Leg. quoties, §. qui dolo, ff. de probat. et 30. quaest. 1. cap. Dictum: Fraus, et dolus nemini debent patrocinari, *ut arguit S. Doctor* loco citato.

3 BUT IF you wished to contract, yet not to bind yourself, many affirm that you are bound. So concerning the contract of matrimony, and any other contract whatever, teach Peter Ledesma, *de matrim. quaest. 43. art. 1. dub. 2.*

*SI vero contrahere voluisti, sed non te obligare, multi afferunt, te obligari. Sic de contractu matrimonii, et de quolibet alio contractu docent Petrus Ledesma* de matrim. quaest. 43. art. 1. dub. 2.

4 BUT SPEAKING of contracts and of a vow, hold Soto, *lib. 7. de iust. quaest. 1. art. 2.*, Gutierrez, *lib. 2. canon. qq. cap. 22. num. 31.*, Aragon., *1. 2. quaest. 88. art. 1.*, Ludov. Lopez, *p. p. Instruct. cap. 92.*, Suarez, *lib. 2. de iuram. cap. 7. et lib. 1. de voto, cap. 3.*, fighting most keenly.

*LOQUENTES vero de contractibus, et de voto, tenent Soto* lib. 7. de iust. quaest. 1. art. 2. *Gutierrez* lib. 2. canon. qq. cap. 22. num. 31. *Aragon.* 1. 2. quaest. 88. art. 1. *Ludov. Lopez* p. p. Instruct. cap. 92. *Suarez* lib. 2. de iuram. cap. 7. et lib. 1. de voto, cap. 3. *acerrime pugnax.*

5 THE SECOND opinion is that such a one is not bound. So Fagundez, *lib. 1. de contract. cap. 2.*, Henriquez, *lib. 11. de matrim. cap. 13. num. 2.*, speaking of the contract of matrimony; but of a vow, Lessius, *lib. 3. de voto, cap. 40. dub. 1.*, Azor, *p. p. lib. 2. cap. 17. quaestio 9.*, Valentia, *disp. 6. quaest. 6. puncto 1.*, Navar., *summa, cap. 12. num. 38.*, Sanchez, *tom. 1. de matrim. lib. 1. disp. 9.*, where he adduces twelve Doctors on this. This is the opinion of St. Bonaventure, *in the place cited, and in the preceding quaest.*

*SECUNDA sententia est, hunc non obligari. Ita Fagundez* lib. 1. de contract. cap. 2. *Henriquez* lib. 11. de matrim. cap. 13. num. 2. *loquens de contractu matrimonii : De voto autem, Lessius* lib. 3. de voto, cap. 40. dub. 1. *Azor* p. p. lib. 2. cap. 17. quaestio 9. *Valentia* disp. 6. quaest. 6. puncto 1. *Navar.* summa, cap. 12. num. 38. *Sanchez* tom. 1. de matrim. lib. 1. disp. 9. *ubi supra duodecim Doctores allegat. Haec est opinio D. Bonaventurae* loco citato, et quaest. praecedenti.

6 I ASSERT, with this opinion, that one contracting with the intention of not binding oneself is truly not bound.

*ASSERO cum hac sententia, contrahentem cum intentione non obligandi se, vere non obligari.*

7 IT IS PROVED from St. Bonaventure first, *quaest. 1.*, because a contract binds of itself from within; and indeed obligation arises from the will of binding oneself; but this man did not will to bind himself; therefore he did not will the contract. And so it implies willing the contract and not willing to bind oneself; but the negative, since it is destructive and poisoned, takes away even the positive will of contracting, as the Seraphic Doctor teaches everywhere.

*PROBATUR a D. Bonavent. primo,* quaest. 1. *quia contractus ex intrinseco obligat; atque sane obligatio oritur ex voluntate se obligandi; sed hic non voluit se obligare; ergo noluit contractum. Itaque implicat velle contractum, et nolle se obligare; negativa vero cum sit destructiva, et venenata, tollit etiam positivam voluntatem contrahendi, ut passim docet Seraphicus Doctor.*

8 IT IS CONFIRMED, for the obligation resulting from the will of contracting does not result naturally; but it is a moral effect hanging upon the liberty of the will.

*CONFIRMATUR, nam obligatio resultans ex voluntate contrahendi, non resultat naturaliter; sed est effectus moralis pendens a libertate voluntatis.*

9 IT IS PROVED secondly from St. Bonaventure, *quaest. 2.*, from Innocent III, and it is found *de sponsalibus*, where he decrees that, the intention of binding oneself failing, matrimony is not valid.

*PROBATUR secundo a D. Bonavent.* quaest. 2. *ex Innocentio III. et habetur* de sponsalibus, *ubi decernit; deficiente intentione se obligandi, non valere matrimonium.*

10 IT IS PROVED thirdly from the Holy Doctor. Where the formal reason fails, and therefore the form, the quiddity of the thing fails, and consequently the thing itself; but consent is the form of the words which make matrimony; therefore, the intention of binding oneself failing, there is no contract. The minor is proved, for a contract is an obligation from one side and the other, arising from the will and agreement of the parties, as I said at the beginning of the disputation, and the acts of agents do not obligate beyond their intention. The same the Holy Doctor argues of baptism, *4. dist. 6. art. 2. quaest. 1.*; but by God's law we bind ourselves in that.

> *PROBATUR tertio e S. Doctore. Ubi deficit ratio formalis, atque adeo forma, deficit quidditas rei, et consequenter ipsa res; sed consensus est forma verborum, quae faciunt matrimonium : Ergo deficiente intentione se ligandi, nullus est contractus. Minor probatur, nam contractus est ultro, citroque obligatio ex partium voluntate, et pactione consurgens, ut dixi initio disputationis, et actus agentium non obligant ultra intentionem eorum. Idem de baptismo arguit S. Doctor* 4. dist. 6. art. 2. quaest. 1. *eo autem Dei legi nos obligamus.*

11 IT IS PROVED fourthly from St. Bonaventure, *dist. 28. quaest. 3.*, that a condition contrary to the substance of matrimony annuls it, *ex cap. finali de condit. appositis*; for although the one contracting have the intention of contracting under a condition, that matrimony, for example, be for a time and not perpetual, he does not contract, because matrimony, if it is, is perpetual and indissoluble, as the Holy Doctor proves, dist. 28. art. 2. quaest. 1.; therefore, since to bind oneself is of its intrinsic reason, he who contracts under the condition of not binding himself does not contract. The Authors of this opinion use these arguments.

> *PROBATUR quarto a D. Bonavent.* dist. 28. quaest. 3. *conditio contraria substantiae matrimonii illud cassat* ex cap. finali de condit. appositis*, licet enim contrahens intentionem habeat contrahendi sub conditione conditione, quod matrimonium v. g. ad tempus fiat, et non sit perpetuum; non contrahit, quia matrimonium, si quod est, perpetuum est, et indissolubile, ut probat S Doctor dist. 28. art. 2. quaest. 1. ergo cum de intrinseca ratione sit se obligare; qui sub conditione non se obligandi contrahit, non contrahit. His rationibus utuntur Authores huius sententiae.*

12 THE FOUNDATIONS of the opposite opinion are undermined by these foundations, nail against nail as it were. But indeed, if you had the intention of contracting and of binding yourself, you are bound, even if you had not the intention of executing. So commonly the Doctors, cited in Fagundez, num. 9.

> *Fundamenta oppositae sententiae convelluntur his fundamentis, veluti clavus clavo. Enim vero, si habuisti intentionem contrahendi, et te obligandi, tenetis, etiamsi non habueris intentionem exequendi. Ita communiter Doctores apud Fagundez num. 9.*

13 THE REASON is, because he who wills the antecedent wills also the consequent, lib. 1. §. 1. ff. si usufrust. pet., when the consequent will infallibly follow upon it, as the Holy Doctor argues, in 2. dist. 32. art. 3. quaest. 2. ad 2., and in other places, where he brings the example of one who wills to be Abbot of monks; consequently he ought also to will to be a monk; otherwise he is a fool.

> *Ratio est, quia qui vult antecedens, vult etiam consequens lib. 1. §. 1. ff. si usufrust. pet. quando consequens ex vi eius infallibiliter subsequetur, ut arguit S. Doctor in 2. dist. 32. art. 3. quaest. 2. ad 2. et aliis in locis, ubi affert exemplum de eo, qui vult esse Abbas Monachorum, consequenter debet velle etiam esse Monachus; alioqui stultus est.*

## Question III: How error, or fraud, vitiates a contract

1 It is to be noted from St. Bonaventure, book 4, distinction 30, question 1, and doubt 3, that error concerning a contract can be twofold.

> *Notandum ex S. Bonavent. in 4. dist. 30. quaest. 1. et dub. 3. litt. posse errorem circa aliquem contractum esse duplicem.*

2 The first concerns the substance of the thing; the second, its accidents. Error concerning the substance of the thing arises, for example, when you wish to buy, and you ask for a gold necklace, and you receive one of brass; or if you ask for a diamond, and you are given a piece of crystal. Error concerning accidents occurs if you wish and ask for gilded copper, and it is given to you, but spotted; or if you ask for a horse, and you are given a defective one.

> *Primus est circa substantiam rei, Secundus circa accidentia. Circa substantiam rei datur, quando v. g. vis emere, et petis torquem aureum, et accipis ex aurichalco; vel si petis Adamantem, et datur tibi chrystalli frustum. Circa accidentia est error, si vis, et petis cuprum auratum, et datur tibi, sed maculatum; Vel si petas equum, et datur tibi defectuosus.*

3 Yet the Saintly Doctor admonishes on these points at article 4, that if you ask for a necklace in general, and name it gold, while not knowing the price of gold, nor what gold is, and copper is given to you at a fitting price, there will be no substantial error, because your intention is only about a metal necklace, but you name it gold, speaking like a magpie. Say the same also of error through deceit.

> *Admonet tamen circa haec S. Doctor ad 4. quod si petas torquem in genere, et nomines aureum, nesciens pretium auri, neque quid sit aurum, et detur tibi cuprum pretio competenti, non erit error substantialis, quia tua intentio est tantum de torque metallino, sed nominas aurum, loquens quasi Pica. Idem etiam dic de errore per dolum.*

4 I assert first that error, or deceit, concerning the substance of the thing contracted about renders the contract null by natural law, if it is a preceding error, or deceit, giving cause to the contract, which being removed the contract would not have been made.

> *Assero primo, errorem, vel dolum circa substantiam rei, de qua contrahitur, reddere contractum nullum iure naturae, si sit error, vel dolus antecedens, dans causam contractui, quo amoto non contraheretur.*

5 *It is proved* first by Cardinal Bonaventure, in the place cited, on the first foundation: consent being taken away, the contract is taken away. It is confirmed by the Saintly Doctor; for we are not held to will what we do not know, and much less something different from what we do know; as if we want gold, and copper is given. Fagundez uses this argument, chapter 3.

> Probatur *primo a D. Bonavent. loco cit. fundamento primo. Ablato consensu tollitur contractus. Confirmatur a S. Doctore; non enim censemur velle, quod non cognoscimus, et multo minus diversum ab eo, quod cognoscimus; ut si volumus aurum, detur cuprum. Hoc argumento utitur Fagundez, capite 3.*

6 *It is proved* secondly from the Saintly Doctor. The voluntary is that whose moving principle is within, in the one willing, knowing the particulars: Therefore the involuntary is what comes to us from without against our knowledge, through error.

> Probatur *secundo a S. Doctore. Voluntarium est, cuius principium movens est intra in volente, cognoscente singula: Ergo involuntarium est, quod ab extra nobis advenit contra cognitionem, ex errore.*

7 *It is proved* thirdly from the Saintly Doctor. No less involuntary is what is done through violence than what is done through error. And it is confirmed from cause 29, question 1, where it is defined.

> Probatur *tertio a S. Doctore. Non minus est involuntarium, quod fit per violentiam, quam quod per errorem. Et confirmatur ex causa 29. quaest. 1. ubi id definitur.*

8 *It is confirmed* by the Saintly Doctor in the body of the text, with the same arguments, adding the authority of Cardinal Augustine, book 2 of the Trinity, chapter 1, and tractate 96 on John, where he says: *We can love what we see: what we do not know, by no means.*

> Confirmatur *a S. Doctore in corpore, eisdem argumentis addita authoritate D. Augustini 2. de Trinitate, cap. 1. et tract. 96. in Ioan. ubi ait:* Invisa diligere possumus: incognita nequaquam.

9 *This* assertion is received with great applause by St. Thomas, II II, question 77, article 3, Molina, tractate 2 on justice, disputation 259, and the Thomists there, Lessius, volume 1, book 2, chapter 17, doubt 5, number 27, Sanchez, book 7 on marriage, disputation 18, number 12, Bonacina on contracts in general, disputation 3, question 1, point 2, § 1, and others among these; and Tanner says, disputation 4, question 7, doubt 1, number 11, that it is the opinion of all.

> Haec *assertio magno recipitur plausu a D. Thom. 2. 2. quaest. 77. art. 3. Molina tract. 2. de iust. disp. 259. et Thomistis ibi, Lessio Tom. 1. lib. 2. cap. 17. dub. 5. num. 27. Sanchez lib. 7. de matrim. disput. 18. num. 12. Bonacina de contract. in genere, disp. 3 quaest. 1. puncto 2. §. 1. et aliis apud hos; et ait Tanner. disp. 4. quaest. 7. dub. 1. num. 11. esse omnium sententiam.*

10 Fagundez nevertheless adds, number 6, with Sálaza on sales, doubt 35, that there can be error concerning the substance, and yet the contract still hold, as if alchemic gold were of the same perfection as gold taken from veins, and that were given to you for this; or if one slave girl were bought and given for another of the same quality, or from an apothecary one medicine of equal virtue in place of the one ordered by the physician. But these either do not vary the substance, and if they do, they break the contract; as if I wished that particular slave girl by number, and would not buy another, or that medicine. In the matter of marriage, however, it is certain, as these very men concede, that it is invalid.

> *Addit tamen Fagundez num. 6. cum Sala de empt. dub. 35. posse esse errorem circa substantiam, et tenere adhuc contractum, ut si aurum alchimicum sit eiusdem perfectionis cum auro e venis sumpto, et detur tibi illud pro isto, vel si detur una ergastula empta pro alia eiusdem virtutis, vel a pharmacopola unum pharmacum aequalis virtutis, loco ordinati a medico. Sed haec vel non variant substantiam, et si variant, confringunt contractum; ut si ego velim eam ancillam numero, et aliam non emerem, vel illud medicamentum. In materia vero matrimonii certum est, ut hi ipsi concedunt, esse invalidum.*

11 I assert secondly, with Cardinal Bonaventure, whom Fagundez follows, number 9, Suárez, tractate 1 on laws, book 1, chapter 11, number 6, Sanchez, book 1 on marriage, disputation 64, Molina, tractate 2, disputation 272, Navarre, Latin Summa, chapter 2, number 27, and commonly, that if the error concerns accidents which gravely alter the judgment of the thing, and which can be reduced, by the judgment of the prudent, to the substance of the thing, the contract is null.

> *Assero secundo cum D. Bonavent. quem sequuntur Fagundez num. 9. Suarez tract. 1. de legibus, lib. 1. cap. 11. num. 6. Sanchez lib. 1. de matrim. disp. 64. Molina tract. 2. disp. 272. Navar. summa Lat. cap 2. num. 27. et communiter, si*

*error sit circa accidentia, quae graviter mutant indicium rei, et reduci possunt, prudentum iudicio, ad substantiam rei, contractum esse nullum.*

12 The reason is, because the consent necessary is supposed absent, as above.

*Ratio est, quia supponitur abesse consensus necessarius, ut supra.*

13 Hence I conclude, with St. Bonaventure, book 4, distinction 30, doubt 6, that if the error concerns virtue and morals, for instance if she be dishonest whom I judged honest, these are circumstances greatly to be weighed, and Sanchez says they can break betrothals.

*Hinc colligo cum D. Bonaventura 4. dist. 30. dub. 6. litt. si error sit circa virtutem, et mores, puta si sit inhonesta, quam honestam arbitrabar; esse circumstantias magni faciendas, et ait Sanchez, eas frangere posse sponsalia.*

14 I assert thirdly: if the error concerns circumstances of lesser moment, in the judgment of the prudent, then even if he would not contract if he knew, it is probable that it does not void the contract by natural law. So Molina, tractate 2, disputation 352, Rebello, book 1, question 6, section 2, number 11, and book 9, question 1, Bonacina on contracts, disputation 3, article 1, point 2, Mantica on ambiguous agreements, book 1, title 9, Aegidius Lusitanus on the law "ex hoc iure," chapter 8, number 95.

*Assero tertio. Si error sit circa circumstantias minoris momenti, iudicio prudentum, etiamsi ille non contraheret, si sciret, probabile esse, non irritare contractum iure naturae. Ita Molina Tract. 2. disp. 352. Rebell. lib. 1. quaest. 6. sect. 2. num. 11. et lib. 9. quaest. 1. Bonacina de contract. disp. 3. art. 1. puncto 2. Mantica de ambig. convention. lib. 1. titul. 9. AEgydius Lusitan. in Leg. ex hoc iure, cap. 8. num. 95.*

15 Therefore if you contracted with her whom you thought rich, noble, beautiful, and you found her ignoble, poor, bleary-eyed; the contract stands, because these do not greatly vary in this contract.

*Itaque si contraxisti cum ea, quam putabas divitem, nobilem, pulchram, et invenisti ignobilem, pauperem, lippam; valet contractus, quia haec non admodum variant in hoc contractu.*

16 The reason is also, because that error, or deceit, is indeed a cause of the contract; yet it still has its own object, on which it falls, that is, the substance of the thing, as Pontius says, book 4 on marriage, chapter 21.

*Ratio est etiam, quia ille error, vel dolus est causa quidem contractus; adhuc tamen habet suum obiectum, in quod feratur, idest substantiam rei, ut ait Poncius lib. 4. de matrim. cap. 21.*

17 In another way Casas defines it, tractate 19, disputation 1, section 3, number 35, with Castro Palau, volume 3, tractate 14, disputation 2, point 5. Whenever error, or deceit, is only a causative cause, but not the object of the contract, it will not be null by natural law; but if it is an object expressly declared, such a contract will be null, but not if only implicitly; because then the error, or deceit, is held to be accidental, since there is still supposed an object sufficient for the being of the contract.

*Alio modo id definit Caspensis Tract. 19. disp. 1. sect. 3. num. 35. cum Castro Palao Tom. 3. tract. 14. disp. 2. puncto 5. Quoties error, vel dolus est causa causativa tantum, non autem obiectum contractus; hic non erit iure naturae nullus; si vero sit obiectum expresse declaratum, talis erit nullus, non autem si implicite tantum; quia tunc error, vel dolus censetur esse accidentalis, cum supponatur adhuc obiectum sufficiens ad esse contractus.*

18 The Seraphic Doctor, distinction 30, doubt 3, distinguishes error concerning accidents thus, for instance concerning goods of fortune, in marriage: it can be an impulsive cause in estimation only, and in hope, in such a way that the consent falls upon the person still precisely determined, as upon the object of consent; or it can be such that consent is suspended upon the person, and under this condition it falls: I accept the person, if she is rich, and not otherwise. In the first way the Saintly Doctor says the contract is valid, because consent still has a sufficient object upon which to fall; but in the other way, since consent is absent but reserved, it will not be valid.

> *Seraphicus dist. 30. dub. 3. sic distinguit errorem circa accidentia, puta circa bona fortunae, in matrimonium posse esse vel causam impulsivam in aestimatione tantum, et spe; ita, ut consensus feratur super personam adhuc praecisam, tanquam in obiectum consensus; vel potest esse ut suspendatur consensus super personam, et sub hac conditione cadat: accipio personam, si est dives, et non aliter. Primo modo ait S. Doctor, validum esse contractum, quia adhuc consensus habet sufficiens obiectum, super quod cadat; altero vero modo, cum non adsit consensus, sed reservatus sit, non erit validus.*

19 *He ADDS, however, at question 1,* error concerning accidentals in marriage, concerning condition, or servitude, because it prejudices the great good of liberty; but this is a deposit of positive law, as he explains at *distinction 36, question 2.*

> ADDIT vero quaest. 1. *errorem circa accidentalia in matrimonium, circa conditionem, vel servitutem, quia praeiudicat bono grandi libertatis; sed hoc est iure positivo depositum, ut explicat* dist. 36. quaest. 2.

20 *IN the response indeed to the last, he distinguishes thus:* error concerning goods of fortune, for instance concerning nobility, dignity, and other accidentals, can be twofold. First, if one errs concerning the subject of the person. Second, if concerning the properties.

> IN responsione vero ad ultimum, sic distinguit: *Dupliciter potest esse error circa bona fortunae, puta circa nobilitatem, dignitatem, et caetera accidentalia. Primo si erretur circa subiectum personae. Secundo si circa proprietates.*

21 *Error occurs CONCERNING the subject,* when the girl, knowing and recognizing the person, for instance the son of the King of England, by sight or by hearing, consents to him and not to another, and then there will be a substantial error voiding the contract of marriage. But if she does not recognize the person of the son of the King of England, but only believes that this one whom she sees has that dignity, then since she consents only to this one, the consent will be valid, even if he is not endowed with that dignity.

> CIRCA subiectum erratur, *cum Puella sciens, et cognoscens personam, puta filium Regis Angliae visu, vel auditu, et in illum consentit, et non in alium, et tunc erit substantialis error irritans contractum matrimonii. At si personam filii Regis Angliae non agnoscit, sed tantum credit, hunc, quem videt habere hanc dignitatem, tunc cum non consentiat, nisi in hunc, erit validus consensus, etiamsi non sit ea dignitate praeditus.*

22 *I ASSERT fourthly;* if we speak of positive law, the most received opinion is the one teaching: if the error concerns the substance of the thing, and the accidents and substantial qualities which greatly vary the judgment, and the contract itself is made in good faith on one part, and through deceit on the other, so that the deceit gives cause to the contract, the contract is null by positive law. So *Vasquez on the law of Emphyteusis, question 5, number 9, Lusitanus on the law "ex hoc iure," Digest on justice and law, chapter 8, from number 93, Bonacina on contracts, disputation 3, question 1, point 3, § 2, Gómez, volume 2, varieties, chapter 2, number 48, Fagundez, book 1, chapter 3, Bassaeus V. Contractus, Tanner, disputation 4,*

*question 7, doubt 1. It is clear from Law 1, and from the law "sciendum," § last, Digest on the aedilitian edict, and from Law 65, title 5, Partidas 5.*

> ASSERO quarto; *si loquamur de iure positivo, receptissima est sententia docens; si error sit circa substantiam rei, et circa accidentia, et qualitates substantiales, quae multum variant iudicium, et contractus ipse fiat bona fide ex una parte; et dolo ex altera, ut dolus det causam contractui, contractum esse nullum iure positivo. Ita* Vallascus de iure Emphyt. quaest. 5. num. 9. Lusitanus in Leg. ex hoc iure, ff. de iust. et iure, cap. 8. a num. 93. Bonacina de contract. disp. 3. quaest. 1. puncto 3. §. 2. Gomez Tomo 2. var. cap. 2. num. 48. Fagundez lib. 1. cap. 3. Bassaeus V. Contractus, Tanner. disp. 4. quaest. 7. dub. 1. Patet ex Leg. 1. et ex Leg. sciendum, §. ult. ff. de aedilit. edict. et ex Leg. 65. tit. 5. part. 5.

23 *It is PROVED by Cardinal Bonaventure, in the question lately adduced, from the matter of marriage, from cause 29, question 1, and from the reasons adduced for the first assertion.* For what is invalid by natural law cannot be validated by positive law; otherwise positive law would be against natural law.

> PROBATUR a D. Bonavent. quaestione, nuper adducta, ex materia matrimonii ex causa 29. quaest. 1. et rationibus adductis pro prima assertione. *Quod enim iure naturae est invalidum, non potest iure positivo validari; alioqui ius positivum esset contra ius naturae.*

24 WHAT we have said of antecedent error, some apply also to concomitant error, not only in the contract of marriage, as when you contract with Bertha, thinking her Titia, but yet you would contract more gladly with Titia if you recognized her; but also in other contracts, as if you buy crystal, judging it a gem, but yet you would buy even if you knew it to be crystal. So *Fagundez, number 7, adducing St. Thomas, I II, question 6, article 8, Bonacina on contracts, disputation 3, question 1, point 2, § 1, and on marriage, question 3, point 2, number 3.*

> *QUAE diximus de errore antecedenti, afferunt aliqui de errore etiam comitante, non modo in contractu matrimonii, ut dum contrahis cum Berta, putans eam Titiam, sed tamen libentius contraheres cum Titia, si eam agnosceres; sed etiam in aliis contractibus, ut si emis Chrystllum, existimans gemmam, sed tamen emeres, etiamsi novisses, esse Chrystallum. Ita* Fagundez num. 7. adducens D. Thom. prima secundae, quaest. 6. art. 8. Bonacinam de contract. disp. 3. quaest. 1. puncto 2. §. 1. et de matrim. quaest. 3. puncto 2. num. 3.

25 *HENCE you observe, it is disputed:* whether a contract excused from deceit can be validated, the option being given by natural law to the deceived party, to stand by the contract or not, if it is reduced to equality; and both opinions are probable: I judge that it can, because by natural law the deceived party can repair the injury.

> HINC observas, disputari: *an contractus dolo excusatus, possit validari, data ex iure naturae optione, decepto ad standum, vel non standum contractui, si reducatur ad aequalitatem, et utraque sententia est probabilis: Ego arbitror, id posse, quia iure naturae deceptus potest refarcire iniuriam.*

26 *BUT by natural law the deceiver is held to stand by the contract; if the deceived party so wills, but this after the judge's sentence.*

> SED iure naturae deceptor tenetur stare contractui; si deceptus velit, sed hoc post iudicis sententiam.

27 *It is PROVED by Cardinal Bonaventure, book 4, distinction 17, article 2, question 2, ad 4, from cause 30, question 1, also in every forum, whether judicial, civil, or Canonical: indeed even in the forum of conscience, where it is defined that fraud and deceit ought not to avail the defrauder, law "Quoties," § "qui dolo," Digest on proofs, from the chapter "sedes Apostolica," on rescripts, the chapter "ex tenore" of the same, and the chapter "ex literis," on deceit*

*and contempt, and finally the final law, title 2, Partidas 4, which defines,* that the option must always be given to the deceived party, whether he wills or does not will to stand by the contract, which by natural law was void, in punishment of the deceit, lest he obtain advantage from his own deceit; for the whole law always resists deceit and fraud, *as Fagundez notes, number 18*.

> PROBATUR a D. Bonavent. 4. dist. 17. art. 2. quaest. 2. ad 4. ex causa 30. quaest. 1. etiam in omni foro, tum iudiciali, sive civili, sive Canonico: imo et in foro conscientiae, ubi definitur, fraudem, ac dolum non debere fraudanti patrocinari, Leg. Quoties, §. qui dolo, ff. de probat. ex cap. sedes Apostolica, de rescriptis, cap. ex tenore eodem, et cap. ex literis, de dolo, et contum. et tandem Leg. finali, tit. 2. part. 4. quae definit, *optionem semper dandam esse decepto; velit ne, an nolit stare contractui, qui iure naturae fuit irritus in poenam doli, ne commodum ex dolo suo consequatur; resistit enim semper totum ius dolo, ac fraudi,* ut notat Fagundez num. 18.

28 There is given also to the deceived party an action against the third party who committed the deceit, *law 2, Digest on proceeds and rights introduced,* and every deceiver is held in conscience to restitution of damages before the judge's sentence; for deceit and fraud are of the genus of mortal sin, *as Reginald shows in practice, book 25, number 125, Bonacina on contracts, disputation 3, question 1, point 2, § 2, Fagundez, number 23, from Cardinal Bonaventure in the Mirror of the Soul, chapter 2, § the second branch, and the following*.

> *DATUR etiam decepto actio adversus tertium, qui dolum fecit* leg. 2. ff. de prowentis, et iuribus allatis, *et omnis decipiens tenetur in conscientia restitutioni damnorum ante iudicis sententiam; est enim dolus, et fraus ex genere mortalis,* ut ostendunt Reginaldus praxi, lib. 25. num. 125. Bonacina de contract. disp. 3. quaest. 1. puncto 2. §. 2. Fagundez num. 23. ex D. Bonavent. in speculo animae, cap. 2. §. secundus ramus, et sequenti.

## Question IV: How fear voids a contract

1 *The holy Doctor PREFACES in dist. 29, question 1, that fear is twofold.* One is grave, which is also called just, and falling upon a constant man; the other light, which is also called falling upon an inconstant man, *L. metu, ff. de eo, quod metus causa, cap. consultationi, cap. veniens, 2. de sponsal. cap. Cum dilectus, de his quae vi.* Grave fear is fear of some great evil considered absolutely and in itself, which we fear is about to befall us or ours; such is inflicted fear of death, mutilation, atrocious torture, violation, servitude, loss of goods, of status, of honor, of great gain, of infamy, of unjust excommunication, etc. *as Sanchez proves lib. 4. de matrim. disp. 5*.

> PRAELIBAT S. Doctor in 4. dist. 29. quaest. 1. metum duplicem. *Alter est gravis, qui et iustus dicitur, et cadens in constantem virum: Alter levis, qui et dicitur cadens in virum inconstantem,* L. metu, ff. de eo, quod metus causa, cap. consultationi, cap. veniens, 2. de sponsal. cap. Cum dilectus, de his quae vi. *Metus gravis est metus alicuius magni mali absolute, et in se considerati, quod nobis timemus, vel nostris eventurum; talis est metus incussus, mortis, mutilationis, atrocis cruciatus, stupri, servitutis, amissionis bonorum, status, honoris iacturae, magni lucri, infamiae, excommunicationis iniustae, etc.* ut probat Sanchez lib. 4. de matrim. disp. 5.

2 *Whether indeed these evils threaten us or ours, they instill grave fear.* So *Menochius tract. 1. lib. 2. de arbitr. centur. 2. casu 136. Azor p. p. lib. 2. cap. 17. dub. 6. Sanchez lib. 4. de matrim. disput. 1.*

> HAEC quidem mala sive nobis immineant, sive nostris, gravem incutiunt timorem. *Ita* Menochius tract. 1. lib. 2. de arbitr. centur. 2. casu 136. Azor p. p. lib. 2. cap. 17. dub. 6. Sanchez lib. 4. de matrim. disput. 1.

[3] *IN SONS, as Leg. Isti quidem, §. fine, ff. de eo, quod metus causa, proves;* for children are part of the father, *as Aristotle teaches in the Ethics.*

> IN filiis, ut probat Leg. Isti quidem, §. fine, ff. de eo, quod metus causa; *liberi enim sunt pars patris,* ut docet Aristoteles in Ethicis.

[4] *IN WIVES, AND HUSBANDS,* because they are one. So *D. Thom. in 4. dist. 29. quaest. unic. art. 2. ad 3. D. Bonavent. same dist. and others teaches.*

> IN uxoribus, et maritis, *quia unum sunt. Ita* D. Thom. in 4. dist. 29. quaest. unic. art. 2. ad 3. D. Bonavent. eadem dist. et alii.

[5] *IN FATHERS, BROTHERS, AND SISTERS leg. ult. Cod. de impub. et aliis substit. §. hi, qui, Instit. de inut. stipul. and the Doctors commonly; and concerning all connected in the first degree the Praep. teaches cap. cum locum de sponsal. num. 10. Cucus lib. 5. inst. Maior tit. 22. num. 156.*

> IN patribus, fratribus, et sororibus leg. ult. Cod. de impub. et aliis substit. §. hi, qui, Instit. de inut. stipul. et communiter Doctores; et de omnibus coniunctis in primo gradu docent Praep. cap. cum locum de sponsal. num. 10. Cucus lib. 5. inst. Maior tit. 22. num. 156.

[6] *IN OTHER KINDRED, AND AFFINES,* because, as is said in *cap. non existimemus, 13. quaest. 2.*, they are one flesh. It is also proved by *cap. sciant cuncti de elect. in 6.*, which text *Iason* calls notable, *leg. de pupillo, §. si quis ipsi, num. 12. ff. de oper. nov. nunciat.*

> IN aliis consanguineis, et affinibus, *quia ut dicitur* cap. non existimemus, 13. quaest. 2. *sunt una caro. Probatur etiam* cap. sciant cuncti de elect. in 6. *quem textum vocat notabilem* Iason, leg. de pupillo, §. si quis ipsi, num. 12. ff. de oper. nov. nunciat.

[7] *IN FRIENDS JOINED BY THE TIGHTEST BOND IT IS PROVED,* because a friend is *another self, as the Philosopher says, 6. Eth. cap. 4. and D. Augustine lib. 4. confess. cap. 6.* Hence grave fear of an evil, whether ours or our dear ones', is said to be inflicted, and it invalidates the contract, if the evil truly impends.

> IN amicis arctissimo vinculo iunctis probatur, *quia amicus est* alter ego, ut ait Philosophus 6. Eth. cap. 4. et D. Augustinus lib. 4. confess. cap. 6. *Itaque metus gravis mali sive nobis, sive nostris dicitur incussus, et irritat contractum, si vere immineat malum.*

[8] LIGHT fear is reverential fear, on account of the presence of some grave person; yet this fear, if threats, harsh words, etc. are added, can become grave. Therefore one must note that fear is called grave and light respectively; for what is light fear for someone, say a man, will be grave for a girl, as Sanchez shows, citing some fifty Doctors, and it is proved *ex Leg. 3. ff. ex quibus causis*.

> *METUS levis est metus reverentialis, ob praesentiam alicuius personae gravis; hic tamen metus, si addantur minae, verba aspera, etc. potest fieri gravis. Ideo oportet advertere, metum dici gravem, et levem respective; nam qui alicui, puta viro, est metus levis, erit puellae gravis, ut ostendit Sanchez, citans supra quinquaginta Doctores, et probatur* ex Leg. 3. ff. ex quibus causis.

[9] FIVE conditions, however, are required for fear to be grave.

> *QUINQUE autem conditiones requiruntur, ut sit metus gravis.*

[10] FIRST, that the evil feared be grave *leg metum, ff. de eo quod metus causa*; there Labeo says fear is to be understood not as any fear whatever, but of a greater evil, that is, a great evil, as the Gloss explains.

*PRIMA, ut malum, quod timetur, sit grave* leg metum, ff. de eo quod metus causa*, ibi metum accipiendum Labeo dicit, non quemlibet timorem, sed maioris mali, idest magni mali, ut explicat Glossa.*

11 SECOND is, that it be feared rationally, not for a light cause: it is clear *ex Leg. metum cit. ibi*, "fear, however, not of a vain man, but of one who fears deservedly," and *Leg. Nec timorem, §. proinde, ff. eodem*. Whence *Eccl. 19: He who quickly believes is light of heart*. So D. Thom. 4. dist. 29. quaest unic. art. 2. D. Bonavent. same dist. quaest. 1. in the body, and others. And indeed true infliction of punishments is not required, but a probable and not vain fear, as S. Bonavent. and others prove, as cited by Sanchez *lib. 4. de matrim. disp. 1. num. 16*.

*SECUNDA est, ut timeatur rationabiliter, non levi de causa: patet* ex Leg. metum cit. ibi*, metum autem non vani hominis, sed qui merito timet, et* Leg. Nec timorem, §. proinde, ff. eodem. *Unde* Eccl. 19. Qui cito credit, levis est corde. *Ita D. Thom. 4. dist. 29. quaest unic. art. 2. D. Bonavent. eadem dist. quaest. 1. corpore, et alii. Et quidem non requiritur vera poenarum inflictio, sed timor probabilis, et non vanus, ut probat S. Bonavent. et alii apud Sanchez* lib. 4. de matrim. disp. 1. num. 16.

12 THIRD condition is, that the one instilling fear be able to carry out his threats. So D. Bonavent. *loco cit*. It is clear *ex Leg. famosi, ff. ad legem Iulia maiest.* and Sanchez proves *cit. num. 19*.

*TERTIA conditio est, ut metum incutiens possit minas suas exequi. Ita D. Bonavent.* loco cit. *patet* ex Leg. famosi, ff. ad legem Iulia maiest. *et probat Sanchez* cit. num. 19.

13 FOURTH is, that the one making threats be accustomed to carry them out; for if he is ready to remit them, the fear is not grave, *ex Leg. Unica, Cod. si quis Imperatori, and Leg. famosi cited*.

*QUARTA est, ut minas incutiens, solitus sit minas exequi; nam si sit facilis ad remittendum, non est gravis metus,* ex Leg. Unica, Cod. si quis Imperatori, et Leg. famosi citata.

14 FIFTH is, that the one fearing be unable to avoid the evils threatened. So Sanchez *num. 23*. and at the same time Fagundez *cap. 5*.

*QUINTA est, non posse timentem vitare mala comminata. Ita Sanchez* num. 23. *et simul Fagundez* cap. 5.

15 The Doctors note here also that grave fear can proceed from an extrinsic natural agent and natural cause, as from a storm, disease, etc.; or from an extrinsic living being operating by natural impulse, as from a brute animal, a drunkard, and a madman; or finally from an extrinsic freely acting agent, such as a man or a demon.

*ANIMADVERTUNT hic etiam Doctores, metum gravem aut posse provenire ab extrinseco agente, et causa naturali agente, ut a tempestate, morbo, etc. vel ab extrinseco vivente, sed operante naturali impetu, ut a bruto, ebrio, et furioso. Vel denique ab extrinseco agente libere, veluti homine, vel daemone.*

16 THEREFORE, if fear is instilled by an extrinsic natural agent, the contract is not held invalid, even though the consent there is conditional, as if, were no shipwreck threatening from the storm, or death from disease, he would not vow or swear to do this. The reason is that such fear is not injurious, but is often sent by the providence of God to do holy works, or to rouse penance, as the Council of Trent teaches *sess. 14. cap. 4*. Therefore it adds: *For by this fear the Ninevites, usefully shaken, did penance at the preaching of Jonah, full of terrors, and obtained mercy from the Lord*.

*IGITUR si metus incutiatur ab extrinseco agente naturali, non irritus contractus censetur, tamen consensus etiam ibi sit conditionalis, ut si non immineret naufragium ex tempestate, vel mors e morbo, non voveret, nec iuraret, hoc agere.*

*Ratio est, quia talis metus non est iniuriosus, sed a Dei saepe providentia immissus ad facienda opera sancta, vel ad ciendam poenitentiam, ut docet Concilium Trident.* sess. 14. cap. 4. *Ideo addit:* Hoc enim timore utiliter concussi Ninivitae, ad Ionae praedicationem plenam terroribus, poenitentiam egerunt, et misericordiam a Domino impetrarunt.

17 Then, however, penance, to be right, ought not to have conditional consent. "If ruin did not impend, I would not repent," as I shall say in my *Tract. de Poenit. Disput. de contritione*.

*TUNC autem poenitentia, ut sit recta, non debet habere consensum conditionatum. Si ruina non immineret, non poeniterem, ut dicam* Tract. de Poenit. Disput. de contritione.

18 THIS is the doctrine of D. Thom. *prima secundae, q. 6.* and D. Bonavent. *in 3. dist. 34. part. 2. quaest. 1. and 2. Vasquez part. 2. disp. 27. cap. 3. Sanchez in decal. lib. 4. cap. 1. Fagundez cap. 5. num. 17.* and it is clear *ex cap. de regul.* where the vow of a sick man, made from fear of death, is declared valid. The same is said if the inflicted fear is from a brute animal, a drunkard, etc.

*HAEC est doctrina D. Thom.* prima secundae, q. 6. *et D. Bonavent.* in 3. dist. 34. part. 2. quaest. 1. et 2. Vasquez part. 2. disp. 27. cap. 3. Sanchez in decal. lib. 4. cap. 1. Fagundez cap. 5. num. 17. *et patet* ex cap. de regul. *ubi votum aegroti, ex timore mortis, declaratur validum. Idem dicitur, si metus incussus sit a bruto, ebrio, etc.*

19 BUT if the inflicted fear is from a freely acting agent to extort consent, the most certain resolution of all the Doctors is that the contract is invalid. So D. Bonavent. *4. dist. 29. quaest. 1. Sanchez lib. 4. decal. cap. 3. Suarez Tom. 3. de relig. lib. 6. cap. 4. Lessius lib. 2. cap. 17. dub. 6. Azor part. 1. lib. 1. cap. 10. num. 11. and part. 3. lib. 6. cap. 7. Bonacina de contract. disp. 3. quaest. prima, puncto 2. §. 3. Fagundez lib. 1. de contract. cap. 5. num. 18. Tanner. disp. 4. quaest. 6. num. 315.*

*SI vero metus incussus sit ab agente libere ad extorquendum consensum, certissima resolutio est omnium Doctorum, invalidum esse contractum. Ita D. Bonavent.* 4. dist. 29. quaest. 1. Sanchez lib. 4. decal. cap. 3. Suarez Tom. 3. de relig. lib. 6. cap. 4. Lessius lib. 2. cap. 17. dub. 6. Azor part. 1. lib. 1. cap. 10. num. 11. et part. 3. lib. 6. cap. 7. Bonacina de contract. disp. 3. quaest. prima, puncto 2. §. 3. Fagundez lib. 1. de contract. cap. 5. num. 18. Tanner. disp. 4. quaest. 6. num. 315.

20 A GRAVE question, however, is: whether such contracts are invalid by natural law, or rather by positive law. The Doctors are divided into two lines.

*QUAESTIO autem gravis est: An tales contractus sint iure naturae irriti, an vero iure positivo. Scinduntur autem in duas acies Doctores.*

21 The FIRST opinion is that they are not invalid by natural law. So Paludanus *4. dist. 15. quaest. 2. art. 5. Sanchez lib. 4. de matrim. disp. 15. num. 5. et lib. 4. decal. cap. 3. num. 9. Suarez lib. 1. de relig. cap. 7. num. 12. Corbo quaest. 46. Valentia Tom. 4. disp. 10. quaest. 3. puncto 2. Henriquez lib. 11. cap. 9. Pet Ledessm. quaest. 47. art. 3. Tanner. loco cit. Azor. p. p. lib. 11. cap. 15. quaestio 6. Lessius lib. 2. cap. 40. dub. 1. speaking of a vow, and speaking of contracts cap. 17. dub. 6. from num. 36. Vasquez prima secundae, disp. 27. cap. 3. Bonacina de contract. disp. 3. quaest. 1. puncto 2. §. 2. Fagundez de contract. lib. 1. cap. 6. num. 5. Caspensis Tract. 19. de contract. disp. 1. sect. 4.* who takes innumerable authorities for this opinion as listed with Sanchez. Ballixus subscribes, *V. Contractus num. 21.*

*PRIMA opinio est, non esse iure naturae irritos. Ita Paludanus* 4. dist. 15. quaest. 2. art. 5. Sanchez lib. 4. de matrim. disp. 15. num. 5. et lib. 4. decal. cap. 3. num. 9. Suarez lib. 1. de relig. cap. 7. num. 12. Corbo quaest. 46. Valentia Tom. 4. disp. 10. quaest. 3. puncto 2. Henriquez lib. 11. cap. 9. Pet Ledessm. quaest.

47. art. 3. Tanner. loco cit. Azor. p. p. lib. 11. cap. 15. quaestio 6. Lessius lib. 2. cap. 40. dub. 1. loquens de voto, et loquens de contractibus cap. 17. dub. 6. a num. 36. Vasquez prima secundae, disp. 27. cap. 3. Bonacina de contract. disp. 3. quaest. 1. puncto 2. §. 2. Fagundez de contract. lib. 1. cap. 6. num. 5. Caspensis Tract. 19. de contract. disp. 1. sect. 4. *qui innumeros pro hac sententia apud Sanchez accipit recensitos. Subscribit Ballixus,* V. Contractus num. 21.

22 They except, however, contracts of marriage, betrothal, dowry for marriage, and profession in Religion, which nevertheless they maintain can be rescinded by a judge's sentence.

*EXCIPIUNT tamen isti contractus matrimonii, sponsalium, dotis ad matrimonium, et professionis in Religione, quos tamen iudicis sententia rescindi posse autumant.*

23 CONCERNING marriage the Doctors commonly teach this, Sanchez, speaking of marriage and betrothal *lib 4. de matrim. disp. 12. a num. 18. Azor 3. part. lib. 3. cap. 7. Lessius Tom. 1. lib. 2. cap. 17. dub. 6. n. 37. Henriquez de matrim. lib. 11. cap. 9. num. 6. Bonacina de matrim. quaest. 3. puncto 8. num. 31. where he also proves the same of betrothals from many most weighty Doctors,* and it is clear *ex cap. veniens 2. et cap. cum locum 1. et cap. consolationi de sponsal.*

*DE matrimonio hoc docent communiter Doctores, Sanchez, loquens de matrimonio, et sponsalibus* lib 4. de matrim. disp. 12. a num. 18. Azor 3. part. lib. 3. cap. 7. Lessius Tom. 1. lib. 2. cap. 17. dub. 6. n. 37. Henriquez de matrim. lib. 11. cap. 9. num. 6. Bonacina de matrim. quaest. 3. puncto 8. num. 31. ubi etiam de sponsalibus id probat ex multis gravissimis Doctoribus, *et constat* ex cap. veniens 2. et cap. cum locum 1. et cap. consolationi de sponsal.

24 AND consequentially concerning the promise of a dowry they give the same warning, Azorius, Lessius, Bonacina and Fagundez, cited.

*ET idem consequenter de promissione dotis admonent Azorius, Lessius, Bonacina et Fagundez, allegati.*

25 The REASON is, because marriage is perpetual, nor after it has been legitimately contracted is there any longer room for invalidation, as in other contracts; therefore perfect liberty is required to contract.

*RATIO est, quia matrimonium est perpetuum, nec amplius est locus irritationi, postquam est legitime contractus, sicuti in aliis contractibus; ideo exigitur ad contrahendum perfecta libertas.*

26 HENCE consequentially concerning profession in Religion they deduce the same, Sanchez *lib. 4. decal. cap. 5. Suarez tract. 3. de Relig. lib. 6. cap. 4. Fagundez num. 5.* and it is clear *ex cap. de his, quae vi.*

*HING consequenter de professione in Religione idem deducunt Sanchez* lib. 4. decal. cap. 5. Suarez tract. 3. de Relig. lib. 6. cap. 4. Fagundez num. 5. *et constat* ex cap. de his, quae vi.

27 OF any simple vow whatsoever, in whatever matter it be made, Suarez asserts it valid *de voto lib. 1. cap. 18. a num. 5. and others; but that such simple vows extorted by fear are invalid teach Sanchez Tom. 1. decal. lib. 4. cap. 3. num. 12. Cardin. cap. 2. quaest. 1. casu 4. de his quae vi. Sylvest. verb. metus, q. 8. and verb. votum 2. quaest. 12. Tolet. lib. 4. summae, cap. 17. Nauar. summa Latina, cap. 12. num. 52. et commonit 2. de regular. num. 15. Azor. p. p. lib. 11. cap. 11. quaestio 7. Abbas, Sotus, Aragon, and others cited by Sanchez, and Bonacina de matrim. quaest. 3. puncto 8. a num. 2. to whom Fagundez subscribes num. 6.*

*DE voto autem quocumque simplici, in quacumque materia fiat, validum esse asserunt Suarez* de voto lib. 1. cap. 18. a num. 5. et alii; sed irrita esse talia vota simplicia, metu extorta, docent Sanchez Tom. 1. decal. lib. 4.

cap. 3. num. 12. Cardin. cap. 2. quaest. 1. casu 4. de his quae vi. Sylvest. verb. metus, q. 8. et verb. votum 2. quaest. 12. Tolet. lib. 4. summae, cap. 17. Nauar. summa Latina, cap. 12. num. 52. et commonit 2. de regular. num. 15. Azor. p. p. lib. 11. cap. 11. quaestio 7. Abbas, Sotus, Aragon, et alii apud Sanchez, et Bonacina de matrim. quaest. 3. puncto 8. a num. 2. cui subscribit cum Fagundez num. 6.

28 OF an oath extorted by grave fear they commonly assert that it is valid by natural law; and the reason is, because an oath is a promise made with God asserted as its witness. Therefore, lest God be a false witness, it will be valid by natural law.

*DE iuramento, metu gravi extorto, communiter asserunt, esse iure naturae validum; et ratio est, quia iuramentum est promissio facta, cuius assertur Deus testis. Igitur ne Deus testis sit falsus, erit valida iure naturae.*

29 AS TO a testament extorted by grave fear, that it is null by natural law, Sanchez asserts *lib. 4. de matrim. disp. 8. num. 6. Molina tom. 1. de Iust. Tract. 2. disp 136. Spino in speculo glosae, Rubr. 2. part. num. 5. Guttier. de quaest. canon. lib. 2. cap. 11. num. 83. Caldas in Leg. si iuratorem, v. contractum, num. 27. which most common opinion Fagundez applauds, number 8*.

*QUOAD testamentum, metu gravi extortum, esse iure naturali nullum, asserunt Sanchez* lib. 4. de matrim. disp. 8. num. 6. Molina tom. 1. de Iust. Tract. 2. disp 136. Spino in speculo glosae, Rubr. 2. part. num. 5. Guttier. de quaest. canon. lib. 2. cap. 11. num. 83. Caldas in Leg. si iuratorem, v. contractum, num. 27. quam opinionem communissimam acclamat Fagundez numero 8.

30 The REASON is, because a testament is the last will, and therefore it ought to remain free until death, nor is it confirmed except by the death of the testator, as the Apostle says, *Heb. cap. 6.*; therefore fear cannot give it firmness.

*RATIO est, quia testamentum est ultima voluntas, et ideo debet usque ad mortem manere liberum, nec firmatur, nisi morte testatoris, ut ait Apostolus Apostolus ad* Heb. cap. 6. *ideo metus non potest dare ei firmitatem.*

31 CONCERNING the collation of a benefice extorted by fear, Garcia asserts it valid by natural law *de benef. part. 11. cap. 3. §. 2. num. 145.* Fagundez *num. 9.* and they say it is clear from *cap. super hoc penult. de renunc. cap. Abbas, cap. ad aures, cap. ad audientiam de his, quae vi, and* Rebuffus teaches it *in praxi benefic. tit. de resign. metu fact. and tit. de vi, in resign. adhibita, and tit. de causis resignationem irritantibus*, Rosinus *lib. 19. de benefic.* Nauar. *in cap. accepta, de restit. spoliat. opposit. 4. 5. and 6.* Flaminius *de resign. lib. 13. quaest. 1. and 2.* Azor *2. part. lib. 7. cap. 26. quaestio 1.* Selua *de benefic. 3. part. quaest. 32.* They prove it by the reasons I shall set out at the end.

*CIRCA collationem beneficii metu extortam, esse iure naturae validam asserit Garsia* de benef. part. 11. cap. 3. §. 2. num. 145. *Fagundez* num. 9. *et constare dicunt ex* cap. super hoc penult. de renunc. cap. Abbas, cap. ad aures, cap. ad audientiam de his, quae vi, et *docet Rebuffus* in praxi benefic. tit. de resign. metu fact. et tit. de vi, in resign. adhibita, et tit. de causis resignationem irritantibus, *Rosinus* lib. 19. de benefic. *Nauar.* in cap. accepta, de restit. spoliat. opposit. 4. 5. et 6. *Flaminius* de resign. lib. 13. quaest. 1. et 2. *Azor* 2. part. lib. 7. cap. 26. quaestio 1. *Selua* de benefic. 3. part. quaest. 32. *Probant rationibus, quas in fine apponam.*

32 WE must also, with another distinction of contracts, set out various opinions.

*DEBEMUS etiam alia distinctione contractuum, varias apponere opiniones.*

33 AND indeed that a lucrative and promissory contract celebrated under just fear is valid by natural law, Sotus teaches *in 4. dist. 29. quaest. 1. art. 3.* which he had almost taught *lib. 6. de iust. quaest. 1. art. 4.* teaching that a donation, or promise, made under just fear is valid by natural law. The same hold

Henriquez *lib. 11. cap. 9.* Carbo *de test. cap. 46. quaest. 4.* Ledesma *de matrim. quaest. 47. art. 3. dub. 1. ad 3.* Sanchez *de matrim. lib. 4. disp. 8. num. 4.* Lessius *lib. 2. cap. 7. dub. 6. num. 37. ex leg. ultima, Cod. de his, quae vi,* which opinion Diana judges probable *part. 3. tract. 5. resol. 118.*

> *ET quidem contractum lucrativum, et promissorium, metu iusto celebratum, esse validum iure naturae docent Sotus* in 4. dist. 29. quaest. 1. art. 3. *quod fere docuerat* lib. 6. de iust. quaest. 1. art. 4. *docens, donationem, aut promissionem, metu iusto factam, esse validam iure naturae. Idem tenent Henriquez* lib. 11. cap. 9. *Carbo* de test. cap. 46. quaest. 4. *Ledesma* de matrim. quaest. 47. art. 3. dub. 1. ad 3. *Sanchez* de matrim. lib. 4. disp. 8. num. 4. *Lessius* lib. 2. cap. 7. dub. 6. num. 37. ex leg. ultima, Cod. de his, quae vi, *quam opinionem censet probabilem Diana* part. 3. tract. 5. resol. 118.

34 THE OPPOSITE, however, no less probable, others defend, namely that a contract of liberal donation, or promise, celebrated from grave fear, is invalid by natural law. So Medina *Cod. de restitut. quaest. 3. causa 2.* Aragon *2. 2. quaest. 86. art. 7.* Rebellius *part. 2. lib. 1. quaest. 5. conclu. 1.* Molina, and Azor, whom, as cited, Basilius Pontius follows *de matrimonio, lib. 4. cap. 6. numero 4.* Diana *loco citato.*

> *OPPOSITAM tamen non minus probabilem tuentur alii, nempe contractum liberalis donationis, aut promissionis, ex metu gravi celebratum, invalidum esse iure naturae. Ita Medina* Cod. de restitut. quaest. 3. causa 2. *Aragon* 2. 2. quaest. 86. art. 7. *Rebellius* part. 2. lib. 1. quaest. 5. conclu. 1. *Molina, et Azor, quos allegatos sequitur Basilius Pontius* de matrimonio, lib. 4. cap. 6. numero 4. *Diana* loco citato.

35 The SAME concerning onerous contracts Rebell. asserts *loco cit.* and others with him. Others, however, assert these contracts (excepting marriage) valid — I mean those contracts in which a thing is given for a thing given. So Basilius Pontius *cap. 7.* citing Soto, Richard, Paludanus, Sylvester, Navarrus, Henriquez, Molina, and Vasquez. Indeed Pontius says *cap. 9.* that it is valid even by positive law; yet he grants the action, and limits it only in gaming, and the alienation of the goods of the Church, and Diana notes these things *resol. 119.* to remove scruples. Bassaeus defends almost this opinion V. *Contractus, num. 21.* excluding some.

> *IDEM de contractibus onerosis asserunt Rebell.* loco cit. *et alii apud eum. Alii tamen hos contractus (excepto matrimonio) asseverant, validos, Contractus istos, inquam, in quibus datur res pro re data. Ita Basilius Pontius* cap. 7. *allegans Sotum, Richartdum, Paludanum, Sylvestrum, Nauarrum, Henriquez, Molinam, et Vasquez. Imo Pontius ait* cap. 9. *valere etiam iure positivo; dati tamen actionem, et limitat solum in ludo, et alienatione rerum Ecclesiae, et haec notanda ait Diana* resol. 119. *ad scrupulos tollendos. Hanc fere sententiam tuetur Bassaeus V.* Contractus, num. 21. *excludens aliquos.*

36 TRULY indeed, Molina asserts all contracts extorted by fear to be invalid by natural law *Tract. 2. de Iustitia, disput. 267. et 326.* Sotus *in 4. dist. 29. quaest. 1. art. 3. et lib. 7. de iustitia, quaest. 2. art. 1. et lib. 8. quaest. 1. art. 7.* Salas *part. 2. quaest. 6. art. 6. dub. 3. sect. 1.* speaking of contracts outside marriage: but speaking of the contract of marriage, where the reason is the same, the same maintain Matienzo *lib. 5. recopil. tit. 2. rubr. gloss. 1. num. 189.* Barbosa, *ff. solut. matrim. rubr. 4. num. 30.* Couar. *in 4. decret. 2. part. cap. 3. §. 5.* Veracruz *p. p. speculi, art. 8.* Gabriel *in 3. dist. 39. quaest. 1. art. 2. concl. 8.* Bartholom. Ledesma *dub. 23. de matrim. concl. 3.* Philiar. *de offic. sacerd. Tom. 1. part. 2. lib. 2. cap. 8.* and Sanchez says it is most probable *lib. 4. de matrim. disp. 14.* Fagundez also cites D. Bonavent. *4. dist. 39. quaest. prima, art. 2. concl. 8.*

> *VERUM enim vero, contractus omnes, metu extortos, iure naturae esse irritos asserunt Molina* Tract. 2. de Iustitia, disput. 267. et 326. *Sotus* in 4. dist. 29. quaest. 1. art. 3. et lib. 7. de iustitia, quaest. 2. art. 1. et lib. 8.

quaest. 1. art. 7. *Salas* part. 2. quaest. 6. art. 6. dub. 3. sect. 1. *loquentes de contractibus extra matrimonium: loquendo vero de contractu matrimonii, ubi eadem est ratio, idem sustinent Matienzo* lib. 5. recopil. tit. 2. rubr. gloss. 1. num. 189. *Barbosa,* ff. solut. matrim. rubr. 4. num. 30. *Couar.* in 4. decret. 2. part. cap. 3. §. 5. *Veracruz* p. p. speculi, art. 8. *Gabriel* in 3. dist. 39. quaest. 1. art. 2. concl. 8. *Bartholom. Ledesma* dub. 23. de matrim. concl. 3. *Philiar.* de offic. sacerd. Tom. 1. part. 2. lib. 2. cap. 8. *et valde probabilem ait Sanchez* lib. 4. de matrim. disp. 14. *citatur Fagundez etiam D. Bonavent*. 4. dist. 39. quaest. prima, art. 2. concl. 8.

37 The holy Doctor supports his opinion not there; but *dist. 29. quaest. 1. in the body*, where indeed he treats of the contract of marriage, but his reason is universal, taken from the consent of the will being necessary; which embraces other contracts also; and indeed, although he does not refuse to call the opposite opinion, weighed from this passage, probable, he concludes that this one is more probable *at the end of the body*.

*SENTENTIAM suam astruit S. Doctor, non ibi; sed* dist. 29. quaest. 1. in corpore*, ubi agit quidem de contractu matrimonii, sed ratio eius universalis, est sumpta ex voluntatis necessario consensu; quae complectitur alios etiam contractus; atque adeo, tametsi oppositam sententiam, ex hoc capite libratam, probabilem non renuat, hanc tamen esse probabiliorem* in fine corporis*, concludit.*

38 I ASSERT first, that the former opinion is not improbable.

*ASSERO primo, non improbabilem esse priorem sententiam.*

39 It is PROVED first by D. Bonavent. because, where there is consent sufficient for a moral act, there is a valid moral act; but consent from fear is sufficient for a moral act, as I showed *prima secunda, Tract. 1. disput. 3.* where I showed that grave fear does not simply take away liberty. And if contracts are rescinded by positive law, this is from indulgence, because he is judged not to have consented fully with his whole heart, but to redeem the penalty.

*PROBATUR primo a D. Bonavent. quia, ubi est consensus, sufficiens ad actum moralem, ibi est actus moralis validus; sed consensus ex metu est sufficiens ad actum moralem, ut ostendi* prima secunda, Tract. 1. disput. 3. *ubi ostendi metum gravem non tollere libertatem simpliciter. Quod si rescinduntur iure positivo contractus, hoc est ex indulgentia, quia existimatur non consensisse plene toto corde, sed ad redimendam poenam.*

40 It is PROVED second by the holy Doctor; because he who receives Baptism through fear of death is baptized: Therefore by natural law what is done from fear is valid, at least as to those things that concern God.

*PROBATUR secundo a S. Doctore; quia, qui timore mortis recipit Baptismum, est Baptizatus: Ergo iure naturae id, quod fit ex metu, est validum, saltem quoad ea, quae Deum respiciunt.*

41 It is PROVED third by the holy Doctor: The will cannot be forced to consent, but only freely induced by a creature. Then thus: He is no less induced by troublesome prayers and blandishments than the one who fears; but the latter consents to contracts sufficiently by natural law: Therefore so does the former. The major is held by many Doctors, as Fagundez admits.

*PROBATUR tertio a S. Doctore: Voluntas ad consensum non potest cogi, sed solum libere induci a creatura. Tunc sic: Non minus sollicitatus precibus molestis, et blanditiis inducitur, quam qui timote; sed ille satis ex iure naturae consentit contractibus: Ergo et iste. Maior tenetur a multis Doctoribus, ut fatetur Fagundez.*

42 INDEED the holy Doctor replies, that blandishments and prayers do not equal fear, unless tacit threats lie beneath, as Sanchez also teaches *lib. 4. de matrim. disp. 7. num. 7.* Fagundez *cap. 5. num. 25.*

Romanus *Leg. interpositas, Cod. de transact.* Nauar. *summa, cap. 17. num. 16.* Mascardus *de probat. concl. 193. numero 4. and 8.* Ludov. Lopez *p. p. Instruct. cap. 96.* And Hippolytus and others will the same, singulae. 645. Sigism. *inter consilia feudalia, cons. 17. num. 21.* Albertus Brunus *inter the same counsels, consil. 14. num. 387.* Burgo de Paz *consil. 25. num. 72.* while they say that the blandishments of princes instill fear in a constant man, because, namely, hidden threats are present; for Princes are accustomed to avenge rebuffs.

> *ENIM vero S. Doctor respondet, blanditias, et preces non aequipollere metui, nisi tacitae subsint minae, ut docent etiam Sanchez* lib. 4. de matrim. disp. 7. num. 7. *Fagundez* cap. 5. num. 25. *Romanus* Leg. interpositas, Cod. de transact. *Nauar.* summa, cap. 17. num. 16. *Mascardus* de probat. concl. 193. numero 4. et 8. *Ludov. Lopez* p. p. Instruct. cap. 96. *Et idem volunt Hippolytus singulae. 645. Sigism.* inter consilia feudalia, cons. 17. num. 21. *Albertus Brunus* inter eadem consilia, consil. 14. num. 387. *Burgo de Paz* consil. 25. num. 72. *dum aiunt, blanditias principum inferre metum viro constanti, quia scilicet insunt minae occultae; solent enim Principes ulcisci repulsas.*

43 It is PROVED fourth by the holy Doctor: Where there is consent sufficient for mortal sin, there is consent sufficient for a contract; but in our case such is found: Therefore. The minor is proved by D. Bonavent. for if anyone denies Christ through fear of death, he sins mortally.

> *PROBATUR quarto a S. Doctore: Ubi est consensus sufficiens ad peccatum mortale, ibi est sufficiens ad contractum; sed in nostro proposito talis invenitur: Ergo. Minor probatur a D. Bonavent. nam si quis metu mortis neget Christum, peccat mortaliter.*

44 Yet the holy Doctor replies, denying the parity, because more things are required to constitute what requires an integral cause; than to do an evil, which is done from any defect whatever; whence it does not follow that, if conditional consent, shaken by fear, suffices for sin, such consent also suffices for a good act: Therefore, if someone under fear of death, or even of hell, elicited a conditional act of attrition for his sins, namely intending that, with the fear of death or hell removed, he would not grieve, it will be an imperfect act, indeed a blameworthy one, preferring himself to God.

> *RESPONDET tamen S. Doctor, negando paritatem, quia plura requiruntur ad constituendum, quod requirit integram causam; quam ad malum faciendum, quod fit ex quocunque defectu; unde non sequitur, quod si ad peccatum sufficit consensus conditionatus, metu excussus, sufficiat etiam talis consensus ad actum bonum: Itaque si aliquis metu mortis, vel etiam inferni, eliceret actum attritionis de peccatis conditionatum, nempe intendens, remoto metu mortis, vel inferni, se non dolere, erit actus imperfectus imo culpatus, Deo se ipsum anteponens.*

45 NEXT he replies that fear falling upon a constant man is not that which is instilled to contemn the Divine majesty: For a constant man ought to prefer God to all things. Therefore the fear falling upon a constant man is held to be that which is instilled to do or omit something that is not contrary to salvation, which can also rationally be done and omitted. For if anyone wished to undergo death lest he consent to some indifferent thing, he would certainly act not as constant, but as imprudent; say, if death were threatened to someone unless he were willing to go to the square by the other road, equally convenient, and he persisted in going by the road suspected to the other. But contracts are of the kind of things not necessary to salvation.

> *DEINDE respondet, metum, cadentem in virum constantem, non esse, qui incutitur ad Divinam maiestatem contemnendam: Vir enim constans debet praeferre Deum omnibus rebus. Itaque metus, cadens in virum constantem, censetur ille, qui incutitur ad aliquid faciendum, vel omittendum, quod non sit saluti contrarium, quod rationabiliter*

*potest etiam fieri, et omitti. Si enim quis vellet mortem subire, ne alicui rei indifferenti consentiret, sane ageret non ut constans, sed ut imprudens; puta si mors indiceretur alicui, si nollet altera via, aeque commoda, pergere ad plateam, et persisteret in transeundo per viam alteri suspectam. Contractus autem sunt de genere eorum, quae non sunt ad salutem necessaria.*

46 I ASSERT second, more probable, that contracts extorted by grave fear are invalid by natural law.

*ASSERO secundo probabilius, contractus, metu gravi extortos, esse iure naturae invalidos.*

47 It is PROVED by D. Bonavent. first, most validly, by the first foundation, for the laws declare marriage contracted under grave fear invalid from defect of consent, which natural law requires, but they do not invalidate it by positive law; indeed many past marriages they declare to have been invalid by natural law, and to be just as if they had never been made, as is clear *ex cap. cum locum, et cap. consolamini, et cap veniens 2. de sponsal. and ex cap. significasti de eo, qui duxit uxorem; Similarly cap. primo, de his, quae vi: profession made under grave fear is not invalidated, but declared invalid, and no text is found in the whole law that invalidates it.*

*PROBATUR a D. Bonavent. primo validissime fundamento primo, nam iura, matrimonium, metu gravi contractum, irritum declarant ex defectu consensus, qui iure naturae exigitur, non autem irritant iure positivo, imo multa matrimonia praeterita declarant fuisse irrita, et invalida iure naturali, et perinde esse, ac si nunquam fuissent facta, ut patet* ex cap. cum locum, et cap. consolamini, et cap veniens 2. de sponsal. et ex cap. significasti de eo, qui duxit uxorem; Similiter cap. primo, de his, quae vi, non irritatur professio gravi metu facta, sed declaratur irrita, et nullus textus in toto iure invenitur, qui eam irritet.

48 Fagundez REPLIES *num. 10.* granting that marriage shaken by fear is null by natural law. Similarly, betrothal, and the promise of a dowry, and profession of religion, as above; but he denies the parity concerning other contracts.

*RESPONDET* Fagundez num. 10. *concedendo, matrimonium metu excussum, esse iure naturae nullum. Similiter. et sponsalia, et promissionem dotis, ac professionem religionis, ut supra; sed negat paritatem de aliis contractibus.*

49 AGAINST, because he does not perceive the force of the argument of D. Bonaventure. It stands in this: What is invalid from defect of consent is such by natural law; but every contract shaken by grave fear is null from defect of consent: Therefore. The minor is proved, for the Pontiffs declare marriage null if made under grave fear, and allege a reason taken not from a consent peculiar to the marriage contract, because it is perpetual; but because it is a contract in its genus, which is an indifferent being, not necessary to salvation. Therefore every contract shaken by grave fear is invalid by natural law.

*CONTRA, quia non percipit vim argumenti D. Bonaventurae. Stat enim in hoc: Id, quod ex defectu consensus est irritum, est iure naturae tale; sed contractus omnis, metu gravi excussus, est ex defectu contractus nullus: Ergo. Minor probatur, nam Pontifices declarant, matrimonium esse nullum, si metu gravi sit factum, et allegant rationem sumptam, non ex consensu peculiari, debito matrimonii contractui, eo quod sit perpetuus; sed quia est contractus in genere, quod est ens indifferens, non necessarium ad salutem. Igitur omnis contractus, metu gravi excussus, est iure naturae invalidus.*

50 It is PROVED second by the holy Doctor, because every contract by which dominion is transferred to another ought to be free; but where there is fear falling upon a constant man, there is not full liberty: Therefore.

*PROBATUR secundo a S. Doctore, quia omnis contractus, per quem transfertur dominium in alterum, debet esse liber; At ubi est metus, cadens in constantem virum, non est plena libertas: Ergo.*

51 The ADVERSARIES reply that these contracts are simply voluntary, and that such consent suffices for mortal sin. But I met this reason above.

*RESPONDENT* adversarii, *hos contractus esse simpliciter voluntarios, et ad peccatum mortale talem consensum sufficere. Sed huic rationi occurri supra.*

52 It is PROVED third by D. Bonavent. concerning marriage. Contracts which are made with God, such as profession and a private vow, proceed in the same way as marriage: But those are invalid by natural law if shaken by grave fear: Therefore also marriage. The major is proved, for marriage is the sign of the union of the Church, or of the soul, with God; but the sign measures the signed.

*PROBATUR tertio a D. Bonavent. de matrimonio. Eodem passu incedunt contractus, qui fiunt cum Deo, puta professio, et votum privatum; atque matrimonium: Sed illa iure naturae sunt invalida, si metu gravi sint excussa: Ergo et matrimonium. Probatur maior, nam matrimonium est signum coniunctionis Ecclesiae, vel animae cum Deo; signum autem mensurat signatum.*

53 It is PROVED fourth by the holy Doctor, as to marriage, because the contract of marriage is through love, and this conjugal love ought to be perpetual, according to the Apostle's word: *Husbands, love your Wives, as Christ the Church;* but coerced consent is not with love: Therefore.

*PROBATUR quarto a S. Doctore, quoad matrimonium, quia contractus matrimonii est per amorem, atque hic amor coniugalis debet esse perpetuus, iuxta Apostoli dictum:* Viri diligite Uxores, sicuti Christus Ecclesiam; *sed consensus coactus non est cum amore: Ergo.*

54 It is PROVED fifth by the holy Doctor; because in an onerous contract there ought to be equals, so that the giver render equally: but where there is grave fear, equality is not given: therefore an onerous contract is not valid by natural law, if it is made from grave fear.

*PROBATUR quinto a S. Doctore; quia in contractu oneroso debent esse aequales, ut dans retribuat aeque: sed ubi est metus gravis, non datur aequalitas: ergo contractus onerosus non est iure naturae validus, si fiat ex gravi metu.*

55 It is PROVED sixth validly, by an argument taken from D. Bonavent. *4. dist. 27. art. 2. quaest. 1. argument 4. with the reply added.* Natural law dictates that no one take gain from the loss which one, through his deceit, injustice, and malice, gives to another, *as all the laws cry, 30. quaest. 1. cap. Dictum, cap. sedes Apostolicae, cap. ex tenore de rescript. cap. ex litteris de dolo, and leg. quoties, §. qui dolo, ff. de probat.* But he would take a great deal of gain who would shake consent to a contract from another by grave fear through malice and iniquity, unless the contract were invalid by natural law; for he could keep the thing in conscience, and its fruits meanwhile, until the contract were rescinded by a judge, which is an enormous absurdity; but absurdities are especially to be avoided in law, *Leg. Nam quod absurdum, ff. operis lib. cap. dudum de praebend. in 6.*

*PROBATUR sexto valide, argumento sumpto a D. Bonavent.* 4. dist. 27. art. 2. quaest. 1. argumento 4. addito responso. *Ius naturale dictat, ut nullus reportet commodum ex damno, quod unus, ob dolum, iniuriam, et malitiam suam, alteri dat,* ut omnia iura clamant, 30. quaest. 1. cap. Dictum, cap. sedes Apostolicae, cap. ex tenore de rescript. cap. ex litteris de dolo, et leg. quoties, §. qui dolo, ff. de probat. At multum admodum commodi reportaret, qui metu gravi excuteret ab alio consensum ad contractum ex malitia, et iniquitate, nisi contractus esset iure naturae irritus; posset enim in conscientia retinere rem, et fructus eius interim,

usque dum a iudice rescinderetur contractus, quod est ingens absurdum; absurda autem sunt de iure maxime vitanda, Leg. Nam quod absurdum, ff. operis lib. cap. dudum de praebend. in 6.

56 Fagundez REPLIES *num. 10.* that then he is held in the forum of conscience to restore everything, and this he gravely enjoins on Confessors for their tribunal, which is the tribunal of truth. But he says he is held to this restitution by reason of the loss inflicted; for natural law commands it, not by reason of the contract.

*RESPONDET* Fagundez num. 10. *teneri tunc in foro conscientiae omnia restituere, et hoc graviter iniungit Confessariis pro eorum tribunali, quod est tribunal veritatis. Teneri autem ait ad hanc restitutionem ratione damni illati; nam ius naturae id iubet, non autem ratione contractus.*

57 AGAINST, I argue most validly. What inflicts loss against natural law is forbidden by natural law, if from the force of the action the loss follows formally; but through you, from the contract extorted by fear, loss against natural law is produced and inflicted: Therefore such a contract also is forbidden by natural law, and null.

*CONTRA arguo validissime. Id, quod infert damnum contra ius naturae, est iure naturae vetitum, si ex vi actionis formaliter damnum sequitur; sed per te ex contractu metu extorto producitur, et infertur damnum contra ius naturae: Ergo et talis contractus est iure naturae vetitus, et nullus.*

58 I strengthen this attack validly by Diana's argument. Almost countless Doctors, and some of the adversaries, as *Lessius, Sanchez, Navarrus, and Sylvester with Pontius n. 6.* assert that he who unjustly extorts something by force and fear from a donor is bound to restitution: Therefore dominion is not transferred, and therefore the contract was not valid by natural law; for if it were valid by natural law, it would not have to be restored before the judge's sentence; for thus dominion would be transferred.

*HANC impugnationem valide roboro argumento Dianae. Innumeri fere Doctores, et aliqui ex adversariis, ut* Lessius, Sanchez, Navarrus, et Sylvester apud Poncium n. 6. *asserunt, eum, qui iniuste aliquid per vim, et metum extorquet a donante, teneri ad restitutionem: Ergo neque transfertur dominium, atque adeo non fuit validus contractus iure naturae; nam si iure naturali valeret, non esset restituendum ante iudicis sententiam; nam dominium sic esset translatum.*

59 Since, therefore, dominion has not been conveyed to these, and therefore they are under a continuing burden of restitution, as D. Bonaventure teaches *in speculo animae, cap. 2. near the end;* it follows that it is invalid by natural law. From which Pontius and Rebellus, in *Lessius and Sanchez*, deduce grave inconsequences.

*CUM igitur his non sit delatum dominium, atque adeo sint in continuo onere restitutionis, ut docet D. Bonaventura* in speculo animae, cap. 2. circa finem; *sequitur, iure naturae esse invalidum. Ex quo deducunt Poncius, et Rebellus in* Lessio, et Sanchez *graves inconsequentias.*

60 HERE I note that *Fagundez num. 2. in the first argument* presses this for us, as if we inferred that, if liberal contracts extorted by fear are invalid, much more onerous ones; but on the contrary, for he who donates from fear receives nothing, and he who contracts, giving a thing for an equal thing, receives also another thing, whence he is less specifically burdened, and therefore is an injustice of nature, inferior in species. Whence it would be freer to argue: if an onerous contract extorted by fear is just by natural law, much more a gratuitous one of donations, promises, etc.

> *HIC adverto,* Fagundium num. 2. in primo argumento, *urgere pro nobis, ac si inferamus, quod si contractus liberales, metu extorti, sunt irriti, multo magis onerosi; sed e contra, nam qui donat ex metu, nil recipit, et qui contrahit, dando rem pro re aequalem, recipit etiam aliam rem, unde minus specifice gravatur, atque adeo est iniustia naturae, specie inferior. Unde magis liberet arguere: si contractus onerosus, metu extortus, est iustus iure naturae, multo magis gratuitus donationum, promissionum, etc.*

61 Therefore Caspensis replies to the argument *number 38.* according to the mind of *Vasquez*, that onerous ones are valid by the very law of nature, because it is a sufficient title for their value, namely of the thing given and received. But lucrative ones are not valid by natural law, because in these there is no other title for transferring dominion besides the will, which, since it is coerced, is not sufficient for transferring dominion.

> *ARGUMENTO ergo respondet* Caspensis numero 38. *ex mente* Vasquez, *Onerosos esse ipso iure naturae validos, quia est titulus sufficiens ad illorum valorem, scilicet dati, et accepti. Lucrativos autem non esse validos iure naturae, quia in his nullus alius est titulus ad transferendum dominium, praeter voluntatem, quae cum sit coacta, non est sufficiens ad transferendum dominium.*

62 BUT I showed both invalid from other chapters, namely, because consent is lacking, whatever *Caspensis num. 39.* may mutter, who ineptly argues: light fear does not make contracts invalid by natural law, as is clear from *leg. Vani timoris, ff. de reg. iuris, and Leg. metum, ff. de eo quod metus causa;* and yet light fear inflicts an injury: Therefore neither does grave.

> *SED utrumque invalidum ex aliis capitibus ostendi, nempe, quia deest consensus, quidquid obmurmuret* Caspensis num. 39. *qui inepte arguit: metus levis non reddit irritos contractus iure naturae, ut constat ex* leg. Vani timoris, ff. de reg. iuris, et Leg. metum, ff. de eo quod metus causa; *cum tamen metus levis inferat iniuriam: Ergo neque gravis.*

63 It is replied, however, that the reason is unlike, because grave fear takes away the liberty of consent, not so light fear, as the holy Doctor notes at the end of the body.

> *RESPONDETUR autem, disparum esse rationem, quia metus gravis tollit consensus libertatem, non sic levis, ut advertit S. Doctor in fine corporis.*

64 But to our argument above, and to the attack, *Caspen. num. 40. and 41.* replies that such contracts are simply voluntary and free, nor is it enough to make them invalid if he is bound to restitution; for both can be at once, nor does it repugn, that the contract be valid and that there be an obligation to rescind it, if the other wishes.

> *ARGUMENTO autem nostro supra, et impugnationi respondet* Caspen. num. 40. et 41. *cum tales contractus esse simpliciter voluntarios, et liberos, neque satis esse ad eos irritos reddendos, si teneatur ad restitutionem; nam simul esse possunt, nec repugnat, et contractum esse validum, et esse obligationem rescindendi, si alter velit.*

65 *For it is against, because the argument was taken from the debt of restitution, as is seen above.*

> Contra enim est, quia argumentum sumebatur a debito restitutionis, ut videre est supra.

66 From what has been said it is also clear that the second conclusion of Caspensis *num. 44.* is false: that contracts (excepting very few, that is, marriage, betrothals, religious profession, Witnesses employed in a testament, promises of the goods of the Church, absolution from censures) are not invalid by positive law; but are to be invalidated, which he proves from certain laws, where things

done through fear are to be rescinded *Leg. ult. Cod. de his, quae vi, and cap. Abbas, de his, quae vi. And Instit. de except. at the beginning.*

> *Ex dictis etiam patet, falsam esse secundam conclusionem Caspensis* num. 44. *contractus (exceptis perpaucis, idest, matrimonio, sponsalibus, religiosa professione, Testibus adhibitis in testamento promissionum rerum Ecclesiae, absolutione a censuris) non esse iure positivo irritos; sed irritandos, quod probat ex quibusdam iuribus, ubi facta per metum rescindenda sunt* Leg. ult. Cod. de his, quae vi, et cap. Abbas, de his, quae vi. Et Instit. de except. in principio.

67 *It is answered* indeed, that some laws only say definitively that such contracts are to be declared invalid; for other laws clearly affirm that they are invalid.

> Respondetur *enim, aliqua iura solum definite, declarandos esse irritos tales contractus; nam alia iura clare afferunt esse irritos.*

68 *A question* however can be: whether also from light fear contracts are invalid by law.

> Quaestio *vero esse potest: An etiam ex metu levi, contractus irriti sint iure.*

69 The *first* opinion is that such contracts are invalid in conscience. So Panorm. *in cap. ad Audientiam, and other Canonists, whom Molina cites Tract. 2. disput. 326. de Legibus, Battolus, in Leg. metum, and others.*

> Prima *opinio est, tales contractus in conscientia esse irritos. Ita Panorm.* in cap. ad Audientiam, et alii Canonistae, quos allegat Molina Tract. 2. disput. 326. de Legibus, Battolus, in Leg. metum, et alii.

70 Of the Theologians Sotus *lib. 6. de Iust. quaest. 1. art. 4. et lib. 8. quaest. 1. art. 7. ad 3. Sà verb. contractus, numero 3. Carbo quaest. 46. de restit. Palat. lib. 4. de contract. cap. 9. Lessius lib. 2. cap. 17. dub. 2. num. 46. Rebellius p. p. lib. 1. quaest. 5. with these injunctions, which he says num. 9. and 26. Sanchez de matrim. lib. 4. disp. 9. num. 4. Tanner. here, disp. 4. quaest. 6. num. 121. who brings forward the reason, because that fear is the cause of the contract which would not have been made, and he reports many texts of both Laws, which only say that fear and violence make contracts invalid; but they understand fear equivalent to violence, namely grave, which is called fear simply.*

> *Ex Theologis Sotus* lib. 6. de Iust. quaest. 1. art. 4. et lib. 8. quaest. 1. art. 7. ad 3. Sà verb. contractus, numero 3. Carbo quaest. 46. de restit. Palat. lib. 4. de contract. cap. 9. Lessius lib. 2. cap. 17. dub. 2. num. 46. Rebellius p. p. lib. 1. quaest. 5. iniunctis his, quae dicit num. 9. et 26. Sanchez de matrim. lib. 4. disp. 9. num. 4. Tanner. hic, disp. 4. quaest. 6. num. 121. qui affert rationem, quia ille metus est causa contractus, qui non esset factus, et refert multos textus utriusque Iuris, qui solum dicunt, metum, et vim reddere contractus irritos; sed intelligunt metum aequivalentem vi, nempe, gravem, qui dicitur metus simpliciter.

71 *For* when something is said to be such absolutely, it is understood to be such simply, not such in a certain respect. From which you have that Lessius does not infer rightly, that as many as refuse [to admit] that fear falling upon a constant man invalidates a contract by natural law are bound to sustain this opinion. Among these, however, he lists D. Bonavent. *4. dist. 29. quaest. 1.* Sotus *ibi, quaest. unic. Gabr. quaest. 2. art. 2. in supplem.* but he excepts marriage, which he teaches is not invalidated by light fear, with others; although others say it is invalidated, among whom he lists D. Bonaventure as to be placed.

> Quando *enim aliquid dicitur tale absolute, intelligitur simpliciter tale, non secundum quid tale. Ex quo habes, non recte Lessium inferre, teneri hanc sententiam sustinere quotquot renuere, metum cadentem in virum constantem irritare iure*

*naturae contractum. Inter hos autem recenset D. Bonavent.* 4. dist. 29. quaest. 1. *Sotum* ibi, quaest. unic. Gabr. quaest. 2. art. 2. in supplem. *excipit autem matrimonium, quem metu levi non irritari docet cum aliis; etsi alii dicant irritari, inter quos recenset D. Bonaventuram ponendum.*

72 The *other* opinion is that such contracts are valid in conscience. So Medina *Cod. de restitut. quaest. 3. causa 9.* Basilius Poncius *de matrim. lib. 4. cap. 10. num. 5.* Fagundez *lib. 1. cap. 6. num. 12.* Menochius *lib. 2. de arbitr. iudic. 2. casu 136. num. 2.* Franciscus Ripa *lib. 3. resp. cap. 15. num. 8.* Bonacina *dispm. 3. quaest. 1. puncto 2. §. 3. and others with these, adding that contracts can be invalidated, provided however the contracts be invalidable; for if they are not invalidable, they teach that by both laws they are valid, as marriage, profession of religion, and sacred orders; so also Fagundez above.*

Altera *sententia est, tales contractus in conscientia esse validos. Ita Medina* Cod. de restitut. quaest. 3. causa 9. *Basilius Poncius* de matrim. lib. 4. cap. 10. num. 5. *Fagundez* lib. 1. cap. 6. num. 12. *Menochius* lib. 2. de arbitr. iudic. 2. casu 136. num. 2. *Franciscus Ripa* lib. 3. resp. cap. 15. num. 8. *Bonacina* dispm. 3. quaest. 1. puncto 2. §. 3. et alii apud istos, addentes, contractus posse irritari, si tamen contractus sint irritabiles; nam si irritabiles non sint, docent, utroque iure esse validos, ut matrimonium, professionem religionis, et sacrorum ordinum, sic et Fagundez supra.

73 As to D. Bonavent. he judges no such contract to be invalid by natural law, and as to marriage and other perpetual contracts, he says they can by no law be revoked hence. The reason is, which the others employ, because fear here does not shake liberty so that the act is not free. From which the adverse foundation falls.

Quoad *D. Bonavent. censet nullum contractum talem, iure naturae esse irritum, et quo ad matrimonium, et alios contractus perpetuos, ait, nullo iure posse eos hine revocari. Ratio est, quam caeteri adhibent, quia metus hic non labefactat libertatem, ut actus ille non sit liber. Ex quo ruit fundamentum adversum.*

74 From these Caspensis deduces *num. 47.* that things done under light fear are not to be rescinded by any law, because this action is given in law only on account of grave fear; nevertheless in the forum of conscience they can be rescinded, if the sufferer wishes.

*Ex his deducit Caspensis* num. 47. *ea, quae metu levi fiunt, non esse rescindenda aliquo iure, quia haec actio datur in iure, solum, ob metum gravem; attamen in foro conscientiae rescindi posse, si passus velit.*

75 He also *infers* that things done from reverential fear can be rescinded; and that he who takes gain from them is bound to restitution, because, although this fear is not grave, it is nevertheless injurious, and the cause of the act. So Navar. *cap. 17. num. 152.* Peter Navar. *lib. 3. cap. primo, dub. 7. and others.* Therefore, the contract being rescinded, he who entered it through fear will be bound to restitution. Thus a son, who, fearing his father's indignation, promised to pay his legacies, or debts, is not bound.

Infert *etiam, ea, quae ex metu reverentiali acta sunt, posse rescindi; et eum, qui inde commodum percipit, teneri ad restitutionem, quia, quamvis hic metus gravis non sit; est tamen iniuriosus, et causa actus. Ita Navar.* cap. 17. num. 152. *Petrus Navar.* lib. 3. cap. primo, dub. 7. et alii. *Itaque rescisso contractu, tenebitur restitutioni is, qui metu eum inierit. Sic filius, qui timens patris indignationem, promisit solvere eius legata, vel debita, non tenetur.*

76 *For* a crown-piece Molina notes *Tom. 2. disp. 82. put. 267. Lessius tract. 2. lib. 2. dub. 6. num. 39.* Sanchez *lib. 4. de matrim. disp. 8. num. 7.* Fagundez *cap. 6. num. 13.* that it matters little whether fear is instilled by the contracting party or by another third party; for the same is to be thought of both.

Pro *coronide advertunt Molina* Tom. 2. disp. 82. put. 267. Lessius tract. 2. lib. 2. dub. 6. num. 39. *Sanchez* lib. 4. de matrim. disp. 8. num. 7. *Fagundez* cap. 6. num. 13. *parum referre; an metus incutiatur a contrahente, an alio tertio, idem enim de utroque sentiendum.*

## Question V: On conditional contracts

1 NOTANDUM (to be noted), following D. Bonaventure, that a conditional contract requires some condition in order to exist. Now a condition may concern the past, the present, or the future; and again it may be honorable, or dishonorable, or necessary, or contingent.

***De Contractibus conditionalibus.***

*NOTANDUM ex D. Bonaventura, contractum conditionalem requirere ad sui esse aliquam conditionem. Potest autem conditio esse de praeterito, vel de praesenti, aut de futuro: Rursus vel honesta, vel inhonesta, vel necessaria, vel contingens.*

2 IF the condition concerns a past event, or the present, it does not suspend consent, because the condition has already been fulfilled or not fulfilled, and it cannot be otherwise; as if you give me an estate, if I was in Rome last year. Or: I take you in marriage, if your Father is dead, or if you are a virgin. So the Holy Doctor, whom very many follow, as Sanchez has it *lib. 5. de matrim. disput. 6.* Rebell. *lib. 2. quaest. 15.* Therefore the contract is not suspended by the force of such a condition, as the Holy Doctor explains, and with him Sanchez *lib. 8. de matrim. disput. 10. num. 4. et 5.* and *lib. 4. decal. disp. 23.*

*SI conditio sit de praeterito eventu, vel praesenti, non suspendit consensum, quia iam conditio posita est, vel non est posita, et aliter fieri nequit, ut si dones mihi praedium, si anno praeterito fui Romae. Vel accipio te in uxorem, si est mortuus Pater tuus, vel si es virgo. Ita S. Doctor, quem sequuntur plurimi apud Sanchez* lib. 5. de matrim. disput. 6. *Rebell.* lib. 2. quaest. 15. *Ideo non suspenditur contractus ex vi talis conditionis, ut explicat S. Doctor, et cum eo Sanchez* lib. 8. de matrim. disput. 10. num. 4. et 5. *et* lib. 4. decal. disp. 23.

3 IF indeed the conditions are future and contingent, the contract is suspended until the condition is fulfilled, and then the contract brings a absolute obligation, and therefore a new consent of the contracting parties is not required. So it is held with many authorities adduced, as Sanchez *disput. 8. de matrim. lib. 5.* Azor *3. part. lib. 6. cap. 15. et p. p. lib. 11. cap. 7. quaest. 9.* Navar. *sum. Lat. cap. 2. numero 63.* Innocent. *in cap. 1. num. 4. et in cap. super eo, in fine.*

*SI vero sint de futuro conditiones contingentes, suspenditur contractus, quo usque conditio impleatur, et tunc contractus adducit obligationem absolutam, et ideo non requiritur novus consensus contrahentium. Ita plurimis adductis Sanchez* disput. 8. de matrim. lib. 5. *Azor* 3. part. lib. 6. cap. 15. et p. p. lib. 11. cap. 7. quaest. 9. *Navar.* sum. Lat. cap. 2. numero 63. *Innocent.* in cap. 1. num. 4. et in cap. super eo, in fine.

4 IF indeed the conditions are necessary, they are not judged to suspend the contract, because those conditions are necessary, as if you should say: I take you in marriage, if the sun rises tomorrow. So D. Bonaventure, and with him Azor *p. p. lib. 11. cap. 15. quaest. 9.* Sanchez *lib. 5. de matrim. disp. 5. num. 1.* and *lib. 4. Decal. cap. 23.* Suarez *Tom. 3. de relig. lib. 6. cap. 12. num. 16.* Fagundez *lib. 1. de contract. cap. 7. num. 6.*

*SI vero conditiones sint necessariae, non censentur suspendere contractum, quia conditiones illae sunt necessariae, ut si dicas: accipio te in coniugem, si sol cras orietur. Ita D. Bonavent. et cum eo Azor* p. p. lib. 11. cap. 15. quaest. 9.

> *Sanchez* lib. 5. de matrim. disp. 5. num. 1. *et* lib. 4. Decal. cap. 23. *Suarez* Tom. 3. de relig. lib. 6. cap. 12. num. 16. *Fagundez* lib. 1. de contract. cap. 7. num. 6.

5 IF indeed the condition be naturally, or morally impossible, the Doctors hold different views.

> *SI vero conditio sit naturaliter, vel moraliter impossibilis, diverso modo sentiunt Doctores.*

6 FOR MANY say that such a condition vitiates the contract by the law itself. So Lessius *lib. 2. cap. 18. dub. 15. num. 121.* Azor *p. p. lib. 11. cap. 15. quaest. 9.* Sanchez *tract. 1. decal. cap. 23. num. 8.* Bonacina *de contract.* disp. 3. *quaest. 1. puncto 4. num. 10.* Vasquez *de restis. c. 7. disp. 10.* speaking of wills, and it is found in *Leg. servo manumisso, ff. de condit. instit.*

> *MULTI enim dicunt, talem conditionem vitiare contractum ipso iure. Ita Lessius* lib. 2. cap. 18. dub. 15. num. 121. *Azor* p. p. lib. 11. cap. 15. quaest. 9. *Sanchez* tract. 1. decal. cap. 23. num. 8. *Bonacina* de contract. *disp. 3.* quaest. 1. puncto 4. num. 10. *Vasquez* de restis. c. 7. disp. 10. *loquens de testamentis, et habetur* Leg. servo manumisso, ff. de condit. instit.

7 Others say that such a condition is judged as if not appended, and the contract stands. This seems to be the opinion of D. Bonaventure, for even concerning conditions that cannot be morally fulfilled, he says the conditions are to be judged as not added. This is the view of Philiarch. *tract. 1. de offic. sacerd. part. 1. lib. 3. cap. 21.* and others.

> *Alii dicunt, talem conditionem censeri tanquam non appositam, et contractum valere. Haec videtur sententia D. Bonaventurae, nam et de conditionibus, quae non possunt moraliter impleri, ait, censendas conditiones pro non adiectis. Id sentiunt Philiarch.* tract. 1. de offic. sacerd. part. 1. lib. 3. cap. 21. *et alii.*

8 If indeed the condition be contrary to the substance of the contract, it will be null, as D. Bonaventure asserts concerning Matrimony *loco cit. patet ex cap. fin. de condit. apposit. et cap. soles 32. quaest. 2. et lib. 5. tit. 4. part. 4.* and the reason of D. Bonaventure is, because without its proper substance a thing does not subsist, *cap. tua nos de sponsal. cap. detrahe 1. quaest. 1. facit leg. cum hi, §. si Praetor, ff. de transact.* So also D. Thom. 3. *part. quaest. 47. art. 5. in addit.* The same concerning other contracts the Doctors commonly teach, as found in Fagundez *lib. 1. cap. 7.*

> *Si vero sit conditio contratia substantiae contractus, erit nullus, ut de Matrimonio asserit D. Bonavent.* loco cit. patet ex cap. fin. de condit. apposit. et cap. soles 32. quaest. 2. et lib. 5. tit. 4. part. 4. *et ratio D. Bonavent. est, quia sine substantia propria res non subsistit,* cap. tua nos de sponsal. cap. detrahe 1. quaest. 1. facit leg. cum hi, §. si Praetor, ff. de transact. *Ita etiam D. Thom. 3.* part. quaest. 47. art. 5. in addit. *Idem de aliis contractibus, docent communiter Doctores apud Fagundez* lib. 1. cap. 7.

9 S. Bonaventure then inquires about this wicked condition: I contract with you, if you use poison to procure sterility in our marriage.

> *Quaerit vero S. Bonavent. de hac conditione prava: Contraho tecum, si utaris veneno ad sterilitatem in nostro matrimonio.*

10 The Holy Doctor answers: it invalidates the marriage. So also Paludanus *4. dist. 29. quaest. 2. art. 5. num. 27.* Sanchez *lib. 5. de matrim. disp. 9. num. 8.* Fagundez *lib. 1. cap. 7. num. 24.* The reason is, because it is just the same as binding oneself to take those poisons, which is against the substance of matrimony, as the Holy Doctor notes.

*Respondet S. Doctor, irritate matrimonium. Sic etiam Paludanus* 4. dist. 29. quaest. 2. art. 5. num. 27. *Sanchez* lib. 5. de matrim. disp. 9. num. 8. *Fagundez* lib. 1. cap. 7. num. 24. *Ratio est, quia perinde est ac se obligare ad ea venena sumenda, quod est contra substantiam matrimonii, ut notat S. Doctor.*

11 But if the condition be wicked, yet not against the substance of the contract, as: I take you in marriage, provided you go mad. I say, these conditions are to be judged as if not appended, and the contract is valid; wherefore they are reckoned with morally impossible conditions. For we can do only that which we can do licitly and justly *Lege Nepos. Proculo 125. ff. de verb. signific.* So D. Bonaventure *loco cit.* whom follow Ludovicus Lopez 2. *part. Instruct. lib. 11. de matrim. cap. 12.* Palat. *lib. 5. de contract. cap. ult. folio 498.* Sotus *in 4. dist. 29. quaest. 1. art. 3.* Gregorius Lopez *lib. 6. verbo si furata res, titulo 4. part. 4.*

*Quod si conditio sit prava, sed non contra substantiam contractus, ut: accipio te in maritum, dummodo fureris. Dico, has conditiones censendas tanquam non appositas, et validum esse contractum, quare computantur cum conditionibus moraliter impossibilibus. Id enim solum possumus, quod licite, et iuste possumus* Lege Nepos. Proculo 125. ff. de verb. signific. *Ita D. Bonavent.* loco cit. *quem sequuntur Ludovicus Lopez 2.* part. Instruct. lib. 11. de matrim. cap. 12. *Palat.* lib. 5. de contract. cap. ult. folio 498. *Sotus* in 4. dist. 29. quaest. 1. art. 3. *Gregorius Lopez* lib. 6. verbo si furata res, titulo 4. part. 4.

12 When indeed the shameful conditions concern the present, or the past, since they already are, or already are not, in act: if they are, the contract is valid; otherwise it is void. So D. Thom. 4. *dist. 29. quaest. unic. art. 3. quaest. 3.* Paludanus *ibi quaest. 2. art. 5. num. 28.* Palatius *lib. 5. de contract. cap. ult. fol. 498.* Henriquez *lib. 11. de matrim. cap. 12. num. 7.* Alexander de Neuo *in cap. de illis, num. 18.* Couar. *in 4. Decretal. 2. part. cap. 3. §. 2. num. 2.* Sylvest. *V. matrim. 3. quaesit. 1.* Fagundez *num. 18.*

*Quando vero conditiones turpes sunt de praesenti, aut praeterito, cum sint iam, vel non sint iam actu: Si sunt; valet contractus; aliter est irritus. Ita D. Thom. 4.* dist. 29. quaest. unic. art. 3. quaest. 3. *Paludanus* ibi quaest. 2. art. 5. num. 28. *Palatius* lib. 5. de contract. cap. ult. fol. 498. *Henriquez* lib. 11. de matrim. cap. 12. num. 7. *Alexander de Neuo* in cap. de illis, num. 18. *Couar.* in 4. Decretal. 2. part. cap. 3. §. 2. num. 2. *Sylvest.* V. matrim. 3. quaesit. 1. *Fagundez* num. 18.

13 If the condition concerns the future, depending on the will of a third party, and it is positive, the first act of the third party's will is to be attended to; as: I betroth you to myself, if my father shall wish it. But if it is negative, all the acts are to be attended to; *v. g.* if my father shall not have objected; then at whatever time he objects, if the matter is still intact, the contract will be void, because it belongs to the nature of negation to destroy all things.

*Si conditio sit de futuro, pendens a voluntate tertii, et sit positiva, attendendus est primus actus voluntatis tertii, ut: spondeo te mihi, si meus pater voluerit. Si vero sit negativa; attendendi sunt omnes actus,* v. g. *si meus pater non contradixerit; tunc quocunque tempore contradixerit, si adhuc res est integra, erit contractus irritus, quia de natura negationis est, ut omnia destruat.*

14 If you promise under this condition: if Peter gives Francis a house, it will suffice if he offers it, even if Francis does not accept, because it did not lie with him *Leg. debitor, ff. de usuris.* Azor *p. p. lib. 11. cap. 15. quaestio 9.* and it is deduced *ex Leg. si ita, ff. de condit. inst.* and *ex Lege, statu liber, ff. de statu libero.* The same is taught by Sanchez *lib. 1. de matrim. disp. 33. num. 19.* and *lib. 4. Decal. cap. 23. num. 18.*

*Si promittas sub hac conditione: si Petrus det Francisco domum, satis erit, si ille offerat, etiamsi Franciscus non acceptet, quia per eum non stetit* Leg. debitor, ff. de usuris. *Azor* p. p. lib. 11. cap. 15. quaestio 9. *et deducitur* ex Leg. si

ita, ff. de condit. inst. *et* ex Lege, statu liber, ff. de statu libero. *Idem docent Sanchez* lib. 1. de matrim. disp. 33. num. 19. *et* lib. 4. Decal. cap. 23. num. 18.

15 If a condition appended to a contract is impeded by one of the contracting parties, with the other consenting, both already withdraw from the contract; but if with the other unwilling, the one impeding is held to the contract, as if the condition had been fulfilled. So Roderic. a Cunha *in decret. in cap. quae ad nos, dist. 47.* Molina *de primog. lib. 2. cap. 13. num. 15.* Sanchez *lib. 4. decal. cap. 23. num. 47.* Fagundez *cap. 7. num. 26.* It is proved from the rule: *Cum per eum non fiat 66. de regul. iuris in 6.* and *ex regula in iure civili 122. ff. de regulis iuris, et Leg. in excavatione 85. §. fin. ff. de verb. oblig.*

*Si conditio apposita contractui impediatur ab altero contrahente, consentiente altero; iam uterque recedit a contractu; si vero altero invito, tenetur impediens ad contractum, ac si conditio esset impleta. Ita Roderic. a Cunha* in decret. in cap. quae ad nos, dist. 47. *Molina* de primog. lib. 2. cap. 13. num. 15. *Sanchez* lib. 4. decal. cap. 23. num. 47. *Fagundez* cap. 7. num. 26. *Probatur ex regula:* Cum per eum non fiat 66. de regul. iuris in 6. *et* ex regula in iure civili 122. ff. de regulis iuris, et Leg. in excavatione 85. §. fin. ff. de verb. oblig.

16 The reason is, because a contract requires good faith in the appended condition, which therefore one ought not to impede, either by oneself, or through another. See Sanchez *loco cit. num. 48.*

*Ratio est, quia contractus requirit bonam fidem in apposita conditione, quam ideo non debet impedire, vel per se, vel per alium. Vide Sanchez* loco cit. num. 48.

17 The Holy Doctor adds, that if a condition of marriage is by way of penalty, it has no force, because it ought to be free; whence, even if he does not contract, he is not held to that penalty.

*Addit S. Doctor, quod si conditio matrimonii est per modum poenae, nullius est vigoris, quia debet esse liberum; unde, etiamsi non contrahat, non tenetur illi poenae.*

## Question VI: On the obligation that results from a valid contract

1 The general rule among the Doctors is this. A contract validly celebrated begets a natural obligation in the forum of conscience (forum Poli), such that one party cannot withdraw from it in conscience. So the Doctors commonly hold with D. Bonaventure *in 4. dist. 27. et sequentibus, passim.*

***De obligatione, quae resultat ex valido Contractu.***

*Regula generalis est apud Doctores. Contractus valide celebratus parit naturalem obligationem in foro Poli, ita ut una pars non possit ab ea recedere in conscientia. Ita communiter Doctores cum D. Bonavent.* in 4. dist. 27. et sequentibus, passim.

2 I said validly celebrated, because contracts are often prohibited by positive law, or commanded with such solemnity, without which they are void, as Suarez notes *lib. 5. de Legibus, cap. 24.* Salas *disp. 16. sect. 4.* Bonacina *disp. 1. quaest. 1. puncto 7. §. 5.*

*Dixi valide celebratus, quia saepe contractus prohibentur a iure positivo, vel praecipiuntur tali solemnitate, sine qua irriti sunt, ut advertit Suarez* lib. 5. de Legibus, cap. 24. *Salas* disp. 16. sect. 4. *Bonacina* disp. 1. quaest. 1. puncto 7. §. 5.

3 If the positive law does not render persons incapable, but simply invalidates a contract made without such solemnity, then it is disputed: whether it has force in the forum of conscience.

*Si lex positiva non reddat personas inhabiles, sed simpliciter irritet contractum factum sine tali solemnitate, tunc disputatur: an in foro Poli valeat.*

4 The common opinion teaches that it does not. So Suarez, Salas, and Bonacina alleged above, Azor *part. 3. lib. 6. cap. 9.* Fagundez *lib. 1. cap. 4. de contract. num. 7.*

*Communis sententia docet, non valere. Ita Suarez, Salas, et Bonacina allegati, Azor* part. 3. lib. 6. cap. 9. *Fagundez* lib. 1. cap. 4. de contract. num. 7.

5 The reason of D. Bonav. *in 4. dist. 28. quaest. 5.* is, because the common and public good naturally preponderates over the private; but often, to avoid inconveniences, the civil law intervenes. See the Holy Doctor *in corpore, et ad 1.* where, I think, he adduces the incapacity of persons as a partial example of those things which law is wont to decree for invalidating contracts.

*Ratio D. Bonav.* in 4. dist. 28. quaest. 5. *est, quia bonum commune, et publicum naturaliter praeponderat privato; saepe autem ad evitanda inconvenientia lex civilis subintrat. Vide S. Doctorem* in corpore, et ad 1. *ubi, ut reor, affert inhabilitationem personarum in exemplum partiale eorum, quae solet ius decernere ad irritandos contractus.*

6 Where he also seems to teach that not all acts, or omissions, forbidden by law, invalidate contracts. A striking sign of invalidity is this, if the law says: let it be void *ipso iure*, or *facto*. See Suarez *lib. 5. de legibus, cap. 26. et 32.* Bonacina *de contract. disp. 3. quaest. 1. puncto 3.* Likewise if the law says, they cannot contract. So Sanchez *lib. 6. decal. cap. 12. num. 10. et lib. 6. de matrim. disp. 38. num. 20.* and Fagundez teaches that this opinion is already most common *lib. 1. cap. 4. num. 11.*

*Ubi etiam videtur docere, non omnes actus, vel omissiones, a lege vetitas, irritare contractus. Signum autem invaliditatis insigne est, si lex dicat;* ipso iure*, vel* facto*, sit irritus. Vide Suarez* lib. 5. de legibus, cap. 26. et 32. *Bonacina* de contract. disp. 3. quaest. 1. puncto 3. *Similiter si lex dicat, non possint contrahere. Ita Sanchez* lib. 6. decal. cap. 12. num. 10. et lib. 6. de matrim. disp. 38. num. 20. *et hanc sententiam iam communissimam esse docet Fagundez* lib. 1. cap. 4. num. 11.

7 But if the law decrees something, supposing a contract already made, it is not judged to invalidate it. So Suarez *lib. 5. cap. 32.* as if it be decreed that from such a sale the gabel tax be paid, otherwise that contract be void.

*Quod si lex decernat aliquid, supponens contractum iam factum, non censetur irritare. Ita Suarez* lib. 5. cap. 32. *ut si decernatur ex tali venditione solutio gabellae, alioqui sit irritus ille contractus.*

8 You will ask: whether when the law invalidates contracts out of a presumption of fraud, they are valid where there was no fraud.

*Quaeres: an quando lex irritat contractus ex praesumptione fraudis, sint validi, ubi non fuerit fraus.*

9 It is answered: if the Law invalidates absolutely out of the presumption that fraud could underlie them when done otherwise, they will always be void; for the Law, speaking absolutely, must be taken absolutely, *ex Leg. pretio, ff. de publican. Leg. 1. §. et generaliter, ff. de legatis, prae-* stand. *Leg. 1. §. quod autem, ff. de aleatoribus*, Menochius *cons. 74.* The reason is, because the root is commonly bad, as the Holy Doctor notes in *speculo animae, cap. 2. §. Quartus fructus rapina.* And in this manner the invalidations of contracts are commonly done.

*Respondetur; si Lex absolute irritat ex praesumptione, quod in eis aliter factis possit subesse fraus, erunt semper irriti; Lex enim absolute loquens, absolute est accipienda,* ex Leg. pretio, ff. de publican. Leg. 1. §. et generaliter, ff. de

legatis, prae- *stand*. Leg. 1. §. quod autem, ff. de aleatoribus, *Menochius* cons. 74. *Ratio est, quia radix est mala communiter, ut notat S. Doctor in* speculo animae, cap. 2. §. Quartus fructus rapina. *Et hoc modo communiter fiunt irritationes contractuum.*

10 ADVERTE (take note), however, that often from contracts there results an eviction, which is the loss of a just title by which one possessed another's property.

*ADVERTE tamen, saepe e contractibus resultare evictionem, quae est amissio iusti tituli, quo quis rem alienam possidebat.*

11 OBSERVANDUM (to be observed) also, that there are many obligations for avoiding culpable negligence. Now there is one gross (lata) fault; another light (levis); another most light (levissima). Some add a widest (latissima) one, which is Dolo (fraud), as Barr. notes in *Leg. Quod Nerva, ff. depositi*, who also adds a grosser fault, which is presumed fraud (dolus praesumptus); but these are reduced to gross fault.

*OBSERVANDUM etiam, multas esse obligationes ad evitandam negligentiam culpabilem. Est autem alia culpa lata; alia levis; alia levissima. Aliqui addunt latissimam, quae est Dolus, ut notat Barr. in* Leg. Quod Nerva, ff. depositi, *qui addit etiam culpam latiorem, quae est dolus praesumptus, sed hae ad culpam latam reducuntur.*

12 GROSS fault (CULPA lata), is the omission of the diligence ordinary among provident men for guarding their own things: as if you place a book lent to you on the public road.

*CULPA lata, est omissio diligentiae, ordinariae hominibus providis, ad res suas custodiendas: Ut si librum tibi comodatum ponas in via publica.*

13 LIGHT fault (LEVIS) is the omission of the diligence customary among the more diligent; as if you do not lock the house with a key.

*LEVIS est omissio diligentiae solitae apud diligentiores; ut si domum clave non obseres.*

14 MOST LIGHT fault (LEVISSIMA) is the omission of the diligence which the most diligent employ; as if, going out, and thinking the gate closed with the key, you do not test whether it is so, *Leg. si Pater, ff. ad Legem Aquil. Leg. Dinuu, ff. de offic. praes.*

*LEVISSIMA est omissio diligentiae, quam adhibent diligentissimi; ut si exiens, et putans portam clave clausam, non tentes, an ita sit,* Leg. si Pater, ff. ad Legem Aquil. Leg. Dinuu, ff. de offic. praes.

15 The FIRST rule is. When a contract is made for the sole utility of the receiver, he is held regarding most light fault, and a fortiori regarding light, and gross fault. So Molina *tract. 2. disput. 293. num. 13. Nauar. sum. cap. 17. numero 184. Syluester V. culpa, num. 84. et verb. commodatum, quaest. 8. Lessius lib. 2. cap. 2. dub. 3. num. 11. Bonacina de contract. disp. 3. quaest. 1. puncto 6.* It is clear from *Leg. Vinnu, de offic. praesid. et Leg. si putator, ff. ad Leg. Aquiliam.* The example is: if you have a garment on loan, and you place it in a chest, not locked.

*PRIMA regula est. Quando contractus fit in solam utilitatem accipientis, tenetur is de culpa levissima, et a fortiori de levi, et lata. Ita Molina* tract. 2. disput. 293. num. 13. Nauar. sum. cap. 17. numero 184. Syluester V. culpa, num. 84. et verb. commodatum, quaest. 8. Lessius lib. 2. cap. 2. dub. 3. num. 11. Bonacina de contract. disp. 3. quaest. 1. puncto 6. *Patet ex* Leg. Vinnu, de offic. praesid. et Leg. si putator, ff. ad Leg. Aquiliam. *Exemplum est, si vestem habes conmodatam, et ponis eam in arca, non obferata.*

16 EXCEPT, however, the one who receives precariously, who is held only regarding gross fault, or fraud *Leg. contractus, ff. de reg. iuris, et Leg. Quaesitum, §. et illud, ff. de precario.* So Sylvester, *verb. precarium.*

> *EXCIPE tamen eum, qui accipit precario, qui tenetur solum de culpa lata, seu dolo* Leg. contractus, ff. de reg. iuris, et Leg. Quaesitum, §. et illud, ff. de precario. *Ita Sylvester,* verb. precarium.

17 The SECOND rule. When the contract redounds to the utility of the giver alone, then the receiver is held only regarding gross fault, or fraud; as if you have deposited with me a hundred gold coins, that I may keep them for you gratis.

> *SECUNDA regula. Quando contractus redundat in utilitatem solius dantis, tunc tenetur accipiens solum de culpa lata, seu dolo; ut si deposuisti apud me centum aureos, ut eos tibi servem gratis.*

18 The THIRD rule is. If the contract is for the utility of both, the receiver is held regarding light, and gross fault, not regarding most light fault.

> *TERTIA regula est. Si contractus sit in utriusque utilitatem, tenetur accipiens de culpa levi, et lata, non de levissima.*

19 WHETHER, however, these rules hold only in the forum Soli, or also in the forum Poli; the opinions are difficult, and the probability stands on both sides. See Fagundez *lib. XI. cap. 10.*

> *AN autem hae regulae valeant tantum in foro Soli, an etiam in foro Poli; difficilae sunt opiniones, et utrinque probabilitas stat. Vide Fagundez* lib. XI. cap. 10.

## Question VII: Which persons can enter into a contract, and which cannot

1 FIRST of all, the insane and the furious are excluded from contracting. So asserts St. Bonaventure *in 4. dist. 34. art. 3. quaest. 1.*

> *PRIMO loco a contrahendo excluduntur amentes, et furiosi. Ita asserit S. Bonavent.* in 4. dist. 34. art. 3. quaest. 1.

2 St. Doctor observes, moreover, that there are several species of the insane. Some are insane perpetually; others have lucid intervals, and to this species drunkards are reduced. These three species appear in *Leg. Hoc colore, 2. ff. de inoffic. test.* joined with *Leg. 17. ff. de Testament.*

> *OBSERVAT autem S. Doctor plures esse species amentium. Aliqui enim sunt perpetuo amentes; alii habent lucida intervalla, et ad hanc speciem reducunt ebrios. Hae tres species patent in* Leg. Hoc colore, 2. ff. de inoffic. test. *iuncta* Leg. 17. ff. de Testament.

3 I ASSERT first. Those insane perpetually are incapable of making contracts, of drawing up wills, and of marriage.

> *ASSERO primo. Perpetuo amentes sunt inhabiles ad contractus ineundos, et ad testamenta condenda, et ad matrimonium.*

4 AS TO contracts, even of matrimony, this is clear from *§. furiosus, Instit. de inut. stipul. et in Leg. ubi non vero, §. furiosus, ff. de reg. iuris,* D. Bonaventure in the place cited, D. Thomas *eadem. dist. quaest. unic. art. 4.* Sanchez book 1 *de matrim.* disp. 8. num. 15. Fagundez book 1 *de contract.* chapter 11.

> *QUOAD contractus etiam matrimonii patet ex* §. furiosus, Instit. de inut. stipul. et in Leg. ubi non vero, §. furiosus, ff. de reg. iuris, *D. Bonavent. loco citato, D. Thom.* eadem. dist. quaest. unic. art. 4. Sanchez lib. 1. de matrim. disp. 8. num. 15. Fagundez lib. 1. de contract. capite 11.

5 The UNIVERSAL REASON of D. Bonaventure, which the others use, is that a free consensus is required for a contract; but these lack it, and therefore they can neither merit nor demerit, and consequently neither bind themselves, because they are held as dead, *Leg. Qui ad certum, ff. locat. Leg. Bonorum, ff. rem ratam haberi.*

> *RATIO D. Bonaventurae universalis, qua utuntur caeteri, est, quia ad contractum requiritur liber consensus; sed hoc carent isti, qui ideo nec mereri valent, nec demereri, ac proinde nec se obligare, quia tanquam mortui habentur,* Leg. Qui ad certum, ff. locat. Leg. Bonorum, ff. rem ratam haberi.

6 YOU WILL OBJECT: Fabian the Pope, *cap. furiosus, 32. q. 7.: "Neither a furious man nor a furious woman can contract marriage, but if it has been contracted, they are not to be separated."*

> *OBIICIES Fabianum Papam,* cap. furiosus, 32. q. 7. Neque furiosus, neque furiosa matrimonium contrahere possunt, sed si contractum fuerit, non separentur.

7 Fagundez answers *num. 3.*, from D. Bonaventure *in 4. dist. 34. dub. 7. litt.*, that the Pontiff speaks of the furious in act, who cannot contract; but those who contract in a time of sound mind, even if afterwards they become foolish or dash their head against a wall, it will be a valid marriage.

> *RESPONDET Fagundez* num. 3. *ex D. Bonavent.* in 4. dist. 34. dub. 7. litt. *Pontificem loqui de furiosis in actu, qui nequeunt contrahere; enim vero contrahentes, tempore sanae mentis, etiam si postea desipiant, vel caput in caetalam impingant, erit validum matrimonium.*

8 I SAY second, that the furious who have lucid intervals, and indeed return to sanity of mind, can contract and make wills, from *Leg. cum furiosus, ff. de iudiciis*; and the Doctors commonly teach this with D. Bonaventure, alleged above.

> *DICO secundo, furiosos habentes lucida Intervalla, atque adeo ad mentis redeunt sanitatem, posse contrahere, et testamenta facere ex* Leg. cum furiosus, ff. de iudiciis*, et docent communiter Doctores cum D. Bonavent. allegato.*

9 The REASON of St. Doctor, which the others use, is that liberty for consent is present.

> *RATIO S. Doctoris, qua caeteri utuntur, est, quia adest libertas ad consensum.*

10 The proof of a lucid interval, moreover, is difficult, because there is an unfavorable presumption about such persons: what is required is that for some considerable time he act with deeds that a prudent judgment would deem to argue a perfect use of reason. So Burgos *de paz. consil. 11. num. 19. Surdus consil. 89. num. 43. Fagundez cap. 11. num. 6.*

> *Ardua est autem probatio lucidi intervalli, quia male de his praesumitur: requiritur autem, ut per aliquod tempus considerabile agat opera prudentis iudicio, arguentia perfectum rationis usum. Ita Burgos* de paz. consil. 11. num. 19. Surdus consil. 89. num. 43. Fagundez cap. 11. num. 6.

11 IN doubt, moreover, when perpetual fury is not established, he is to be presumed of sound mind, because nature does not usually produce insane men, but men endowed with judgment; wherefore, since this presumption is natural, one must stand by it. So Reinosus *observ. 32. Gloss. V. probari in Leg. ne Codicillus, Cod. de codicill. et in cap. ult. v. compotem, de success. ab intest.* Boer. decif. 23. Mantica *de coniect.* ult. vol. lib. VII. tit. 15. num. 3. Couar. in 4. *decretal.* 2. part. num. 5. Menoch. with very many others lib. VI. *praesumpt.* 45. num. 18. Sanchez book 1 *de matrim.* disp. 8. num. 17. and it is clear from the text in *Leg. 2. Cod. qui testam. facere possunt.*

*IN dubio autem, quando non constat perpetuus furor, praesumendum est, eum esse sanae mentis, quia natura non solet producere homines furiosos, sed iudicio praeditos; quare cum haec praesumptio sit naturalis, illi standum. Ita Reinosus* observ. 32. Gloss. V. probari in Leg. ne Codicillus, Cod. de codicill. et in cap. ult. v. compotem, de success. ab intest. Boer. decif. 23. Mantica de coniect. ult. vol. lib. VII. tit. 15. num. 3. Couar. in 4. decretal. 2. part. num. 5. Menoch. cum plurimis lib. VI. praesumpt. 45. num. 18. Sanchez lib. 1. de matrim. disp. 8. num. 17. et constat ex text. in Leg. 2. Cod. qui testam. facere possunt.

12 Spendthrifts are held to be the counterpart of the insane. Now the spendthrift is he who, lavishing without discretion, gives what should not be given, consuming and squandering his goods, as D. Bonaventure teaches *in opusc. terminorum Theologiae declaratio*, and Ulpian *leg. 1. v. minoribus, ff. de iurat. furios:* Gregorius Lopez *lib. 5. tit. 11. part. 5.* Hence prodigality is a vice of profusion, dissipative of one's own things without cause, as St. Doctor says, and it is a vice against the virtue of prudence and temperance, as is gathered *ex text. in cap. saepe, dist. 45. et ex glossa in cap. ex parte penult. de consuet.* and Cutnha teaches *dist. 86. cap. 15. num. 4.* Wherefore in ancient times tutors were given to spendthrifts as if to infants; so it was customary at Athens, as Athenaeus testifies *lib. IV. caenae sapientum, cap. 20.*; so also the Romans had decreed it in their own laws, and in Lusitania it is practiced *lib. IV. nov. ordin. tit. 105.* For spendthrifts are in this respect equated with the furious, as St. Doctor indicates *in 15. Lucae* at these words: *In se autem reversus.* And at these words: *Erat filius senior in agro:* for he is called elder because sensible: and at these words: *Filius meus mortuus erat, et revixit*, for spendthrifts are held as dead because of the lack of prudence and reason under which they labor.

*INSTAR amentium censentur prodigi. Est autem prodigus ille, qui profusus absque discretione dat non danda, absumens, dilapidansque sua bona, ut docet D. Bonavent.* in opusc. terminorum Theologiae declaratio, *et Ulpianus* leg. 1. v. minoribus, ff. de iurat. furios: *Gregorius Lopez* lib. 5. tit. 11. part. 5. *Unde prodigalitas est vitium profusionis suarum rerum sine causa dissipativum, ut ait S. Doctor, et est vitium contra virtutem prudentiae, et temperantiae, ut colligitur* ex text. in cap. saepe, dist. 45. et ex glossa in cap. ex parte penult. de consuet. *et docet Cutnha* dist. 86. cap. 15. num. 4. *Quare antiquitus dabantur prodigis tutores, quasi infantis, Sic usitatum apud Athenas testatur Athaeneus* lib. IV. caenae sapientum, cap. 20. *sic etiam Romanis suis legibus id decreverant, et in Lusitania id practicatur* lib. IV. nov. ordin. tit. 105. *furiosis enim in hoc aequiparantur prodigi, ut indicat S. Doctor* in 15. Lucae ad ea verba: In se autem reversus. Et ad ea verba: Erat filius senior in agro: dicitur enim senior, quia sensatus: et ad ea verba: Filius meus mortuus erat, et revixit, *censentur enim prodigi, quasi mortui ob prudentiae, et rationis inopiam, qua laborant.*

13 Nor does *l. in re mandata, Cod. mandati,* stand in the way, which says the rich abuse their goods; for that is held true when someone lacks every vice of mind. Then it is true, moreover, before the administration is taken from him.

*NEQUE obstat* l. in re mandata, Cod. mandati, *quae dicit diti rebus suis abuti; id enim habetur verum, quando quis omni vitio mentis caret. Deinde verum est, antequam ei auferatur administratio.*

14 But that someone be proven a spendthrift, the deeds must be examined; for some seem to speak prudently but to act imprudently, *Leg. is qui 12. ff. de tutor. et curat.*

*Ut autem quis probetur prodigus, facta sunt inspicienda, aliqui enim videntur prudenter loqui, sed imprudenter operari,* Leg. is qui 12. ff. de tutor. et curat.

15 THEREFORE the actions of spendthrifts, before a curator has been given them, are valid; but afterwards by no means without the authority of the curator, *Leg. Iulianus, ff. de tutor. furios.* Before the

provision of the Judge, however, if the spendthrift alienates, one may recur to the judge, that he redeem it, as the Jurists say, cited at Fagundez *lib. 1. cap. 11.*

> *IGITUR actiones prodigi, antequam datus sit ei curator, validae sunt; postea vero nequaquam absque authoritate curatoris,* Leg. Iulianus, ff. de tutor. furios. *Ante vero Iudicis provisionem, si prodigus alienet, potest recurri ad iudicem, ut redimat, ut dicunt Iuristae apud Fagundez* lib. 1. cap. 11.

16 That the spendthrift has indeed come to his senses will be proven if he acts prudently for at least two years, as the Doctors say.

> *PROBABITUR sane prodigus resipuisse, si biennio saltem prudenter agat, ut dicunt Doctores.*

17 AND truly, if a notorious spendthrift be chosen for the governance of the Church, such an election will be null, because it is harmful to the Church, *argumento, leg. final. Cod. de sent. pass.*

> *ET vero si prodigus notorius eligatur ad gubernationem Ecclesiae, talis electio erit nulla, quia est nociua Ecclesiae,* argumento, leg. final. Cod. de sent. pass.

18 THERE FOLLOW minors and those below the age of puberty, to whom the faculty of making contracts is denied.

> *SEQUUNTUR minores, et impuberes, quibus ineundi contractus facultas interdicitur.*

19 They are called INFANTS, moreover, sons up to the seventh year; from that age up to the years of puberty, impuberes; puberty begins in males in the fourteenth year, in females in the twelfth; and thereafter up to the twenty-fifth year they are called minors, as the Doctors commonly teach with D. Bonaventure *in 4. dist. 27. art. 2. quaest. 1.* And indeed before the seventh year boys and girls cannot contract, as all teach with D. Bonaventure *dist. cit. quaest. 2.*

> *DICUNTUR autem filii infantes usque ad septimum annum; ab eo autem usque ad annos pubertatis impuberes; incipit autem in masculis pubertas quarto decimo anno; in foemellis duodecimo; exinde vero usque ad annum vigesimum quintum dicuntur minores, ut docent communiter cum D. Bonavent.* in 4. dist. 27. art. 2. quaest. 1. *et quidem ante septennium pueri, et puellae nequeunt contrahere, ut docent omnes cum D. Bonavent.* dist. cit. quaest. 2.

20 The reason is that free consent is lacking; thereafter, up to the years of puberty, tutors are given them, during which time they are wards; after that, up to the twenty-fifth year, curators; and if before this year he is proven to have been wronged, he can be restored to his original position, *Leg. in causa 13. §. interdum, et Leg. Quod si minor, §. non semper, ff. de minoribus.*

> *Ratio est, quia deest consensus liber; exinde usque ad annos pubertatis dantur tutores, quo tempore sunt pupilli; postea usque ad annum vigesimum quintum Curatores, et si ante hunc annum probetur laesus, poterit in integrum restitui,* Leg. in causa 13. §. interdum, et Leg. Quod si minor, §. non semper, ff. de minoribus.

21 A period of four years after majority is PRESCRIBED for restitution in integrum, according to the *Clementinam unic. de restit. in integrum, et Leg final.* where the Doctors treat *de restit. in integrum,* and this time runs from the point of the celebration of the contract. So teach *Antonius Picardus, lib. 2. instit. titulo 19.* and others at Fagundez *cap. 12.*

> *PRAESCRIBITUR autem quadriennium post maioritatem ad restitutionem in integrum, iuxta* Clementinam unic. de restit. in integrum, et Leg final. *ubi Doctores* de restit. in integrum, *et hoc tempus currit a puncto celebrationis contractus. Ita docent* Antonius Picardus, lib. 2. instit. titulo 19. *et alii apud Fagundez* cap. 12.

22 ALL the contracts of minors, therefore, in order to be valid require the decree of the Judge and the consent of curators or tutors, if they are wards, and one without the other does not suffice. Hence the alienation of the goods of minors without the other does not suffice. Hence the alienation of the goods of minors, without the decree of the judge and the consent of curators or tutors respectively, is null, as St. Doctor shows in 4. dist. 15. part. 2. art. 2. quaest. 1. ad arg.

> *OMNES igitur contractus minorum, ut validi sint, requirunt decretum Iudicis, et consensum curatorum, seu tutorum, si pupilli sint, et unum sine altero non sufficit. Unde alienatio bonorum minorum sine altero non sufficit. Hinc alienatio bonorum minorum, sine decreto iudicis, et consensu curatorum, vel tutorum respective, nulla est, ut ostendit S. Doctor in 4. dist. 15. part. 2. art. 2. quaest. 1. ad arg.*

23 REINOSUS *obser. 30.* Hercules Marescot *lib. 1. variarum resol. cap. 68. num. 8. et leg. cit. 38. num. 15.* Bartol. and others on *Leg. Cum hi, §. eam transactionem, ff de transact.* Provided, however, that fraud and deceit are absent; otherwise they will be void, *leg. 1. ff. de minoribus, et leg. finali.* A male over twenty years, and a female over eighteen years, could nevertheless petition the Prince for enabling.

> *REINOSUS* obser. 30. *Hercules Marescot* lib. 1. variarum resol. cap. 68. num. 8. et leg. cit. 38. num. 15. *Bartol. et alii in* Leg. Cum hi, §. eam transactionem, ff de transact. *Dummodo tamen absit fraus, et dolus, alioqui erunt irriti,* leg. 1. ff. de minoribus, et leg. finali. *Posset tamen masculus maior viginti annis, et foemina maior decimo octavo anno, petere a Principe habilitatem.*

24 NOTE, moreover, that the alienation or contract of minors done without the decree of the judge and the consent of the tutor is invalid, and is not revalidated if they arrive after the contract has begun. The reason is that these intervene as cause, which ought to precede, as Fagundez notes *cap. 12. num. 16*, and D. Bonaventure intimates in 4. dist. 29. and 30. passim. For the due consent ought to precede, not follow.

> *ADVERTE autem, quod alienatio, vel contractus minorum gestus sine decreto iudicis, et consensu tutoris, est invalidus, et non revalidatur, si post initum contractum adveniant. Ratio est, quia haec interveniunt ut causa, quae debet praecedere, ut notat Fagundez* cap. 12. num. 16 *et innuit D. Bonavent. in 4. dist. 29. et 30. passim. consensus enim debet praecedere debitus; non subsequi.*

25 NOTE second, that tutors, curators, their sons, or wives cannot buy the goods of a ward; otherwise the sale is invalid *Leg. Non licet, et Leg. si emptione 23.*

> *ADVERTE secundo, tutores, curatores, eorumve filios, aut uxores non posse emere bona pupilli; alioqui venditio est invalida* Leg. Non licet, et Leg. si emptione 23.

26 YOU WILL ASK: can wards, at least in the forum of conscience, bind themselves by contracts?

> *QUAERES: an pupilli saltem in foro conscientiae se possint obligare contractibus.*

27 The FIRST opinion is the negative one of very many, at Fagundez *cap. 13.*

> *PRIMA sententia est negatiua plurimorum apud Fagundez,* cap. 13.

28 The SECOND is the affirmative one of very many there, and it seems more probable.

> *SECUNDA est assertiua plurimorum ibi, et videtur probabilior.*

29 The REASON is that a contract made by a curator is confirmed by an oath, as *Sanchez lib. 6. de matrim. disp. 38. num. 13.* proves. Therefore a natural obligation arises from it.

*RATIO est, quia contractus, factus a curatore, firmatur a iuramento, ut probat* Sanchez lib. 6. de matrim. disp. 38. num. 13. *Ergo ex illo oritur obligatio naturalis.*

30 It is confirmed; for minors and wards can consecrate themselves to God by vows without tutors, as others teach with D. Bonaventure *in 4. dist. 38. quaest. 3.*

*Confirmatur; nam minores, et pupilli possunt se votis Deo consecrare absque tutoribus, ut docent cum D. Bonavent.* in 4. dist. 38. quaest. 3. *alii.*

31 SONS of the family too, namely those under the power of the Father, even if they exceed twenty-five years, can indeed contract concerning CASTRENSIAN and quasi-CASTRENSIAN goods, because concerning these they have the most plenary right, so that they can even make wills about them, as most Doctors argue, at *Molinam Tract. 1. disp. 131.* Fagundez *lib. 1. cap. 14.*

*FILII etiam familias, nempe qui sub potestate Patris sunt, etiamsi viginti quinque annos excedant, possunt quidem circa bona Castrensia, et quasi Castrensia contrahere, quia circa haec plenissimum habent ius, ita, ut de eis possint etiam testari, ut Doctores plerique astruunt apud* Molinam Tract. 1. disp. 131. *Fagundez* lib. 1. cap. 14.

32 Concerning ADVENTITIOUS goods, however, since the father has the usufruct of these, the son cannot donate or dispose of them among the living by any contract whatsoever. Sons cannot, however, donate in view of death without the consent of the father.

*CIRCA bona vero aduentitia, cum de his habeat pater usumfructum, non potest filius donare, aut disponere inter vivos per quemlibet contractum: Non possunt vero filii donare causa mortis sine consensu patris.*

33 Concerning PROFECTITIOUS goods, however, since they are altogether the father's, the son can dispose of nothing without the father's leave. But if they contract concerning these two, an action is given against them, as Bassaeus says *V. Contractus.*

*De profectitiis autem, cum sint omnino patris, nil potest filius disponere, nisi de licentia patris. Quod si de his duobus contrahant, datur in eos actio, ut ait Bassaeus* V. Contractus.

34 OBSERVE, nevertheless, that a son can exit paternal power in many ways.

*OBSERVA tamen, posse filium egredi e potestate paterna multis viis.*

35 The FIRST is by emancipation, which consists in the supplement of age granted by the Prince, on which *Instit. quibus modis ius patriae potestatis solvitur, §. praeterea.*

*PRIMA est per emancipationem, quae consistit in supplemento aetatis, concesso a Principe, de quo* Instit. quibus modis ius patriae potestatis solvitur, §. praeterea.

36 By the common law, however, when father and son appear together before a judge, the son exits by reciprocal consent, as *Molina diss 229.* proves. By the same common law, emancipation properly so called is when the father emancipates the son *Leg. 1. ff. de iis, qui sunt sui, vel alieni iuris princip. Instit. et Leg. iubemus, et Leg. ult. Cod. de emancip.*

*DE Iure tamen communi, patre, et filio comparentibus coram iudice, filius egreditur reciproco consensu, ut probat* Molina diss 229. *De eodem Iure communi emancipatio proprie est, quando pater filium emancipat* Leg. 1. ff. de iis, qui sunt sui, vel alieni iuris princip. Instit. et Leg. iubemus, et Leg. ult. Cod. de emancip.

37 The SECOND is by the death of the father; for then indeed he exits from his power.

*SECUNDA est per mortem patris, tunc enim profecto egreditur de potestate eius.*

38 The THIRD is by the heresy of the father, even occult, *cap. 2. §. ult. de haeret. in 6.* See *Molinam Tract. 1. disp. 9.* Sanchez *lib. 2. decal. cap. 24. num. 5.*

*TERTIA est per haeresim patris, etiam occultam,* cap. 2. §. ult. de haeret. in 6. *Vide* Molinam Tract. 1. disp. 9. Sanchez lib. 2. decal. cap. 24. num. 5.

39 The FOURTH way is marriage, which can take place even against the will of parents, as D. Bonaventure teaches *in 4. dist. 29. quaest. ult.*, where he shows that no one can prevent him from contracting marriage.

*QUARTA via est matrimonium, quod inuitis parentibus potest esse, ut docet D. Bonavent.* in 4. dist. 29. quaest. ult. *ubi ostendit, nullum posse eum vetare, quin matrimonium contrahat.*

40 The FIFTH is by the profession of the father, or of the son, in Religion.

*QUINTA est per professionem patris, vel filii in Religione.*

41 The SIXTH, according to others, is the reception of sacred Orders.

*SEXTA secundum alios, est susceptio sacrorum Ordinum.*

42 The SEVENTH by the assumption of the son, or indeed of the Father, to the Episcopate.

*SEPTIMA per assumptionem filii ad Episcopatum, siue etiam Patris.*

43 The EIGHTH by PATRICIAN dignity as Councillor of the King, or Praetorian Prefect.

*OCTAVA per dignitatem Pattitiam in Consiliarium Regis, vel Praefecti praetorii.*

44 The NINTH is when the father is captured by enemies, or cast into exile. See Fagundez *lib. 1. cap. 18. de contract.*

*NONA est, cum pater capitur ab hostibus, vel eiicitur in exilium. Vide Fagundez* lib. 1. cap. 18. de contract.

45 THERE FOLLOW Religious, who can donate nothing, nor enter into any contract, without the license of their Superior. So D. Bonaventure *in 4 dist. 15. part. 2. art. 2. quaest. 1.*, concerning whom Bassaeus treats *V. Contractus,* in the course of his tract, and Fagundez *cap. 19.*, and we treated of it in the *disput. de restit.*

*SUBSEQUUNTUR Religiosi, qui nihil donare, nullumve possunt contractum inire absque licentia Superioris sui. Ita D. Bonavent.* in 4 dist. 15. part. 2. art. 2. quaest. 1. *de quo agit Bassaeus* V. Contractus, *tractu, et Fagundez* cap. 19. *et nos in* disput. de restit. *egimus.*

46 SIMILARLY slaves are excluded in those matters in respect of which they are slaves, and wives in those in respect of which they are under the power of husbands, as D. Bonaventure teaches in 4. dist. 29. quaest. ult. And this is the general rule for all subjects: that they cannot contract as to those matters in respect of which they are subjects. The general reason of D. Bonaventure is that for a contract liberty is required, and power over the things contracted about. And this rule will solve many things.

*SIMILITER servi excluduntur in iis rebus, secundum quas sunt servi, et uxores in his, secundum quas sunt sub potestate virorum, ut docet D. Bonavent. in 4. dist. 29. quaest ult. et haec est regula generalis pro omnibus subditis, ut non*

*possint contrahere, quo ad eas res; secundum quas subditi sunt. Ratio generalis D. Bonaventurae est, quia ad contractum requiritur libertas, et potestas supra res contrahendas. Et haec regula multa solvet.*

## Question VIII: Whether, and when, it is lawful to withdraw from a contract, the other party objecting

1 CONCERNING the obligation resulting from contract — something of which I said in *quaest. 6.*, which is to preserve the contract — cases can nevertheless arise in which either party may be able to withdraw.

*DE obligatione resultante ex contractu, aliqua dixi* quaest. 6. *quae est servare contractum, possunt tamen evenire casus, ut alter possit resilire.*

2 FIRST I bring forward: when satisfaction has been made on both sides for any contract whatever, it is licit for neither contracting party to withdraw from the contract, in any forum, even in conscience, whether by civil or by Canon law.

*PRIMO affero. Quando contractui cuicumque ex utraque parte satisfactum est, neutri contrahenti in aliquo foro licet in conscientia, tum iure civili, tum Canonico a contractu recedere.*

3 This is COMMON with D. Bonaventure *in 4. dist. 35. passim*, Sanchez *Tom. 1. decal. lib. 3. cap. 15. num. 11.* Meres *de maioratu, p. p. quaest. 23.* Molina *tomo 1. de iustitia, tract. 2. disp. 258.* The Gloss *in Leg. ex placito, Cod. de rerum permut.*, where it is asserted that each is bound to the other concerning eviction.

*EST communis cum D. Bonavent.* in 4. dist. 35. passim*, Sanchez* Tom. 1. decal. lib. 3. cap. 15. num. 11. *Meres* de maioratu, p. p. quaest. 23. *Molina* tomo 1. de iustitia, tract. 2. disp. 258. *Glossa* in Leg. ex placito, Cod. de rerum permut. *ubi asseritur alterum alteri teneri de evictione.*

4 I ASSERT second, the other party objecting, that it is unlawful in both forums, *Poli*, and *Soli*, to withdraw from nominated contracts entered into by mutual consent. It is gathered from *cap. qualiter de pactis*, according to *leg. iuris gentium 7. ff. de pactis*, *Leg. si pecuniam, ff. de condict. causa data.*

*ASSERO secundo, parte altera repugnante, nefas est in utroque foro,* Poli*, et* Soli*, a contractibus nominatis mutuo consensu initis resilire. Colligitur ex* cap. qualiter de pactis*, iuxta* leg. iuris gentium 7. ff. de pactis, Leg. si pecuniam, ff. de condict. causa data.

5 I ASSERT third, that although a pact has been confirmed by stipulation, if nevertheless one of the contracting parties has been unwilling to fulfill it on his side, it will be lawful for the other party, according to either law, to withdraw from such a pact and to reclaim whatever he gave. So Molina *tract. 2. disput. 158.* It is clear *ex leg. 3. §. idem erit, ff. de condict. causa data, non secuta.*

*ASSERO tertio, quamvis pactum stipulatione firmatum sit, si tamen alter contrahentium ex parte sua implere illud noluerit, fas erit parti alteri secundum utrumque ius recedere a tali pacto, et repetere, si quid dedit. Ita Molina* tract. 2. disput. 158. *patet* ex leg. 3. §. idem erit, ff. de condict. causa data, non secuta.

6 I ASSERT fourth. If we attend precisely to the disposition of the civil law, any one of the contracting parties can, the other unwilling, withdraw from any INNOMINATE contract (provided the matter is still intact), so that satisfaction has been made on neither side, and they remain within the limits of a bare pact, Molina *disp. 258.* It is clear *ex leg. 3. §. praesertim in principio*, and *§. 1.* and *Leg. si pecuniam, ff. de condict. causa data*, and from the Gloss, and Bartol. there; and it is the common opinion of all.

Indeed, if the matter has been fulfilled on one side, but not yet on the other, you can withdraw without penalty according to the cited laws, even if the other is ready to fulfill on his side.

> *ASSERO quarto. Si praecise attendamus iuris civilis dispositionem, potest quivis contrahentium altero invito recedere a quovis contractu innominato (modo res integra sit,) ut neutra ex parte sit satisfactum, manentque intra limites nudi pacti, Molina* disp. 258. *Patet* ex leg. 3. §. praesertim in principio, *et* §. 1. *et* Leg. si pecuniam, ff. de condict. causa data, *et ex Glossa, et Bartol. ibi, estque communis omnium opinio. Imo si ex una parte impleta res sit, non tamen ex altera parte, impune poteris secundum leges citatas recedere, etiamsi alter paratus sit ex parte sua implere.*

7 RIGHTLY, however, from the same laws Molina observes that, according to the same civil law, there is no place for repentance for him who has not fulfilled, with respect to him who has fulfilled.

> *RECTE tamen ex iisdem legibus observat Molina secundum idem ius civile, non esse locum poenitentiae ei, qui non implevit respectu eius, qui impleverit.*

8 I ASSERT fifth. Meanwhile, while one of the contracting parties does not dissent, the other cannot withdraw, against his will, both in the forum of conscience and according to either the civil or the Canon law, from a nominated contract already entered into and perfected, *leg. sicut 5. Cod. de act. et obligat.*, joined with those laws which the Gloss there enumerates, *verbo minime.* LIMITED, however, are the contracts of precarium, mandate, and deposit, which do not forbid the grantor, the mandator, and the depositor from withdrawing.

> *ASSERO quinto. Interim dum unus e contrahentibus non dissentit, nequit alter eo invito, tam in foro conscientiae, quam secundum utrumque ius civile, et Canonicum recedere a nominato contractu iam inito, et perfecto,* leg. sicut 5. Cod. de act. et obligat. *iunctis illis iuribus, quae ibi recenset Glossa,* verbo minime. *Limita vero contractus precarii, mandati, et depositi, qui non prohibent concedentem, mandantem, et deponentem resilire.*

9 Concerning PRECARIUM the matter is plain, *ex Leg. cum precario, ff. de precario.* Concerning the contract of mandate it is clear *ex Leg. si mandavero, 2. §. finali*, and *Leg. si quis alieni, §. qui suscepit, ff. mandati.* Concerning the contract of deposit it is gathered *ex leg 1. §. penult. ff. de depositi.*

> *DE Precario res est patens,* ex Leg. cum precario, ff. de precario. *De contractu mandati, patet* ex Leg. si mandavero, 2. §. finali, *et* Leg. si quis alieni, §. qui suscepit, ff. mandati. *De contractu depositi colligitur* ex leg 1. §. penult. ff. de depositi.

10 ADD also the contract of partnership not having some determinate time affixed, *Leg. verum, §. finali, ff. pro socio.*

> *ADDE etiam contractum societatis non habentem determinatum aliquod tempus affixum,* Leg. verum, §. finali, ff. pro socio.

11 I ASSERT sixth, when a contract, consent having been given to it, does not receive from it some specific name, but in order to vindicate it further desires traditio of the thing, either on both sides, or on one side only; and it is not yet perfect by such traditio — one can meanwhile, while it is thus imperfect, if we attend to the civil law, withdraw. So Couar. *in cap. quamvis pactum, 2. part. § 4. num. 14.* Molina *Tom. 2. tract. 2. disp. 257.*

> *ASSERO sexto, quando contractus, praestito sibi consensu, non accipit ex eo nomen aliquod specificum, sed ad illud vindicandum ulterius rei traditionem desiderat, aut utrinque, aut ex altera tantum parte; Et adhuc tali traditione non est perfectus, potest quis interim, dum ita imperfectus est, si ius civile attendamus, resilire. Ita Couar.* in cap. quamvis pactum, 2. part. § 4. num. 14. *Molina* Tom. 2. tract. 2. disp. 257.

12 It is PROVEN, because a contract of this kind remains within the boundaries of a bare pact; but a bare pact does not give rise to an obligation in the CIVIL forum. *leg. Iuris gentium 7. §. finali, ff. de pactis*, there: *nuda pactio obligationem non parit, sed parit exceptionem, leg. ex placito, Cod. de rerum permut.*

> *PROBATUR, quia huiusmodi contractus intra terminos nudi pacti manet; pactum autem nudum non parit obligationem in foro CIVILI.* leg. Iuris gentium 7. §. finali, ff. de pactis*, ibi* nuda pactio obligationem non parit, sed parit exceptionem, leg. ex placito, Cod. de rerum permut.

13 IN the forum of conscience, however, from the natural law the obligation follows in all contracts, and before the civil law was introduced they already bound; as Vallaens teaches *de iure emphyt. quaest. 6.*, Molina alleged above, Padella *in Leg. Naturalis, §. etsi quidem, num. 17. ff. de praescript.*, Gomez *Tom. 2. var.* and others at Fagundez *lib. 1. de contract. cap. 15.*

> *IN foro tamen conscientiae ex iure naturae obligatio sequitur in omnibus contractibus et antequam ius civile introduceretur, iam obligabant; ut docet Vallaens* de iure emphyt. quaest. 6. *Molina allegatus, Padella* in Leg. Naturalis, §. etsi quidem, num. 17. ff. de praescript. *Gomez* Tom. 2. var. *et alii apud Fagundez* lib. 1. de contract. cap. 15.

14 I ASSERT seventh. The Canon law does not permit, at its own tribunal, withdrawing from a contract, even a bare one, *cap. 1. de pactis*, and *cap. iuramenti 22. quaest. 5.*

> *ASSERO septimo. Ius Canonicum pro tribunali suo non permittit recedere a contractu etiam nudo,* cap. 1. de pactis*, et* cap. iuramenti 22. quaest. 5.

15 I ASSERT eighth. When one party is in default of fulfilling, he can withdraw according to every law, as the Doctors commonly teach *in regula mora, de regul. iur. in 6.*

> *ASSERO octavo. Quando alter est in mora implendi, potest resilire secundum omne ius, ut docent communiter Doctores* in regula mora, de regul. iur. in 6.

16 I ASSERT ninth. The Donator can, according to every law, withdraw from a donation as long as the Donatarius has not accepted it. See Couar. *in rubr. de testament. 3. part. numero 13.* Sanchez *lib. 1. de matrim. disput. 6.* Molina above *disput. 258.* Fagundez *lib. 1. cap. 15. num. 11.*

> *ASSERO nono. Potest Donator secundum omne ius resilire a donatione, quamdiu Donatarius non acceptavit. Vide Couar.* in rubr. de testament. 3. part. numero 13. *Sanchez* lib. 1. de matrim. disput. 6. *Molinam supra* disput. 258. *Fagundez* lib. 1. cap. 15. num. 11.

17 They treat here: whether contracts are confirmed by oath; but of this below, *disp. de Iuramento.*

> *AGUNT hic: an iuramento firmentur contractus, sed de hoc infra* disp. de Iuramento.

18 HERE, in passing, NOTE, from Bonacina *disput. 3. de contract. quaest. 1. part. 1. num. 4.*, that one who promises something with an OATH can, before it is accepted, revoke his promise. The reason is that then the oath is accessory to the promise, whose nature it follows as of its principal; but no promise obliges before acceptance.

> *HIC obiter Adverteudnm e Bonacina* disput. 3. de contract. quaest. 1. part. 1. num. 4. *promittentem aliquid cum Iuramento posse, antequam acceptetur, suam promissionem revocare. Ratio est, quia tunc Iuramentum est promissioni accessorium, cuius naturam tanquam sui principalis sequitur; nulla autem promissio obligat ante acceptationem.*

19 An OATH, moreover, affixed to a contract, has various effects; it first gives rise to a twofold obligation, one toward God, the other toward man: truly, if the contract is not affected by the oath, the second perishes and only the first subsists. Then it gives rise to an action of the party against the one swearing. Third, it makes the obligation confirmed by oath pass to the heirs; for it is real, not personal: understand this, however, when the oath affects the very contract. So Bonacina above, with Sanchez, alleged by him.

> *IURAMENTUM autem, contractui affixum, varios habet effectus; duplicem primo parit obligationem, unam erga Deum, alteram erga hominem: verum si contractus non afficitur iuramento: perit secunda, et prima tantum subsistit. Deinde parit actionem partis in Iurantem. Tertio facit, ut obligatio iuramento firmata ad haeredes transeat; est enim realis, non personalis: Haec tamen intellige, quando Iuramentum afficit ipsum contractum. Ita Bonacina supra, cum Sanchez apud ipsum alegato.*

## Disputation II: On the Acquisition of Dominion over Persons and Other Things through the Division of Things

1 NATURE instituted the common use of things, and also left to each one free dominion over his own person; but with covetousness creeping in through sin, and the lust of dominating, by the Law of Nations there was first introduced *Mine and Thine*, both in Things and in persons, lest anyone with excessive license should endeavor to seize everything for himself; from these two titles, as from a double rivulet of the same fountain, there flowed unceasingly a thousand arts of acquiring, which long usage at last established, and the laws of many places sanctioned. Hence we cannot make contracts unless we have dominion over the things contracted about; therefore, before the disputations on the individual contracts, there must be treated the acquisition of dominion over things by the law of nations.

> ***De acquisitione Dominii in Personas, et Res alias, per Divisionem Rerum Acquisitas.***
>
> *COMMUNEM rerum usum natura instituit, cuique etiam suae personae dominium liberum reliquit; verum subintrante per peccatum cupiditate, ac dominandi libidine, Iure Gentium primo invectum est* Meum, ac Tuum *tam in Res, quam in personas, ne nimia licentia totum quisque sibi arripere moliretur; e duobus his titulis, tanquam e duplici eiusdem fontis rivulo, manarunt iugiter mille acquirendi artes, quas tandem longa firmavit consuetudo, ac multa locorum Iura sanxerunt. Hinc non possumus contractus inire, nisi dominium rerum contractarum habeamus, ideo ante disputationes de contractibus singulis, agendum de acquisitione dominii rerum, iure gentium.*

### Question I: By what right the first division of things, and subjection, was made

1 IN this most weighty question we must first see in what way the most precious liberty of men, *which is not well sold for all gold*, has been bound.

> ***Quo iure facta sit prima rerum divisio, et subiectio.***
>
> *IN hac gravissima quaestione videndum est primo, quo pacto pretiosissima hominum libertas, quae non bene pro toto venditur auro, temetata sit.*

2 THE holy Doctor supposes that even in the state of integral nature there would have been pre-eminence and prelation; as also among the Angels, not only while on the way, but now also in the homeland: for this is most suitable to the hierarchy, which is called the *directing power, that the wiser direct the less wise.* Thus 1 Corinth. 11 it is said: *the man is the head of the woman.*

> *SUPPONIT autem S. Doctor in statu etiam naturae integrae futuram fuisse praeeminentiam, atque praelationem; sicuti etiam inter Angelos, ne dum erat in via, sed nunc est etiam in patria: haec enim optime hierarchiae convenientissima est, quae dicitur* Vis directiva, ut sapientior dirigat minus sapientem. *Sic prima Corinth. 11. dicitur:* Vir caput mulieris.

3 ANOTHER is legal pre-existence and prelation, by which a Prince governs his subjects and coerces them civilly.

> *ALIA est praeexistentia, et praelatio legalis, qua Princeps subditos gubernat, atque coërcet civiliter.*

4 THE third is the subjection of servitude, by which one man is despotically in the power of another; and this mode of servitude is misery, of which Aristotle, *first Polit. cap. 3. and 4.*

*TERTIA est subiectio servitutis, qua unus homo est in alterius potestate despotice, et hic modus servitutis est miseria, de qua Aristoteles,* primo Polit. cap. 3. et 4.

5 THE holy Doctor shows that these two servitudes did not exist in the state of integral nature. Therefore he says, God did not say to men: *rule over one another;* but only: *rule over the fishes of the sea, and the fowls of the air, and the beasts of the whole earth,* as D. Thomas also observes, 2. 2. *quaest. 66. art. 1.*

*HAS duas servitutes in statu naturae integrae ostendit S. Doctor non extitisse. Ideo ait, Deum non dixisse hominibus:* Dominamini invicem; *sed solum:* Dominamini piscibus maris, et volatilibus caeli, et bestiis universae terrae, *ut observat etiam D. Thomas* 2. 2. quaest. 66. art. 1.

6 THEREFORE the holy Doctor proves that servitude arose from sin: not only is it asserted as imposed after sin; thus *Gen. 9.* Noe says to Chanaan: *A servant of servants shalt thou be to thy brethren. And Exod. 21. If thou buy a Hebrew, six years shall he serve thee: in the seventh however he shall go out free. Levit. 25. The bondmen and handmaids who are round about you (that is, from the Gentiles) these you shall have as servants: and you shall transmit them by hereditary right to posterity, and possess them for ever.*

*IGITUR servitutem a peccato ortam esse probat S. Doctor, non solum post peccatum astruitur; sic* Genef. 9. *ait Noë ad Chanaan* Servus servorum eris fratrum tuorum. Et Exodi 21. Si emeris Hebraeum, sex annis serviet tibi: in septimo autem egredietur liber. Levit. 25. Servus, et ancilla, qui in circuitu vestro sunt (idest ex gentibus) hos habebitis famulos: et haereditario iure transmittetis ad posteros, ac possidebitis in aeternum.

7 IN PARTICULAR also the Apostle expresses the servitude of Christians, 1. Corinth. 7: *Let every man abide in the same calling in which he was called; art thou called a servant? care not for it; but, if thou canst be made free, use it rather.* And first Timot. 6: *Whosoever are servants under the yoke, let them count their masters worthy of all honour, lest the name of the Lord, and his doctrine, be blasphemed.*

*PECULIARITER etiam Christianorum servitutem exprimit Apostolus 1. Corinth. 7.* Unusquisque in ea vocatione, in qua vocatus est, permaneat; servus vocatus es? non sit tibi curae; sed, si potes fieri liber, magis utere. *Et prima Timot. 6.* Quicumque sunt sub iugo servi, dominos suos omni honore dignos arbitrentur, ne nomen Domini, et doctrina blasphemetur.

8 BY this servitude the pious Emperors often condemned those taken in war, whom they could have killed, adjudging that servitude, a misery almost to be equated with death; who for that reason were called servi, because they were preserved; and mancipia, as if taken by hand. So Molina *tract. 1. de Iust. disp. 32.* Fagund. *lib. 2. de contractibus, cap. 1.*

*HAC servitute Impetatores pii damnatunt saepe bello captos, quos poterant interficere, adiudicantes, servitutem miseram morti fere aequandam, qui ideo dicti servi, quia servabantur; mancipiaque, quasi manu capta. Ita Molina* tract. 1. de Iust. disp. 32. *Fagund.* lib. 2. de contractibus, cap. 1.

9 THEREFORE the cited Scriptures show that servitude was introduced as a punishment, and hence that servitude is not against corrupt nature, as taught by D. Bonau. and also D. Thom. *loc. cit. and in 4. dist. 36.* Navar. *in C. Ita quorundam de Iudaeis, notab. 11. Gloss. penult. num. 1.* Couar. *in regula peccatum, 2. p. §. 11.* it is evident from *C. Ius naturale, dist. 1.* and from Roderico Cunha *on the same C. in p. 1. decret. and* Fagundez *l. 2. de contract. cap. 1. num. 6.*

*IURE igitur in poenam invectam esse servitutem ostendunt allatae Scripturae, atque adeo servitutem non esse contra naturam corruptam, ut docent cum D. Bonau. etiam D. Thom.* loc. cit. et in 4. dist. 36. *Navar.* in C. Ita

quorundam de Iudaeis, notab. 11. Gloss. penult. num. 1. *Couar.* in regula peccatum, 2. p. §. 11. *patet ex* C. Ius naturale, dist. 1. *et ex Roderico Cunha* ad idem C. in p. 1. decret. et *Fagundez* l. 2. de contract. cap. 1. num. 6.

10 NEXT it is proved by D. Bonau. from D. August. *l. 19. de civit. cap. 15.* where he also proves it, because God willed that rational man, made to the image of God, dominate only over the irrational. The same he proves from D. Gregory.

*DEINDE probatur a D. Bonau. ex D. August.* l. 19. de civit. cap. 15. *ubi id etiam probat, quia rationalem hominem ad imaginem Dei factum dominari noluit Deus, nisi irrationabilibus. Idem probat ex D. Gregorio.*

11 IT IS PROVED thirdly by D. Bonavent. by the argument of D. August. which the other cited authors use. Liberty is in man from nature, as created to the image of God. But liberty is the natural power by which it is licit for a man to do what he wills. Therefore servitude is against nature; but man, free by nature, ought not to be deprived of his liberty on any other ground than fault: Therefore.

*PROBATUR tertio a D. Bonavent. argumento D. August. quo utuntur alii allegati. Libertas homini inest a natura, tanquam ad Dei imaginem condito. Est autem libertas naturalis potestas, qua licet homini facere quod vult. Ergo servitus est contra naturam; sed non alio ex capite privandus fuerit homo, natura liber, sua libertate, nisi ex culpa: Ergo.*

12 ALTHOUGH dominion is of dignity; yet to be a slave is said to be an indignity, and hence those do not judge well who say that dominion over slaves ought to have existed even in the state of integral nature, as the holy Doctor says *ad 3.* Hence it arose from sin, and also on the occasion of the drunkenness of Noe it was proclaimed, and this D. Ambrosius wills, *l. de Elia, et ieiunio, cap. 5.* saying: *Servitude was introduced through the sin of drunkenness,* as D. Bonau. reports *ad 4.*

*QUAMVIS igitur dominati sit dignitatis; tamen servum esse dicit indignitatem, atque adeo non bene arguunt, dominium in servos debuisse etiam in statu naturae integrae esse, ut ait S. Doctor* ad 3. *Itaque ex peccato orta est, atque etiam occasione ebrietatis Noë fuit proclamata, et hoc vult D. Ambrosius* l. de Elia, et ieiunio, cap. 5. *dicens:* Servitus introducta fuit per peccatum ebrietatis, *ut refert D. Bonau.* ad 4.

13 MOREOVER the holy Doctor shows most excellently, *ad ultimum,* that servitude is most justly to be posited in the state of sin, namely to remove oppressions, and to ward off crimes. For if all were free without subjection, they would already be carried by unbridled cupidity into every crime; and one would try to oppress another.

*OPTIME autem ostendit S. Doct.* ad ultimum, *iustissime servitutem in statu peccati esse ponendam, scilicet ad oppressiones removendas, et ad scelera arcenda. Si enim omnes essent liberi absque subiectione iam effraeni cupiditate ferrentur in omne facinus; et Alter alterum opprimere conaretur.*

14 BUT by four titles men already fall, from sin, into servitude.

*QUATVOR vero titulis iam ex peccato cadunt aliqui in servitutem.*

15 THE FIRST is by the right of just war, by which the captured are made the captors' own; thus *Leg. Hostes, ff. de captivis. it is introduced by the law of nations, as cap. cum Redemptor, 12. quaest. 1. proves,* where D. Gregory, the author of that canon, says, as D. Bonau. also reports, *quaest. 2. fund. 1. Men, whom nature at first brought forth free, the law of nations subjected to the yoke of servitude.*

*PRIMUS est iure belli iusti, quo capti efficiuntur capientium, ita* Leg. Hostes, ff. de captivis. est autem Iure gentium invectum, ut probat cap. cum Redemptor, 12. quaest. 1. *ubi D. Gregorius, eius canonis author, ait, ut*

*refert etiam D. Bonau.* quaest. 2. fund. 1. Homines, quos ab initio natura liberos protulit, ius gentium iugo subdidit servitutis.

16 THE holy Doctor proves the same, *quaest. 2. argum. 4. with the response,* from the Instit. of Justinian: *Wars arose, and captivities followed, and servitude.*

*Idem probat S. Doct.* quaest. 2. argum. 4. cum responso, *ex Instit. Iustiniani:* Bella exorta sunt, et captivitates secutae, et servitus.

17 FOR since by the right of war it is licit to kill enemies, *C. ab illo, 14. quaest. 4. C. quid culpatur, 23. quaest. 1.* nothing could be judged more equitable for tempering the raging of war than that life be granted in mercy to those who could be slain, according to *c. noli 23. quaest. 1. at the end.* Whence, as I already said, they are called servi, because they are kept alive, and mancipia, because they are taken by hand, when they could have been killed, *Leg. Libertas, ff. de stat. homin.*

*CUM enim iure belli sit licitum, hostes occidere* C. ab illo, 14. quaest. 4. C. quid culpatur, 23. quaest. 1. *nihil aequius ad temperandum belli saevientis existimari potuit, quam, quod illis, qui necari poterant, vita ex misericordia donaretur, iuxta* c. noli 23. quaest. 1. in fine. *Unde, ut iam dixi, dicuntur servi, quod serventur vivi, et mancipia, quod manu capiantur, cum possent occidi,* Leg. Libertas, ff. de stat. homin.

18 YET Christian CHARITY works further, so that Christians taken in war are not reduced to servitude, which has been preserved by perpetual custom, as Bartol. admonishes on *Leg. Hostes, ff. de capt.*

*CHRISTIANA tamen Charitas amplius operatur, ut Christiani bello capti in servitutem non redigantur, quod consuetudine perpetua servatum est, ut monet Bartol. ad* Leg. Hostes, ff. de capt.

19 THE SECOND title of servitude is birth, on which D. Bonavent. *in 4. dist. 36. quaest. 3.* For he who is born of a bondwoman is a slave, of whatever condition the father may be, whether he be born of lawful marriage or not, because the offspring follows the womb, *ex Leg. partum, Cod. de rei vindicatione, Instit. de iure personarum, §. penult. Instit. de ingenuis, §. 2. cap. unic. de natis ex libero ventre,* as the holy Doctor proves *in 4. dist. 36. quaest. 2. and 3.* where he shows this not only by imperial and canon law, but also from the divine law, *Exod. 21.* where it is said: *If the Lord shall have given to him (the Servant) a wife, and she have borne sons and daughters: the woman, and her children, shall be her master's, but he himself shall go out.* Fagundez proves almost the same by these.

*SECUNDUS titulus servitutis, est nativitas, de quo D. Bonavent.* in 4. dist. 36. quaest. 3. *qui enim ex ancilla nascitur, servus est, qualiscumque sit patris conditio, sive nascatur ex legitimo matrimonio, sive non, quia partus sequitur ventrem,* ex Leg. partum, Cod. de rei vindicatione, Instit. de iure personarum, §. penult. Instit. de ingenuis, §. 2. cap. unic. de natis ex libero ventre*, ut probat S. Doctor* in 4. dist. 36. quaest. 2. et 3. *ubi non solum iure caesareo, et Canonico id ostendit, sed etiam ex lege divina* Exodi 21. *ubi dicitur:* Si dederit Dominus illi (Servo) uxorem, et pepererit filios, et filias: mulier, et liberi eius erunt Domini sui, ipse vero exibit. *His fere et Fagundez hoc probat.*

20 YET the holy Doctor admonishes that he who is born of a bondwoman does not become a slave, if the mother was free, either when she conceived, or at least in birth, or at any intermediate time, *ex Leg. et servorum, ff. de stat. homin. Instit. de ingen. §. 2. and cap. unic. de natis ex libero ventre,* cited above.

*ADMONET vero S. Doctor, eum, qui nascitur ex ancilla, non fieri servum, si mater fuit libera, vel quando concepit, vel saltem in partu, vel aliquo tempore intermedio,* ex Leg. et servorum, ff. de stat. homin. Instit. de ingen. §. 2. et

cap. unic. de natis ex libero ventre, *allegato.*

21 A REASON also is brought by the holy Doctor, because the mother is the more substantial principle of the offspring, as the father is the more honourable; therefore in honours the offspring follows the father, and in all things which he has, since those are acquired by paternal solicitude; but in that which he is, he follows the mother; and because servitude is according to that which one is, not according to that which one has, therefore in it he follows the mother.

*RATIO etiam affertur a S. Doctore, quia mater est prolis principium substantialius, sicut pater honorabilius, ideo in honoribus sequitur patrem, et in omnibus, quae habet; quoniam illa acquiruntur paterna sollicitatione; at in eo, quod est; sequitur matrem; et quia servitus est secundum id, quod est, non secundum id, quod habet; ideo in ea sequitur matrem.*

22 YET the holy Doctor observes *in the body* that some provinces, which do not obey the imperial laws, dispose otherwise by their own laws, so that the offspring either follows the worse parent, or follows the condition of the father, or contracts no servitude unless both parents are slaves; and this is to be observed there, as appears *ex cap. licet de coniug. servorum*, and Panormitanus affirms there. But where the Roman laws did not prevail, nor any other peculiar law, or custom; it could be judged that the mother is a bondwoman at the time of birth, as Fagundez also says, *lib. 2. cap. 1. num. 5.*

*ADVERTIT vero S. Doctor* in corpore, *aliquas provincias, quae legibus caesareis non obediunt, aliter disponere suis legibus, ut partus, vel sequatur deteriorem partem, vel sequatur conditionem patris, vel ne contrahat servitutem, nisi uterque parens sit servus, et hoc ibi servandum, ut constat* ex cap. licet de coniug. servorum, *et affirmat ibi Panormitanus. Ubi vero leges Romanae non vigerent, nec alia peculiaris lex, aut consuetudo; iudicari posset, quod mater sit ancilla, tempore partus, ut ait etiam Fagundez* lib. 2. cap. 1. num. 5.

23 THE holy Doctor ADDS also that in certain places of France there is a custom, that if one of the spouses is a slave, the children are slaves; and if the mother is a bondwoman under a different master, the children are divided among the masters. Yet he says it is more fitting that the offspring follow the mother, just as also in animals, the foal engendered follows the mother, not the father, and the fruit of the seed is the lord of the land's, not the sower's; and in artificial things, if one builds on another's land, the building goes to the Soil, but not the Soil to the building. So *Lex Patet*. The reason is, that although the formative power is from the Father, nevertheless it draws more substance from the mother.

*ADDIT etiam S. Doctor in quibusdam Franciae locis consuetudinem esse, ut si alter coniugum sit servus, sint servi filii; et si mater ancilla sub diverso domino, filii dividantur inter dominos. Attamen convenientius esse ait, ut proles sequatur matrem, sicuti et in animalibus, equulus genitus sequitur matrem, non patrem, et fructus seminis est domini terrae, non seminantis; et in artificialibus, si quis aedificat in terra aliena, aedificium cedit Solo, non autem Solum aedificio. Ita* Lex Patet, *Ratio est, quia licet vis formativa sit a Patre, tamen plus substantiae trahit a matre.*

24 THE THIRD title of reducing to servitude is some most grave crime, on account of which one is condemned by the Prince. That this punishment can be imposed the Doctors teach commonly: Scotus *in 4. dist. 36. quaest. 15.* Navar. *in cap. ita quorumdam, de Iudaeis notab. 11. gloss. penult.* Sylvester *V. servitus*, Angelus there, Lessius *Tom. 1. lib. 2. cap. 3. dub. 4. num. 4.* Cunha *dist. 32. in cap. eos qui, Salon de dominio, quaest. 3. art. 1. poss. 4. concl.* Fagundez *lib. 2. cap. eos qui 32. dist.* It is conceded to secular Princes the power of reducing to servitude women who knowingly contracted marriage with those in sacred orders; and *cap. cum multae 15. quaest. 4.* it is established that the sons conceived of such a union

become slaves of that Church to which the father belonged, *cap. de raptoribus, 36. quaest. 1.* ravishers are condemned to the punishment of servitude, which laws the holy Doctor indicates *in 4. dist. 37. and in confess. cap. 3. particula 54.*

> *TERTIUS titulus redigendi in servitutem, est crimen aliquod gravissimum, propter quod a Principe damnetur. Hanc poenam imponi posse docent communiter Doctores, Scotus* in 4. dist. 36. quaest. 15. *Navar.* in cap. ita quorumdam, de Iudaeis notab. 11. gloss. penult. *Sylvester* V. servitus*, Angelus ibi, Lessius* Tom. 1. lib. 2. cap. 3. dub. 4. num. 4. *Cunha* dist. 32. in cap. eos qui, Salon de dominio, quaest. 3. art. 1. poss. 4. concl. *Fagundez* lib. 2. cap. eos qui 32. dist. *conceditur Principibus saecularibus potestas redigendi in servitutem foeminas, quae scienter contraxerint matrimonium cum initiatis sacris ordinibus; et* cap. cum multae 15. quaest. 4. *statuitur, ut filii, ex tali coniugio suscepti, efficiantur servi illius Ecclesiae, ad quam pater pertinebat,* cap. de raptoribus, 36. quaest. 1. *raptores poena servitutis damnantur, quae iura indicat S. Doctor* in 4. dist. 37. et in confess. cap. 3. particula 54.

25 THE FOURTH title of reducing to servitude, or of possessing one as a slave, is sale, as D. Bonavent. teaches *in 4. dist. 36. dubio 2. litt.*

> *QUARTUS titulus redigendi in servitutem, seu possidendi ut servum, est venditio, ut docet D. Bonavent.* in 4. dist. 36. dubio 2. litt.

26 AND first indeed a free man can sell himself into slavery, as the holy Doctor observes, *dub. 3. dist. cit.* which the holy Doctor proves elsewhere by the example of *D. Paulinus, Bishop of Nola,* who had sold himself to redeem the son of a poor widow. Thus also *Deut. 15.* has the rule for sanctioning this; yet it must be done according to that rule; thus *Levit. 25.* poverty is assigned as a sufficient cause of sale.

> *ET primo quidem potest homo liber seipsum vendere in servum, ut advertit S. Doctor* dub. 3. dist. cit. *quod probat alibi S. Doctor exemplo* D. Paulini, Episcopi Nolani*, qui se pro redimendo filio pauperculae viduae vendiderat. Sic et* Deut. 15. *habetur regula de hoc sanciendo; id tamen debet iuxta eam regulam fieri; ita* Levit. 25. *assignatur paupertas, pro sufficienti venditionis causa.*

27 YET the law of the Caesars *Leg. liberis, §. si quis sciens, ff. de liberali causa,* prohibits anyone from knowingly buying a free man, even one willing, and grants to one so bought a proclamation in liberty.

> *IUS tamen Caesareum* Leg. liberis, §. si quis sciens, ff. de liberali causa*, prohibet, ne quis sciens liberum hominem, etiam volentem emat, conceditque sic empto proclamationem in libertatem.*

28 YET OBSERVE that that law of the Caesars was enacted in favour of the liberty of the subjects of the Romans. This I prove, for *Leg. Non ideo, Cod. de liberali causa,* there belongs to parents the power of selling their free children in grave necessity, which also is of the law of nature, as is gathered *from Exod. 21.* But this necessity is restricted by the law of the Caesars to the case of extreme poverty, *leg. 2. Cod. de partibus, qui filios suos distraxerunt.*

> *OBSERVA tamen, ius illud Caesareum, latum esse in favorem libertatis subditorum Romanorum. Id autem probo, nam* Leg. Non ideo, Cod. de liberali causa*, competit parentibus potestas vendendi filios suos liberos in gravi necessitate, quod etiam est de iure naturae, ut colligitur* ex 21. Exodi. *Haec autem necessitas ad casum nimiae paupertatis restringitur a iure Caesareo* leg. 2. Cod. de partibus, qui filios suos distraxerunt.

29 FOR indeed although there only the cause of destitution is expressed, yet if another similar necessity arrives, the law is extended, as Pinellus observes, *ad Rubr. Cod. de bonis matern. part. 2. num. 27.* who also observes from the common sense of the Jurists that the sale of offspring is granted to

the father alone, not to the mother, on account of the lack of counsel, and the weakness of mind, which is found in women; by the law of nature, however, the aforesaid power belongs also to the mother, as the Doctors unanimously hold in Pinellus *number 28.* on the law *2. Cod. de Patribus, qui filios distraxerunt.* All of which the holy Doctor saw *dist. allegata, dubiis litterae.*

> *ENIM vero licet ibi causa sola egestatis sit expressa, si tamen alia similis adveniat, extenditur lex, ut observat Pinellus* ad Rubr. Cod. de bonis matern. part. 2. num. 27. *qui etiam observat ex communi Iuristarum sensu, soli patri, non matri concedi venditionem prolis ob Consilii inopiam, et animi imbecillitatem, quae in foeminis reperitur; de iure tamen naturae etiam matri competit praedicta potestas, ut unanimiter sentiunt Doctores apud Pinellum* numero 28. *Legem illam* 2. Cod. de Patribus, qui filios distraxerunt. *Quae omnia vidit S. Doctor* dist. allegata, dubiis litterae.

30 YET that Roman law grants to the son that he can recover his liberty, the price being returned to the buyer.

> *EA tamen lex Romana concedit filio, posse libertatem recuperare, reddito emptori pretio.*

31 YET this law, and others like it, are no longer in use among Christians. See also Fagundez *lib. 2. de contract.* through many chapters, in which he discourses eruditely on the purchases of slaves of infidels from the lands beyond the seas, especially in the Indies.

> *HAEC tamen lex, et aliae similes, iam apud Christianos in usu non sunt. Vide etiam Fagundez* lib. 2. de contract. *per multa capita, quibus erudite edisserit de emptionibus mancipiorum infidelium e terris ultra Marinis, maxime in Indiis.*

32 THERE REMAINS now to be seen the other part of the question, on the division of other things, made by the law of nations; and first I shall treat of the Fact: then of the Right.

> *REMANET iam videnda altera quaestionis pars de divisione aliarum rerum, facta iure gentium, et primo agam de Facto: deinde de Iure.*

33 IT IS CERTAIN, however, that in the state of innocence no division of things was made, as the holy Doctor observes *hic, quaest. 2. ad 4.* nor was there to be in it any dominion of property, but only of jurisdiction, as Tanner says, *to be cited num. 69.* but immediately after sin it was fitting that the things to be possessed be divided; thus Abel, and Cain are said, *Genes. 4.* to have offered of their goods; the one sheep; the other the fruits of the earth he immolated to God; then indeed Noe divided the world among his sons, *Genes. 10. and 11.* Afterwards indeed smaller divisions were made by fields, and acres, and thus the division is believed to have been made by Adam, or Noe, whether through a Prince chosen from the people as arbiter, as Tanner says, *disp. 4. quaest. 1. num. 70.*

> *CERTUM est autem, in statu innocentiae nullam esse factam rerum divisionem, ut advertit S. Doctor* hic, quaest. 2. ad 4. *neque ullum in eo futurum erat dominium proprietatis, sed tantum iurisdictionis, ut ait Tanner.* citandus num. 69. *statim autem post peccatum conveniens fuit dividi res possidendas; sic Abel, et Cain dicuntur* Genes. 4. *obtulisse de suis rebus; ille oves; hic fructus terrae immolavit Deo; mox vero Noë divisit filiis orbem* Genes. 10. et 11. *Postea vero minutiores factae sunt divisiones per campos, et iugera, et ita creditur facta divisio ab Adam, vel Noë, sive per electum a populo Principem arbitrum, ut ait Tanner.* disp. 4. quaest. 1. num. 70.

34 AS TO what is of right, I ASSERT that the division was made by the best right. So D. Bonavent. *hic ad 4. D. Thom. 2. 2. quaest. 66. art. 2. Sotus lib. 4. de iustitia, quaest. 3.* quaest. 3. art. 1. Ioan. Medina Cod. de rebus restitut. quaest. 1. Conradus de contract. lib. I. quaest. 8. and 9. Molina tomo I. de iust. tract. II. disp. 20. Brito de locato, et conducto, I. part. rubrica, fol. 4. col. 4. and the Doctors commonly in Fagundez lib. II. de contract. cap. 7.

*QUOAD quid iuris, Assero, Iure optimo factam esse divisionem. Ita D. Bonavent.* hic ad 4. D. Thom. 2. 2. quaest. 66. art. 2. Sotus lib. 4. de iustitia, quaest. 3. *quaest. 3. art. 1. Ioan. Medina Cod. de rebus restitut. quaest. 1. Conradus de contract. lib. I. quaest. 8. et 9. Molina tomo I. de iust. tract. II. disp. 20. Brito de locato, et conducto, I. part. rubrica, fol. 4. col. 4. et communiter Doctores apud Fagundez lib. II. de contract. cap. 7.*

35 IT IS PROVED first by D. Bonavent. in the cited place, because the law of nature dictates that peace, and justice be preserved in the society of men; but if all things were possessed in common, innumerable disputes, dissensions, and quarrels would arise; for the stronger would seize, and would leave nothing to the weaker, and often many would rush together to take the same thing, as necessary to them.

*PROBATUR primo a D. Bonavent. loco cit. quia ius naturale dictat pacem, et iustitiam in societate hominum servandam; At si omnia in communi possiderentur, innumerae orirentur lites, dissensiones, et iurgia; nam validiores raptarent, nihilque imbecillioribus relinquerent, et saepe numero plures concurrerent ad accipiendam eandem rem, tanquam sibi necessariam.*

36 HOW EASILY, however, these quarrels arise in the state of corrupt nature, is clearly evident from the societies of travellers, and merchants. Thus *Genes. 13.* quarrels arose between the shepherds of Abraham, and of his nephew; which inconvenience *Abraham avoided by dividing the land with Lot.*

*QUAM facile autem haec iurgia in statu naturae corruptae nascantur, manifeste elucet e peregrinantium, et mercatorum societatibus. Sic* Genes. 13. *orta sunt iurgia inter pastores Abrahae, et ipsius nepotis, quod incommodum* ut evitaret Abraham, divisit terram cum Lot.

37 ARISTOTLE also proves this in the cited place of the Polit. against Plato, and Socrates, who, to preserve peace, willed all things to be common, even wives, *so that all things might be more one.*

*ID etiam probat Aristoteles loco cit. Polit. contra Platonem, et Socratem, qui ad pacem conservandam volebant, omnia esse communia, etiam uxores,* ut sic omnia essent magis unum.

38 FURTHERMORE, *Deuter. 32.* it is said: *When the Most High divided the nations, when he separated the sons of Adam, he appointed the bounds of the peoples according to the number of the sons of Israel.* Therefore God proclaims himself the author of this division.

*PRAETEREA* Deuter. 32. *dicitur:* Quando dividebat Altissimus gentes, quando separabat filios Adam, constituit terminos populorum iuxta numerum filiorum Israel. *Itaque Deus praedicat se authorem huius divisionis.*

39 FURTHERMORE in the Council of Constance, among the dogmas of John Hus, that was condemned which held that it was not licit for Clerics to possess anything of their own, which was also the heresy of the Manichaeans, as S. Bonavent. reports *in quarto cap. regulae Minorum.* For it is certain that from the time at least of D. Sylvestri, Clerics, and Prelates have had possessions, and these most justly, the Church acclaiming; otherwise all the holy Clerics, Prelates, and Laics who had anything of their own would have been condemned, as the holy Doctor argues there; indeed from the time of the Apostles, and before, many saints were rich, and yet just, which he alleges as a noted point, *in decretis, 12. quaest. 1.*

*PRAETEREA in Concilio Constantiensi inter dogmata Ioannis Hus, damnatum est illud, quod Clericis non liceret quidquam proprium possidere, quae fuit haeresis etiam Manichaeorum, ut refert S. Bonavent.* in quarto cap. regulae Minorum. *Certum enim est a tempore saltem D. Sylvestri, Clericos, et Praelatos habuisse possessiones, et has*

> *iustissime, Ecclesia conclamante; alioqui omnes sancti Clerici Praelati et Laici, qui aliquid proprii habuere, fuissent damnati, ut arguit S. Doctor ibi, imo a tempore Apostolorum, et antea multi sancti fuere divites, et tamen iusti, quam rem allegat, tanquam notam,* in decretis, 12. quaest. 1.

40 YOU OBJECT first. The division of things is against the law of nature: Therefore it is unjust. The antecedent is proved, because by the law of nature all things are common, as in *cap. ius naturale, dist. 1. and in cap. dilectissimis, 12. quaest. 1.* where Clement, the author of that canon, says thus: *The common use of all things that are in this world ought to have been for all men, but through iniquity one said this was his, another that, and thus among mortals division was made.*

> *OBIICIES primo. Rerum divisio est contra ius naturae: Ergo iniqua. Antecedens probatur, quia iure naturae omnia sunt communia, ut habetur* cap. ius naturale, dist. 1. et in cap. dilectissimis, 12. quaest. 1. *ubi sic ait Clemens, eius Canonis author:* Communis usus omnium, quae sunt in hoc mundo, omnibus hominibus esse debuit, sed per iniquitatem alius dixit, hoc esse suum, alius istud, et sic inter mortales facta est divisio.

41 Scotus answers in *4. dist. 15. quaest. 2. from D. Bonavent. dist. 44. art. 2. quaest. 2. ad 4.* that the law of nature, which before sin required all things common, after sin, with the state changed, required that things be proper; and this Scotus meant to say when he said the law of nature was changed after sin. Wherefore Fagundez, *num. 11.* says Scotus spoke imprudently, although he tries to draw him to the mind of D. Bonavent.

> *RESPONDET Scotus in* 4. dist. 15. quaest. 2. ex D. Bonavent. dist. 44. art. 2. quaest. 2. ad 4. *ius naturae quod ante peccatum exigebat omnia communia, exegisse post peccatum mutato statu, res esse proprias, et hoc voluit dicere Scotus, cum ait, mutatum esse ius naturae post peccatum. Quare inconsulte Fagundez* num. 11. *ait, Scotum inconsulte locutum, tametsi ad mentem D. Bonavent. trahere ipsum conetur.*

42 TO the text of Clement Pope *12. quaest. 1.* the holy Doctor already answers above *ad 4. cap. regulae,* namely that according to those canons the Church had proper goods from the beginning, granted the occasion of the state of corruption.

> *AD textum Clementis Papae* 12. quaest. 1. *iam respondet S. Doctor supra ad* 4. cap. regulae, *nempe iuxta Canones illos, Ecclesiam ab initio habuisse propria, esto data occasione status corruptionis.*

43 YOU OBJECT secondly, many Fathers teaching that all things are common. Thus Chrystost. *in cap. 6. Lucae,* Ambrosius, reported *in cap. sicut hi, 47. dist. and others.* See D. Chrysost. *oratione de sancto Philogonio.*

> *OBIICIES secundo multos Patres docentes, omnia esse communia. Sic Chrystost.* in cap. 6. Lucae, *Ambrosius, relatus* in cap. sicut hi, 47. dist. et alii. *Vide D. Chrysost.* oratione de sancto Philogonio.

44 THE holy Doctor answers most fully, *ad cap. 4. regulae, and in the Apologies of poverty, and of the poor,* that the Fathers meant only this: that riches are not to be so adhered to that for their sake one omits serving God, and that one remember that in necessity all things are common as to use; and therefore alms are to be given, and the counsel of leaving all things is best, because that *Mine, and Thine,* is tenacious, and viscous. Moreover he shows most luminously that riches are licit, and that innumerable saints were and are rich, and glorious. That the Church indeed even of old was most wealthy, and that the Levites were opulent, he proves from the Law of God in *Apolog. pauperum, responsionis tertiae cap. 2.*

*RESPONDET S. Doctor, latissime* ad cap. 4. regulae, et in Apologiis paupertatis, et pauperum, *id solum voluisse Patres, non esse adeo adhaerendum opibus, ut propter eas omittant Deo servire, et ut recordentur, omnia in necessitate, esse quoad usum communia; et ideo adhibendas eleemosynas. et optimum esse consilium, omnia relinquere, quia illud* Meum, et Tuum, *tenax, et viscosum est. Caeterum luculentissime ostendit, licitas esse divitias, atque sanctos innumeros divites fuisse esse, ac gloriosos. Ecclesiam vero etiam antiquam ditissimam, et Levitas fuisse opulentos, ex Dei Lege probat in* Apolog. pauperum, responsionis tertiae cap. 2.

45 THESE same things the holy Doctor sets forth at length *ad 14. Lucae* in these words: *Who does not renounce all things that he possesses cannot be my disciple,* saying: to renounce all things in affection is of necessity; but to dismiss all things is of supererogation, and counsel. Therefore it is concluded: some inconveniences indeed arise from the property of things, but there would have been more, if all things in this state were common.

*HAEC eadem late edisserit S. Doctor* ad 14. Lucae *in ea verba:* Qui non renunciat omnibus, quae possidet, non potest meus esse discipulus, *dicens, abrenunciare omnibus affectu, esse necessitatis; sed omnia dimittere, esse supererogationis, et consilii. Itaque concluditur, nonnulla quidem incommoda oriri ex rerum proprietate, sed plura futura fuisse, si omnia in statu hoc essent communia.*

46 IT IS indeed fitting with friends that all things be common, as Pythagoras said, not in property, but in use, as Aristotle said, *2. Polit. cap. 3. et 4.*

*CONVENIT sane cum amicis omnia esse communia, ut aiebat Pythagoras, non proprietate, sed usu, ut aiebat Aristoteles* 2. Polit. cap. 3. et 4.

47 YOU OBJECT thirdly. That is better which is of counsel, and falls under a vow; but expropriation is of counsel, *Matth. 19. If thou wilt be perfect, go, sell all, and give to the poor,* and it is the matter of a vow even solemn: Therefore.

*OBIICIES tertio. Id est melius, quod est consilii, et cadit sub voto; sed expropriatio est consilii,* Matth. 19. Si vis perfectus esse, vade, vende omnia, et da pauperibus, et est materia voti *etiam solemnis: Ergo.*

48 Fagundez answers, *num. 14. from Molina Tom. I. tract. II. disp. 20. §. tertia conclusio,* that it is indeed fitting that there be some congregations in which all things are held in common, and nothing proper, so that, more intent on the cult of God, segregated from every concretion of worldly things, they may lead a heavenly life. The holy Doctor pursues these things most fully *in the cited places,* who also shows that for those wishing to serve God most highly, most high poverty is an option, which admits nothing even in common; yet in the world, where estates, business, and contracts are necessary for civil life, and for political fellowship; it is indeed fitting that certain things be determinately proper; both that contentions, and disputes be removed; and that each diligently apply himself to his own affairs. For one's own good is amiable to each one, as Aristotle says; on the contrary, where the business is common:

*RESPONDET Fagundez* num. 14. ex Molina Tom. I. tract. II. disp. 20. §. tertia conclusio, *convenire sane, aliquas esse congregationes, in quibus habeantur omnia in communi, et nihil proprium, ut sic magis Dei cultui intenti ab omni rerum mundanarum concretione segregati, vitam caelestem ducant. Haec latissime S. Doctor* allegatis locis, *prosequitur, qui etiam ostendit, optionem esse, Deo altissime servire volentibus, altissimam paupertatem, quae nihil etiam in communi admittat; attamen in mundo, ubi ad vitam civilem, et ad Politicum convictum necessaria sunt praedia, negotia, et contractus; oportet sane, quaedam esse determinate propria; tum, ut contentiones, et lites removeantur; tum,*

> *ut sedulo quisque suis rebus incumbat. Nam amabile unicuique est bonum proprium, ut ait Aristoteles; e contra, ubi negotium est commune:*

49 *More sluggishly do many dispatch the affairs committed to them,*

> Segnius expediunt commissa negotia plures,

50 And as in the Law, *Cod. quando, et quibus quarta pars debeatur, leg. 10.* it is a natural defect, that what is possessed in common is neglected.

> *Et ut habetur* in Lege, Cod. quando, et quibus quarta pars debeatur, leg. 10. *naturale vitium est, negligi, quod communiter possidetur.*

51 FOR that proverb is common among many: *He who benefits the community benefits no one.*

> *VULGATUM enim est illud apud plures proverbium:* Qui benefacit communi, nulli benefacit.

52 THERE RESTS now to be seen by what right the division of things was introduced.

> *RESTAT modo videndum, quo iure inducta sit divisio rerum.*

53 ALREADY in the *Tract. de Legibus, disp. 4. quaest. 2.* I solved this doubt together with the others pertaining to servitude.

> *IAM* Tract. de Legibus, disp. 4. quaest. 2. *hoc dubium solui cum caeteris spectantibus ad servitutem.*

54 BUT I said that by the dictate of the natural law indeed the division of things in this state is sanctioned, yet this was made by the law of nations, as D. Bonavent. teaches here *quaest. 2. D. Thom. 1. 2. quaest. 66. art. 2. ad 1. where Caietanus, and other Thomists, Medina Cod. de restitut. quaest. 1. concl. 5. Salon 2. 2. quaest. 4. art. 1. et 2. Ledesma 2. 4. quaest. 18. art. 1. dub. 6. Molina Tom. I. de iust. tract. II. quaest. 20. concl. 1. Fagundez lib. II. de contract. num. 16. and it appears from Leg. ex hoc iure, ff. de iustitia, et iure, where Bartol. num. 5. Iason num. 43.*

> *DIXI autem, Iuris quidem naturalis dictamine sancitam esse in hoc statu rerum divisionem, hanc tamen factam Iure gentium, ut docet D. Bonavent. hic* quaest. 2. D. Thom. 1. 2. quaest. 66. art. 2. ad 1. ubi Caietanus, et alii Thomistae Medina Cod. de restitut. quaest. 1. concl. 5. Salon 2. 2. quaest. 4. art. 1. et 2. Ledesma 2. 4. quaest. 18. art. 1. dub. 6. Molina Tom. I. de iust. tract. II. quaest. 20. concl. 1. Fagundez lib. II. de contract. num. 16. et constat ex Leg. ex hoc iure, ff. de iustitia, et iure, ubi Bartol. num. 5. Iason num. 43.

55 OBSERVE that D. Augustin is cited in *cap. Quo iure, dist. 8.* where he says: *Each one possesses what he possesses — is it not by human right? Take away the Laws of the Emperors; who dares to say: this villa is mine?*

> *ADVERTE, D. Augustinum relatum in* cap. Quo iure, dist. 8. *ubi ait:* Unusquisque possidet, quod possidet, nonne iure humano? Tolle Iura Imperatorum, quis audet dicere: haec villa mea est?

56 BUT S. Augustine speaks of particular divisions, of divisions; fixed by the law of the Caesars, as Fagundez notes, num. 17.

> *LOQUITUR vero S. Augustinus de specialibus divisionibus; firmatis iure Caesareo, ut notat Fagundez num. 17.*

57 NEXT observe that D. Augustin reduces all laws to Divine law, and Human; and indeed he reduces the law of nations to human law; and human law to the law of the Caesars; just as he recalls the Natural to the Divine, as Cunha teaches, *1. part. decreti, cap. quo in-re, dist. 7.* But the properties of

things are more broadly called servitudes, whether mixed, or real, affirmative, or negative. See Layman *lib. 3.* Filliucium *tract. 31.* Lessium *lib. 2.* Bassaeum *V. Servitus.*

> *DEINDE observa, D. Augustinum omnia iura reducere ad Ius Divinum, et Humanum; Et quidem ad ius humanum reducit ius gentium; et ius humanum ad ius Caesareum; sicuti Naturale ad Divinum revocat, ut docet Cunha* 1. part. decreti, cap. quo in-re, dist. 7. *Rerum autem proprietates latius vocantur servitutes, sive mixtas, sive reales affirmativas, vel negativas. Vide Layman* lib. 3. *Filliucium* tract. 31. *Lessium* lib. 2. *Bassaeum* V. Servitus.

### Question II: On the acquisition of dominion over barbarians

1 EVIL is the report of the Portuguese among the nations, as merchants of slaves; Yet already the Kings of Portugal have tried to regulate by laws whatever crime they perceived in this purchase of slaves, and they sail far and wide to the most remote islands for this kind of trade. The titles honouring this ill-willed commerce are widely reported by Molina *Tom. 1. tract. 2. disp. 34.* who long dwelt in Portugal, and by Fagundez, a Portuguese, *lib. 2. Contractuum.*

> *MALE apud gentes audiuntur Lusitani, mancipiorum mercatores; Attamen iam legibus moderari conati sunt Lusitaniae Reges, quidquid criminis in hac mancipiorum emptione perspexere, et longe lateque ad insulas remotissimas adnavigant ad huiuscemodi mercaturam. Tituli autem honestantes hanc malevolentem mercationem, late referuntur a Molina* Tom. 1. tract. 2. disp. 34. *qui diu Lusitaniam incoluit, et a Fagundez Lusitano,* lib. 2. Contractuum.

2 THE FIRST is a just war, which Christian Kings wage, either provoked, or for another cause. Especially there are certain nations hostile to the Christian name, which devour strangers, and kill merchants. Such are the inhabitants of Monomotapa, Cafraria, Angola, and other nations.

> *PRIMUS est iusti belli, quod vel lacessiti Christiani Reges, vel alia de causa gerunt. Praecipue vero nonnullae sunt gentes, Christiano nomini infensae, quae peregrinos devorant, necantque mercatores. Tales sunt incolae Monomotapae, Cafrariae, Angolae, et aliae gentes.*

3 BY A SIMILAR title the western, Brazilian nations, most wild and man-eating, are bought and reduced to servitude.

> *SIMILI titulo emuntur, et in servitutem rediguntur occidentales, Brasilianae, gentes efferatissimae, et carnivorae.*

4 THE East Indies likewise, of Calicut, and more truly the most savage of Aceh, of Sumatra, the Javanese, the Japanese also once friends of the Christians, now so grown fierce against us that they rage, that Japan is called *the land of Martyrs.*

> *INDIAE pariter Orientales Calecutii, magis vero saevissimi Aceni, Somatrae, Iavanenses, Iaponenses etiam olim Christianis amici, iam adeo excrudescentes contra nos desaeviunt, ut Iaponia,* terra Martyrum*, dicatur.*

5 OTHERS indeed have been made slaves by right, either from wars in Guinea, Manicongo, in Africa, in India, in Ceilan, or in the Empire of the Sinas, from birth; for very many sell themselves, that they may there espouse handmaids, and beget free servants. See Fagundez *cap. 3. and the following.*

> *ALII vero iure servi facti sunt, vel ex bellis in Guinea, Manicongo, in Africa, in India Ceilani vel in Imperio Sinarum ex natalibus, plurimi enim seipsos vendunt, ut ancillas ibi desponsent, et liberos ergastulos gignant. Vide Fagundez* cap. 3. et sequenti.

## Question III: On the acquisition of dominion over irrational creatures

[1] THERE OCCUR first the seas, which adjoin some land: for these are of those who dominate the shores, *cap ubi periculum, §. Porro, de electione, in 6.* and *the Gloss there,* praised by the Doctors of Canon Law, which Baldus also follows *in cap. 1. enitio, quibus modis feudum amittatur, and in Leg. penult. at the end Cod. de infant. et substit. sub conditione factis, and in Authent. Ut omnes obed. iudicibus, §. 1. and l. 1. col. 2. de sent. ex brevi recitat. and cap. ex litteris, de probat. and cap. accedens 2. ut lite non contest.* and the Doctors in Fagundez *lib. 2. cap. 8.* The holy Doctor indicates this *ad 6. Lucae*, where he observes that the sea of Galilee was fierce, because it adjoined the shores of Galilee, and was called of Tiberias, because it adjoined the City of Tiberias, built in honour of Tiberius Caesar. For on this account he who is on the adjoining sea, where it is maritime, is said to be in the district of that city, as appears from *Leg. Insulae, ff. de iudiciis.*

> *OCCURRUNT primo Maria, quae terrae alicui adiacent: haec enim sunt eorum, qui dominantur littoribus* cap ubi periculum, §. Porro, de electione, in 6. *et* Glossa ibi*, a Iuris Canonici Doctoribus laudata, quam sequitur etiam Baldus* in cap. 1. enitio, quibus modis feudum amittatur, et in Leg. penult. ad finem Cod. de infant. et substit. sub conditione factis, et in Authent. Ut omnes obed. iudicibus, §. 1. et l. 1. col. 2. de sent. ex brevi recitat. et cap. ex litteris, de probat. et cap. accedens 2. ut lite non contest. *atque Doctores apud Fagundez* lib. 2. cap. 8. *Id indicat S. Doctor* ad 6. Lucae*, ubi advertit, Mare dirum fuisse Galileae, quia littoribus Galileae adiacens, et vocatum Tyberiadis, eo quod adiaceret Urbi Tyberiadis, constructae in honorem Tyberii Caesaris. Ob id enim qui est in mari adiacenti, ubi maritimae, in districtu illius civitatis esse dicitur, ut constat* Leg. Insulae, ff. de iudiciis.

[2] THEY SAY, however, that dominion is extended from the shore to 100 miles, Bartol. *in tract. de Insula, col. 2.* Caepola *Tract. de servit. rust. praediorum*, and it is found in *Tom. 6. 2. part. tract. iuris, cap. 16. de mari, num. 13.* and is gathered *from Leg. Quicumque Cod. de Episcopis, et clericis.*

> *DICUNT autem, extendi a littore dominium ad 100. milliaria, Bartol.* in tract. de Insula, col. 2. *Caepola* Tract. de servit. rust. praediorum*, et habetur* Tom. 6. 2. part. tract. iuris, cap. 16. de mari, num. 13. *et colligitur* ex Leg. Quicumque Cod. de Episcopis, et clericis.

[3] THIS is understood provided that islands in the midst of the sea have not been found and cultivated; for then the whole sea in circuit, through the said space, belongs to the Prince, the finder, and the settler.

> *HOC vero intelligitur dummodo insulae in medio mari non sint repertae, et cultae; tunc enim totum mare in circuitu per spatium dictum, sunt Principis, repertoris, et populantis.*

[4] AND indeed the sea by the first division remained common; yet the utilities of fisheries, and navigations belonged first to the one who took them; but they belong rather to some one by the concession of a legitimate Prince, as the navigation of the Ocean was conceded by the Pope for sowing the Gospel, as Cabedo testifies he saw the Bulls of this concession, *2. part. decis. 47.*

> *ET quidem mare ex prima divisione mansit commune; attamen utilitates piscationum, et navigationum fuere primo capientis; magis tamen ad aliquem spectant ex concessione legitimi Principis, sicuti a Pontifice concessa est navigatio Oceani ad Evangelium seminandum, ut testatur se vidisse huius concessionis Bullas Cabedo* 2. part. decis. 47.

[5] SO also the most illustrious Venetians enjoy by legitimate right the navigation of the Adriatic Sea, to remove Pirates, placed by divine providence.

*SIC etiam Veneti Illustrissimi Maris Adriatici navigatione potiuntur legitima, ad Pyratas removendos divina positi providentia.*

6 YET fishing in the sea adjoining the land of some King, and in public rivers, is free to all the subjects of that Prince, *ex Leg. 2. and Leg. Nemo, ff. de rerum divisione.*

*PISCATIO vero in mari, adiacenti terrae alicuius Regis, et in fluminibus publicis libera est omnibus illius Principis subditis,* ex Leg. 2. et Leg. Nemo, ff. de rerum divisione.

7 YET Princes have been able to reserve certain fisheries to themselves, as of Tunny, or of Whales, for the common good of the Kingdom. See Lessium *Tom. 1. de iust. lib. 2. cap. 5.* and Fagundez *lib. 2. cap. 8. de contract.*

*POTUERE tamen Principes aliquas piscationes sibi reservare, ut Chinorum, vel Cetorum, ob bonum commune Regni. Vide Lessium* Tom. 1. de iust. lib. 2. cap. 5. *et Fagundez* lib. 2. cap. 8. de contract.

8 ON the acquisition indeed of dominion over animals, over treasures, and the rest, I have briefly indicated something in the *Disput. de restitut.* nor does the holy Doctor suggest more to me on this matter.

*DE acquisitione vero dominii in animalia, in thesauros, et caetera, aliquid breviter indicavi* Disput. de restitut. *nec mihi ampliora suggerit hac de re Sanctus Doctor.*

# Disputation III: On Promise

1 AFTER dominion has been acquired, the first species of contracting is Promise, which indeed lays an obligation on one part; it suffers, however, before acceptance, a free faculty of revoking. One is external: another internal. One simple, another also solemn; Promises are also sometimes made for a shameful cause: how all these stand, is to be settled here in a few words.

> *POST acquisitum dominium prima contrahendi species est Promissio, ponens quidem obligationem in una parte, patitur tamen, ante acceptationem, liberam revocandi facultatem. Alia est externa: alia interna. Alia simplex, alia quoque sollemnis; solent etiam aliquando fieri Promissiones ob turpem causam: quomodo vero hae omnes stent, paucis hic absolvendum.*

## Question I: What a promise is, and how it differs from a donation

1 PROMISE and Donation are AFFINES. Promise is a firm, and spontaneous giving of faith concerning a licit thing; or it is a deliberate, and spontaneous obligation of faith, of giving, or doing something, given to another concerning a licit, and good thing, pleasing to him. So the Doctors commonly. See Sotum *lib. 7. de iustitia, quaest. 2. art. 1.* Fagundez *lib. 3. cap. 1. de contract.* and the holy Doctor indicates it *in 4. dist. 29. quaest. 2. and dist. 38. dub. 5. littera.*

> *AFFINES sunt Promissio, et Donatio. Est autem promissio datio fidei firma, et spontanea de re licita; seu est deliberata, et spontanea fidei obligatio, dandi, vel faciendi aliquid, data alteri de re licita, et bona, ipsique grata. Ita communiter Doctores. Vide Sotum* lib. 7. de iustitia, quaest. 2. art. 1. *Fagundez* lib. 3. cap. 1. de contract. *et indicat S. Doctor* in 4. dist. 29. quaest. 2. et dist. 38. dub. 5. littera.

2 DONATION indeed is an exhibition, not of faith, but of a thing; yet to give signifies actual tradition, from D. Bonavent. *in primo, dist. 18. quaest. 4.*

> *DONATIO vero est exhibitio, non fidei, sed rei; dare tamen, dicit actualem traditionem ex D. Bonavent.* in primo, dist. 18. quaest. 4.

3 POLLICITATIO signifies a promise on the part of the offerer only, just as a promise is on the part of both; yet they are often taken for the same thing, as you have in D. Bonaventura *in 4. dist. 27. dub. 5. littera*, and also donation signifies respect to the donor, and to him to whom the donation is made, as D. Bonavent. notes *in primo, dist. 18. quaest. 5.* Donation indeed by that very fact transfers a determinate thing from the donor to the donee, so that the thing may be called his, mine, or yours, as the holy Doctor admonishes *dist. 18. citata, quaest. ultima.*

> *POLLICITATIO vero dicit promissionem ex parte offerentis tantum, sicuti promissio est ex parte utriusque; attamen pro eodem saepe accipiuntur, ut habes apud D. Bonaventuram* in 4. dist. 27. dub. 5. littera*, tum etiam donatio dicit respectum ad donantem, et ad eum, cui fit donatio, ut notat D. Bonavent.* in primo, dist. 18. quaest. 5. *Donatio vero eo ipso transfert rem finitam a donante ad donatarium, ut ea res dicatur huius, mea, vel tua, ut monet S. Doctor* dist. 18. citata, quaest. ultima.

4 DONATION indeed signifies the liberal exhibition of a gratuitous thing, as the holy Doctor teaches *in the cited places, and in 2. dist. 7. part. 2. quaest. 1. ad septimum.*

*DICIT vero donatio liberalem exhibitionem rei gratuitae, ut docet S. Doctor* locis adductis, et in 2. dist. 7. part. 2. quaest. 1. ad septimum.

5 THEREFORE, being about to treat of the contracts one by one, I treat of Promise, which is the principle of all, and of the liberal exhibition, which is first made from promise, and which obligates the spontaneous exhibitor, just as also a promise in the internal forum indeed, if the intention of binding oneself was present; but if it has the intention not of promising, and yet promises externally, it is compelled in the external forum to fulfil, as D. Bonavent. teaches *in 4. dist. 38. dub. 5. litt.* and in other cited places *disp. 1. quaest. 3.* and commonly Sanchez *lib. 1. de sponsal. disp. 5. num. 21.* Caietanus, and other Thomists *2. 2. quaest. 88. art. 3.* where Aragon Rebell. *de oblig. iustitiae, 2. part. lib. 18. quaest. 1.* Corduba *sum. quaest. 156.* Fagundez *lib. 3. de contract. cap. 1.* So also *the cited quaest. and quaest. 2. disp. 1.* I have shown that a promise ought to be spontaneous, but not extorted by force, fear, or fraud, lest he who extorted it carry off gain from fraud, or force, as the holy Doctor argues *in the places lately cited, and with him D. Thom. 2. 2. quaest. 89. art. 7.* where Caietanus, and other disciples. Sotus *lib. 8. de iust. quaest. 1. art. 7. ad 3.* Mercatus *cap. 16. Nauar. summa, cap. 18.* Molina *tract. 2. disp. 267.* Sylvester *V. restit.* Lopez *2. part. Instruct. cap. 30.* Rebell. *2. part. lib. 18. quaest. 1. num. 7.* Fagundez *lib. 3. cap. 1.*

*ITAQUE acturi de contractibus singulis, ago de Promissione, quae est principium omnium, et de exhibitione liberali, quae ex promissione primo fit, quaeque obligat spontaneum exhibentem, sicuti etiam promissio in foro quidem interno, si adfuit intentio se obligandi; quod si habeat intentionem non promittendi, et tamen extra promittat, cogetur in foro externo adimplere, ut docet D. Bonavent.* in 4. dist. 38. dub. 5. litt. *et aliis locis allegatis* disp. 1. quaest. 3. *et communiter Sanchez* lib. 1. de sponsal. disp. 5. num. 21. *Caietanus, et alii Thomistae* 2. 2. quaest. 88. art. 3. *Ubi Aragon Rebell.* de oblig. iustitiae, 2. part. lib. 18. quaest. 1. *Corduba* sum. quaest. 156. *Fagundez* lib. 3. de contract. cap. 1. *Sic et* quaest. citata, et quaest. 2. disp. 1. *ostendi, promissionem esse debere spontaneam, non autem vi, metu, vel fraude extortam, ne is, qui extorsit, ex fraude, aut vi commodum reportet, ut arguit S. Doctor* locis, nuper allatis, et cum eo D. Thom. 2. 2. quaest. 89. art. 7. *ubi Caietanus, et alii discipuli. Sotus* lib. 8. de iust. quaest. 1. art. 7. ad 3. *Mercatus* cap. 16. Nauar. summa, cap. 18. *Molina* tract. 2. disp. 267. *Sylvester* V. restit. *Lopez* 2. part. Instruct. cap. 30. *Rebell.* 2. part. lib. 18. quaest. 1. num. 7. *Fagundez* lib. 3. cap. 1.

6 WHENCE Fagundez infers, *num. 5.* Azor *Tomo 1. lib. 11. cap. 7. §. tertia regula*, with D. Bonavent. *in speculo animae, cap. 2.* and all suppose, especially the holy Doctor, in the places cited above, that he who receives what was promised, extorted by force, or fear, is bound in conscience to restore it, because he receives it unjustly.

*Ex quo inferunt Fagundez* num. 5. *Azor* Tomo 1. lib. 11. cap. 7. §. tertia regula*, cum D. Bonavent.* in speculo animae, cap. 2. *et supponunt omnes praecipue S. Doctor, locis, supra allatis, eum, qui recipit promissum, per vim, aut metum, extortum, teneri in conscientia illud restituere, quia iniuste recipit.*

### Question II: Whether a simple promise, once accepted, binds in justice

1 IT IS MOST CERTAIN that breaking a promise accidentally is against justice: consider the cases in which the promiser, trusting in his promise, does not provide for himself from elsewhere, and a grave loss befalls him. See Sanchez *lib. 1. de matrim. disp. 5.*

Utrum simplex PROMISSIO acceptata, obliget ex iustitia.

*CERTISSIMUM est, promissionem frangere per accidens, esse contra iustitiam: pone casus quibus promissis fidens promissarius non sibi aliunde provideat, et grave illi damnum adveniat. Vide Sanchez* lib. 1. de matrim. disp. 5.

2 There is therefore a controversy: whether an obligation of justice arises from a promise of itself.

> *Est igitur controversia: an ex promissione per se oriatur obligatio iustitiae.*

3 The FIRST opinion is that of the authors who hold it to be an obligation from justice. So Sanchez *lib. 1. de matrim. disp. 5. num. 20.* Lessius *Tom. 1. lib. 2. dub. 8. num. 55.* Navarr. *sum. lat. cap. 18. num. 6.* Sotus *lib. 7. de iustitia quaest. 2. art. 1.* Covarr. *in cap. quamvis pactum, part. 2. §. 4. num. 24.* Angel. *V. pactum*, Sylvester *ibi, quaest. 4. et V. Lex, quaest. 10.* Rich. *4. dist. 38. quaest. 3.* and others cited by Sanchez *loco cit. et Dianam Parte 1. Tract. 3. miscell. resol. 9.* Tannetus, however, *disp. 4. quaest. 1. num. 62.* holds that one is bound as it were from justice. Bassaeus, *V. Promissio, is more severe.*

> *PRIMA opinio est sententium, eam esse obligationem ex iustitia. Ita Sanchez* lib. 1. de matrim. disp. 5. num. 20. *Lessius* Tom. 1. lib. 2. dub. 8. num. 55. *Nauar.* sum. lat. cap. 18. num. 6. *Sotus* lib. 7. de iustitia quaest. 2. art. 1. *Couar.* in cap. quamvis pactum, part. 2. §. 4. num. 24. *Angel.* V. pactum, *Sylvester* ibi, quaest. 4. et V. Lex, quaest. 10. *Rich.* 4. dist. 38. quaest. 3. *et alii apud Sanchez* loco cit. et Dianam Parte 1. Tract. 3. miscell. resol. 9. *Tannetus autem* disp. 4. quaest. 1. num. 62. *vult obligari, quasi ex iustitia. Bassaeus vero,* V. Promissio, est severior.

4 The OPPOSITE opinion holds that it is an obligation only of fidelity. So Sotus *in 4. dist. 20. quaest. 1. art. 2.* Suarez *de aux. disp. 2. sect. 2.* Molina *tract. 2. de iust. disp. 262.* Azor *tract. 1. lib. 11. cap. 5.* Thom. *2. 2. quaest. 88. art. 1.* Cajetan *ibi*, Fagundez *lib. 3. de contract. cap. 2.* Lessius *num. 54.* calls it probable. Firmus *verbo perfidia*, Leddesma *Tom. 1. tract. 10. cap. 3.* Fernandez *in suo examine, p. p. cap. 15. §. 8.* Diana *loco cit.* indeed hold that it does not bind gravely. This is the opinion of St. Bonaventure *locis citandis.*

> *OPPOSITA sententia censet, eam esse obligationem tantum fidelitatis. Ita Sotus* in 4. dist. 20. quaest. 1. art. 2. *Suarez* de aux. disp. 2. sect. 2. *Molina* tract. 2. de iust. disp. 262. *Azor* tract. 1. lib. 11. cap. 5. *Thom.* 2. 2. quaest. 88. art. 1. *Caietanus* ibi, *Fagundez* lib. 3. de contract. cap. 2. *Lessius* num. 54. *eam probabilem vocat. Sustinent vero Firmus,* verbo perfidia, *Leddesma* Tom. 1. tract. 10. cap. 3. *Fernandez* in suo examine, p. p. cap. 15. §. 8. *Diana* loco cit. *qui opinantur non obligare graviter. Haec est sententia D. Bonavent.* locis citandis.

5 I ASSERT, with this opinion, that a simple promise given and accepted binds only from fidelity.

> *ASSERO cum hac sententia, simplicem promissionem datam, et acceptatam, obligare tantum ex fidelitate.*

6 It is PROVED by St. Bonaventure *in 2. dist. 17. art. 2. quaest. 2. in corpore, et ad 1.* with the argument used by Molina and Fagundez, because a simple promise is a free and purely liberal giving of one's faith, and proceeds from mere liberality, and hence does not confer a right of justice, unless the promiser intended expressly to bind himself to that by liberality — which is not to be believed to be intended. It is confirmed by Suarez, because a simple promise does not include by its nature any actual donation, but a pure and mere obligation of faith to give something in the future; yet this does not transfer a right in a thing, since nothing is given. It is confirmed by St. Bonaventure *ibi*, because a liberal promise depends on the will of the promiser, who can refuse to bind himself to justice, but only to give his faith.

> *PROBATUR a D. Bonavent.* in 2. dist. 17. art. 2. quaest. 2. in corpore, et ad 1. *argumento quo utuntur Molina, et Fagundez, quia simplex promissio est gratuita, et mere liberalis fidei datio, et ex mera liberalitate procedit, atque adeo non tribuit ius iustitiae, nisi promittens liberalis intenderet expresse ad id se ligare, quod non est credendum intendi. Confirmatur a Suarez, quia simplex promissio non includit ex natura sua actualem aliquam donationem, sed puram, et*

*meram obligationem fidei donandi aliquid in futurum; hoc autem non transfert ius in rem, cum non sit data. Confirmatur ex D. Bonavent.* ibi, *quia promissio liberalis pendet ex voluntate promittentis, qui potest nolle se alligare iustitiae, sed tantum fidem suam dare.*

7 You will SAY: A promise accepted passes into a pact of two, from which a civil obligation arises, which also passes to the heirs *Leg. si quis argentum, §. ult. Cod. de donat. et cap. 1. de pactis.*

*DICES: Promissio acceptata transit in pactum duorum, ex quo oritur civilis obligatio, quae transit etiam ad heredes* Leg. si quis argentum, §. ult. Cod. de donat. et cap. 1. de pactis.

8 It is ANSWERED that this happens in the external forum, if it is established by an instrument that he wished to bind himself, because since the obligation of the promiser is established, the laws presume that he wished it from justice, since his intention is not established, as St. Bonaventure warns *in 4. dist. 27. art. 2. quaest. 2. ad ultimum;* it is otherwise in the forum of conscience. It is proved by the Saintly Doctor also *locis adductis, P. P. Tract. 1. disp. 19. quaest. 1.*

*RESPONDETUR, id evenire in foro externo, si constat ex instrumento, se voluisse obligare, quia cum constet de obligatione promittentis, iura praesumunt id ex iustitia voluisse, cum de intentione non constet, ut monet S. Bonavent.* in 4. dist. 27. art. 2. quaest. 2. ad ultimum; *secus est in foro conscientiae. Probatur a S. Doctore etiam* locis adductis, P. P. Tract. 1. disp. 19. quaest. 1.

9 I ADD, however, that this sin against fidelity is mortal, at least in the gravest matter, supposing that it binds only from fidelity, as many Doctors say cited by Fagundez; most consider such matter four times greater than the matter of theft, cited by Bassaeus.

*ADDO vero, hoc peccatum contra fidelitatem esse mortale, saltem in materia gravissima, supposito quod obliget tantum ex fidelitate, ut dicunt multi DD. apud Fagundez; materiam talem censent plurimi apud Bassaeum quadruplo maiorem materia furti.*

### Question III: Whether a merely internal promise, made to a man, binds

1 I SUPPOSE that a promise made merely internally to God, or to the Saints, binds, as all confess with St. Bonaventure *in 4. dist. 38.*

An PROMISSIO mere interna, facta homini, obliget.

*SUPPONO, Promissionem mere interne factam Deo, vel Sanctis, obligare, ut omnes fatentur cum D. Bonavent.* in 4. dist. 38.

2 AS TO our question, which is indeed about the forum of conscience alone.

*QUOAD nostram quaestionem, quae sane de solo foro conscientiae est.*

3 The FIRST opinion holds that it binds. So Sanchez *lib. 1. de matrim. disp. 3.* who calls it probable. Aragon *2. 2. quaest. 88. art. 3.* Angles *in flor. part. 2. quaest. 1. de voto, art. 2. diff. 4.* Leddesma *2. 4. quaest. 18. art. 1.* where, however, he is problematic, indeed at length inclines to the contrary.

*PRIMA opinio censet, obligare. Ita Sanchez* lib. 1. de matrim. disp. 3. *qui eam probabilem vocat. Aragon* 2. 2. quaest. 88. art. 3. *Angles* in flor. part. 2. quaest. 1. de voto, art. 2. diff. 4. *Leddesma* 2. 4. quaest. 18. art. 1. *ubi tamen problematicus est, imo tandem in contrarium inclinat.*

4 Hence Diana deduces that such a person is bound to reveal and fulfill his promise, and consequently that the one to whom the promise was made, if he knows it and owes something to the promiser, which he cannot obtain in judgment, can make himself a secret compensation. The same think Mendoza *lib. 1. de pactis, cap. 1.* Palacius *de contract. lib. 5. cap. 12.* Sanctarellus *var. resol. p. p. quaest. 66. num. 49.*

> *Hinc vero deducit Diana, teneri hunc patefacere, et implere suum promissum, atque adeo eum, cui est promissum, si cognoscat, et debeat aliquid promittenti, quod non potest in iudicio obtinere, occultam posse compensationem sibi facere. Idem sentiunt Mendoza* lib. 1. de pactis, cap. 1. *Palacius* de contract. lib. 5. cap. 12. *Sanctarellus* var. resol. p. p. quaest. 66. num. 49.

5 The SECOND opinion denies that a merely internal promise binds. So D. Thom. *2. 2. quaest. 88. art. 1. et in 4. dist. 38. quaest. 1. art. 1. quaest. 2.* Tanner. *disp. 4. quaest. 1. dub. 5. num. 59.* Basil. Poncias *de matrim. lib. 2. cap. 6. num. 9.* Panormit. *in cap. litteraturam, de voto, num. 2.* Turrecrem. *in cap. 1. 17. quaest. 1. §. 12.* Abul. *ad cap. 5. Levit. quaest. 4. et ad cap. 30. Numer. quaest. 44.* Rosella *V. votum 1.* Tabiena *ibi §. 4.* and Clarius *V. dispensatio,* Molina *Tom. 2. de iustitia, disp. 266.* Lessius *lib. 2. cap. 18. dub. 5. num. 28.* Rebeilius *2. part. lib. 18. quaest. 1.* Fagundez *lib. 3. de contract. cap. 1. num. 4.* Bassaeus *V Promissio, num. 5.*

> *Secvnda sententia negat, promissionem mere internam obligare. Ita D. Thom.* 2. 2. quaest. 88. art. 1. et in 4. dist. 38. quaest. 1. art. 1. quaest. 2. *Tanner.* disp. 4. quaest. 1. dub. 5. num. 59. *Basil. Poncias* de matrim. lib. 2. cap. 6. num. 9. *Panormit.* in cap. litteraturam, de voto, num. 2. *Turrecrem.* in cap. 1. 17. quaest. 1. §. 12. *Abul.* ad cap. 5. Levit. quaest. 4. et ad cap. 30. Numer. quaest. 44. *Rosella* V. votum 1. *Tabiena* ibi §. 4. *et Clarios* V. dispensatio*, Molina* Tom. 2. de iustitia, disp. 266. *Lessius* lib. 2. cap. 18. dub. 5. num. 28. *Rebeilius* 2. part. lib. 18. quaest. 1. *Fagundez* lib. 3. de contract. cap. 1. num. 4. *Bassaeus* V Promissio, num. 5.

6 This is the opinion of D. Bonaventura *4. dist. 29. quaest. 2. ad 2.*

> *Haec est sententia D. Bonaventurae* 4. dist. 29. quaest. 2. ad 2.

7 It is *Proved* by the Saintly Doctor with the argument used by Fagundez. The obligation of one man to another must be proportioned to a human manner; for man communicates with man only through external expressions, whence it comes about that the obligation of one to another cannot be made without the concurrence of the will of both; but while the promise is internal, it is indeed unknown to the promisee, but is a mere volition of one party, not accepted by the other, and hence cannot be a binding donation. So also others argue.

> Probatvr *a S. Doctore argumento, quo utitur Fagundez. Obligatio unius hominis ad alterum debet esse proportionata modo humano; homo enim communicat cum homine solum externis expressionibus, quo fit, ut obligatio unius ad alterum nequeat fieri absque concursu utriusque voluntatis; dum autem promissio interna est, sane ignota est promissario, sed est mera volitio unius, non acceptata ab altero, atque adeo non potest esse donatio obligans. Sic et alii arguunt.*

8 You will *say l. 3. §. manumittenda, ff. de acquir. possess.* possession can be lost by mere intention.

> Dices l. 3. §. manumittenda, ff. de acquir. possess. *solo animo amitti potest possessio.*

9 Fagundez *answers num. 8.* more is required for acquiring a right than for losing it.

> Respondet *Fagundez* num. 8. *plus requiri ad ius acquirendum, quam ad perdendum.*

10 The other things which the adversaries heap up only prove that an internal promise is required as the foundation of a human obligation, but they do not show that it suffices.

> *Caetera, quae congerunt adversarii, solum probant, internam promissionem requiri, ut fundamentum obligationis humanae, non tamen ostendunt eam sufficere.*

11 Nor do they prove that the act of conscience compels one to manifest that internal act, because from the beginning it was imperfect, and therefore essentially invalid as to its being.

> *Neqve probant, cogere actum illum internum ex conscientia ad manifestandum, quia ab initio fuit imperfectus, et ideo invalidus essentialiter, quoad esse.*

12 You will *say* that with an oath added, you are bound to stand to him in conscience, as also by a vow.

> Dices *accedente iuramento, teneris ei stare in conscientia, sicuti et voto.*

13 Fagundez *answers num. 6. ex D. Bonav. 4. dist. 28. dub. 2.* that this happens from another title, reverence toward God, to which even an internal promise, and attestation, if made in a competent manner, is fitting, and therefore valid.

> Respondet *Fagundez* num. 6. ex D. Bonav. 4. dist. 28. dub. 2. *id evenire ex alio titulo reverentiae in Deum, cui etiam interna promissio, et testatio, modo competenti sit, atque adeo valide.*

## Question IV: Whether an external promise binds before it is accepted

1 I ASSERT with D. Bonaventura *in 4. dist. 29. q. 2. ad 2.* that a promise made externally, even if express, before it is accepted does not bind by any right, and can be revoked. Sotus *lib. 3. de iustitia, q. 5. art. 3.* follows, Tiraquellus *ad leg. si unquam, Cod. de revoc. donat. v. libertis, num 54.* Molina *de primog. lib. 4. cap. 2. n. 62.* Covarr. *in c. Quamvis pactum, 2. part. §. 4 n. 15.* Gomez *tract. 2. var. cap. 9.* Panormit. *in c. Cum inter universas, de elect.* Felinus *in c. 1. de pactis, a n. 7.* Fagundez *lib. 3. de contract. c. 4.* Less. *lib. 2. c. 18. dub. 6. n. 35. et 38.* Molina *Tract. 2. de iust. disp. 263.* Tanner. *disp. 4. q. 1. n. 58.* and others generally, with Bass. *eo. v. Promissio, num. 5.*

> *Assero cum D. Bonaventura* in 4. dist. 29. q. 2. ad 2. *promissionem extra etiam expressam, antequam acceptetur non obligare aliquo iure, et posse revocari. Sequuntur Sotus* lib. 3. de iustitia, q. 5. art. 3. *Tiraquellus* ad leg. si unquam, Cod. de revoc. donat. v. libertis, num 54. *Molina* de primog. lib. 4. cap. 2. n. 62. *Couar.* in c. Quamvis pactum, 2. part. §. 4 n. 15. *Gomez* tract. 2. var. cap. 9. *Panotmit.* in c. Cum inter universas, de elect. *Felinus* in c. 1. de pactis, a n. 7. *Fagundez* lib. 3. de contract. c. 4. *Less.* lib. 2. c. 18. dub. 6. n. 35. et 38. *Molina* Tract. 2. de iust. disp. 263. *Tanner.* disp. 4. q. 1. n. 58. *et alii communiter cum Bass.* eo. v. Promissio, num. 5.

2 It is clear by the argument of St. Bonaventure, because an obligation of one to another is not contracted unless the will and consent of both concur.

> *Patet argumento S. Bonavent. quia obligatio unius ad alterum, non contrahitur, nisi concurrente utriusque voluntate, et consensu.*

3 It is next *Proved* by Caesarean law *leg. 1. ff. de pollicitat. leg. 3. ff. eadem, leg. 2. §. sed si quis, et leg. obsenti, ff. ae donat.*

> Probatvr *deinde iure Caesareo* leg. 1. ff. de pollicitat. leg. 3. ff. eadem, leg. 2. §. sed si quis, et leg. obsenti, ff. ae donat.

4 By Canonical law Covarruvas, Felinus, and Panormitanus, cited above, prove it.

> *De iure Canonico id probant Couar. Felin. et Panormit. relati.*

5 By Natural law the same is proved by Covarruvas, Gomez, Molina, Lessius above, Bartol. *ad leg. si unus ex familia, §. pactum, ff. de pactis.*

> *De iure Naturali id ipsum probant Couar. Gomez, Molina, Lessius supra, Bartol.* ad leg. si unus ex familia, §. pactum, ff. de pactis.

6 Whence they deduce, with St. Bonaventure, that it is licit to withdraw from betrothals thus promised.

> *Ex quo deducunt cum D. Bonavent. licitum esse recedere a sponsalibus sic promissis.*

7 Many make an exception for promises for pious causes: they prove it, because in *lege 1. ff. de pollicit.* the donation made to a city for restoring its ruins is excepted.

> *Excipivnt multi promissiones ad pias causas: Probant, quia in* lege 1. ff. de pollicit. *excipitur donatio facta civitati ad illius ruinas instaurandas.*

8 Others, however, deny that these are excepted, according to *leg. Hoc iure, §. si quis dederit, ff. de donat. et leg. 3. ff. de servis exposit. et leg. 1. Cod. si mancipium.*

> *Alii tamen negant, eas esse exceptas, iuxta* leg. Hoc iure, §. si quis dederit, ff. de donat. et leg. 3. ff. de servis exposit. et leg. 1. Cod. si mancipium.

9 Others make an exception for donations made to an infant, by the argument of *leg. Iubemus, Cod. de emancipat. liberorum.* So Decius *consil. 245.* Molina *de primog. lib. 4. cap. 2. num. 76.* but Fagundez *num 8.* does not dare to adduce that law, which speaks only of emancipated persons.

> *Excipivnt alii, donationes factas infanti argumento* leg. Iubemus, Cod. de emancipat. liberorum. *Ita Decius* consil. 245. *Molina* de primog. lib. 4. cap. 2. num. 76. *sed Fagundez* num 8. *non audet illam legem, quae solum de emancipatis loquitur, adducere.*

10 It is truly DOUBTFUL: whether a promise made to one present and silent is valid, because in favorable cases he who is silent seems to consent.

> *Dvbivm vero est: An promissio facta praesenti, et tacenti, valeat, eo quod in favorabilibus qui tacet, consentire videtur.*

11 So affirm Iulius Clar. *§. donatio, quaest. 14.* Molina *de primog. lib. 4. cap. 2.* Fagundez *num. 12.* Cruz *in directotio conscientiae, p. prima, pract. 7. art. 1. disp. 1.* Diana *Tract. 5. miscell. resol. 116.* Covarr. *in rubr. de testam. part. 3. num. 13. ex leg. qui patitur, ff. mandati.*

> *Sic affirmant Iulius Clar.* §. donatio, quaest. 14. *Molina* de primog. lib. 4. cap. 2. *Fagundez* num. 12. *Cruz* in directotio conscientiae, p. prima, pract. 7. art. 1. disp. 1. *Diana* Tract. 5. miscell. resol. 116. *Couar.* in rubr. de testam. part. 3. num. 13. ex leg. qui patitur, ff. mandati.

12 You will ASK: whether a promise made to an absent person binds before acceptance.

> *Qvaeres: an promissio, facta absenti, obliget ante acceptationem.*

13 It is *Answered* negatively from the foundation of D. Bonaventura adduced above, because an obligation arises only from the mutual consent of two or more. So it is had in *leg. si tibi absenti, ff. de donat. et leg. nec ambigi, Cod. eodem, et leg. 4. tit. 4. partita 5.* See Sanchez *lib. 1. de matrim. disp. 6.* Molina *de primog. lib. 4. cap. 2. num. 62.* Fagundez *lib. 3. cap. 5. and others cited by these.*

> Respondetvr *negative ex fundamento D. Bonaventurae allegato, quia obligatio non oritur, nisi ex mutuo duorum, vel plurium consensu. Ita habetur in* leg. si tibi absenti, ff. de donat. et leg. nec ambigi, Cod. eodem, et leg. 4. tit. 4. partita 5. *Vide Sanchez* lib. 1. de matrim. disp. 6. *Molina* de primog. lib. 4. cap. 2. num. 62. *Fagundez* lib. 3. cap. 5. et alios apud istos.

14 Fagundez says this is so true that even promises made to God, and not accepted by him, do not bind, such as vows of a good not greater. But this does not serve for confirmation; for since a vow is a promise of a greater good, it is invalid from its very terms, which is a matter of disputation for promises made to men; but this author often stumbles in this, that to obtain the same thing he returns again and again.

> *Hoc adeo verum ait Fagundez, ut etiam promissiones factae Deo. et non acceptatae ab illo, non obligent, ut sunt vota de bono non maiori. Sed hoc non facit ad confirmationem; nam cum votum sit promissio de maiori bono, ex ipsis terminis est invalidum, quod de promissionibus factis hominibus est in disputatione; sed author iste saepe in hoc impingit, ut ad idem petendum saepius redeat.*

15 But for a promise made by an absent person to be accepted, three things are required. First, that the promiser signify it by himself, or by a messenger, as they teach commonly with Claro *lib. 4. quaest. 12.* Second, that when it is done through a messenger, it be accepted before him, nor is it enough that it be done before others. But if the matter is transacted by letters, the acceptance must be notified by rescript, or by a messenger. Third, that it not be revoked before acceptance. See Sanchez *lib. 1. de matrim. disp. 7. num. 35.* Lessius *lib. 2. cap. 18. dub. 4.* Tannerus *disp. 6. quaest. 2. num. 49.* But it can also be accepted after the death of the donor. So the cited authors, Sanchez *disp. 6. and others.*

> *Ut autem promissio ab absente acceptata sit, tria requiruntur. Prima, ut promittens per se, vel nuntium significet, ut docent communiter cum Claro* lib. 4. quaest. 12. *Secundo, ut cum fit per nuntium, acceptetur coram eo, nec satis est fieri coram aliis. Quod si per litteras res agitur, debet per rescriptum, vel nuntium acceptatio notificari. Tertio, ut non revocetur ante acceptationem. Vide Sanchez* lib. 1. de matrim. disp. 7. num. 35. *Lessium* lib. 2. cap. 18. dub. 4. *Tannerum* disp. 6. quaest. 2. num. 49. *Potest autem acceptari etiam post mortem donatoris. Ita allegati, Sanchez* disp. 6. et alii.

16 The QUESTION, however, is about a promise confirmed by an oath, even if not yet accepted.

> *Qvaestio autem est de promissione, iuramento firmata, tametsi non adhuc acceptata.*

17 I say by Canonical and Civil law an action is given against one who thus promises and donates. So Panormit. *in cap. cum venissent de constitut. num. 26.* Covarr. *in cap. Quamvis pactum, p. p. §. 2.* Molina *tract. 2. disp. 263.* Fagundez *lib. 3. cap. 5. num. 15. Thus the obligation* passes to the heirs, and it is gathered from *cap. contingat de iureiur. et cap. mulieres eodem in 6. et ex Authent. Sacramenta puber. Cod. si adversus vendit.* but of this I shall treat in the *disput. de iuramento*. Meanwhile many deny it, cited by Bassaeus, V. *Promissio*, because an oath follows the nature of the promise; but this, not yet accepted, is revocable.

*Dico de iure Canonico, et Civili, dati actionem in ita promittentem, et donantem. Ita Panormit.* in cap. cum venissent de constitut. num. 26. *Couar.* in cap. Quamvis pactum, p. p. §. 2. *Molina* tract. 2. disp. 263. *Fagundez* lib. 3. cap. 5. num. 15. Sic obligatio *transit ad haeredes, et colligitur ex* cap. contingat de iureiur. et cap. mulieres eodem in 6. et ex Authent. Sacramenta puber. Cod. si adversus vendit. *sed de hoc in* disput. de iuramento agam. *Interim negant, multi apud Bassaeum, V.* Promissio*, quia iuramentum sequitur naturam promissionis; haec vero, non adhuc acceptata, est revocabilis.*

## Question V: Whether a promise binds when made for a base cause

1 It is CERTAIN that a promise for a base cause, such as homicide and concubinage, is invalid even before performance. They agree with D. Bonavent. *in 4. dist. 28. dub. 1. litt et quaest. 3.* D. Thom. *2. 2. q. 32. art. 7. et quaest. 62. art. 5. ad 2.* Caiet. ibi, Covarr. *ad Regulam Peccatum 2. part. §. 2.* Corduba *lib. 1. quaest. 32. art. 2.* Medina *Cod. de restit. quaest. 20.* Lessius *tract. 1. de iustitia, lib. 2. cap. 18. dub. 3.* and the rest cited by Tannerus *disp. 6. quaest. 2. num. 48.*

*CERTUM est promissionem ob turpem causam, puta homicidii, et concubitus, etiam ante solutionem, esse invalidam. Conveniunt cum D. Bonavent.* in 4. dist. 28. dub. 1. litt et quaest. 3. *D. Thom.* 2. 2. q. 32. art. 7. et quaest. 62. art. 5. ad 2. *Caiet. ibi, Couar.* ad Regulam Peccatum 2. part. §. 2. *Corduba* lib. 1. quaest. 32. art. 2. *Medina* Cod. de restit. quaest. 20. *Lessius* tract. 1. de iustitia, lib. 2. cap. 18. dub. 3. *et caeteri apud Tannerum* disp. 6. quaest. 2. num. 48.

2 The REASON is that of D. Bonaventure, on which all rely, because no one can, or ought, to bind himself to perpetrating a sin, whether by oath, or by a simple promise.

*RATIO est D. Bonavent. qua omnes nituntur, quia nemo potest, aut debet se obligare peccato patrando, vel iureiurando, vel simplici promissione.*

3 The QUESTION, however, is whether after the deed is perpetrated the promiser is bound to pay the promised price.

*QUASTIO autem est, an post patratum opus teneatur promissor pretium promissum solvere.*

4 The FIRST opinion is that he is bound. So the cited authors, except St. Bonaventure; Less. *Tom. 1. lib. 2. cap. 18. dub. 3.* also agrees, Sancius *cap. 14. dub. 8. a num. 52.* Guttier. *lib. 2. canon. cap. 10.* Bartolus, and the Legists generally in *leg. 2. Cod. de condict. ob turpem causam*, Navar. *in summa Lat. cap 17. num. 14.* where he asserts that Legists, Canonists, and Theologians conspire in this. And Sotus *lib. 4. de iust. quaest. 7. art. 1.* Fagundez *lib. 3. cap. 6. de contract.* and others cited by Diana *tom. 3. tract. 4. miscell. resol. 26.* prove it.

*PRIMA opinio est cum teneri. Ita allegati, excepto S. Bonaventura, consentit etiam Less.* Tom. 1. lib. 2. cap. 18. dub. 3. *Sancius* cap. 14. dub. 8. a num. 52. *Guttier.* lib. 2. canon. cap. 10. *Bartolus, et communiter Legistae in* leg. 2. Cod. de condict. ob turpem causam*, Navar.* in summa Lat. cap 17. num. 14. *ubi asserit, conspirate in hoc Legistas, Canonistas, et Theologos. Et id probant Sotus* lib. 4. de iust. quaest. 7. art. 1. *Fagundez* lib. 3. cap. 6. de contract. *et alii apud Dianam* tom. 3. tract. 4. miscell. resol. 26.

5 The SECOND opinion denies that he is bound to pay; indeed, that he is bound to restore the price, even after the perpetration of the accepted deed. So many cited by Covarr. *in regulam Peccatum, 2. part, §. 2. num. 9.* and among the Theologians, Medina *Cod. de restitut. quaest. 28.* Dur. *in 3. dist. 39. quaest. 4.* which Lessius, cited above, and Fagundez *num. 5.* with many others, also call probable, Diana *Tomo 1. Tract. 4. miscell. resol. 26.* Bassaeus inclines to it, V. *Promissio, num. 7.*

*SECUNDA sententia negat, teneri solvere; imo teneri pretium restituere, etiam post patrationem acceptum. Ita multi apud Couar.* in regulam Peccatum, 2. part, §. 2. num. 9. *et ex Theologis, Medina* Cod. de restitut. quaest. 28. *Dur.* in 3. dist. 39. quaest. 4. *quam etiam probabilem dicunt Lessius allegatus, et Fagundez* num. 5. *cum multis aliis, Diana* Tomo 1. Tract. 4. miscell. resol. 26. *Inclinat Bassaeus, V.* Promissio, num. 7.

6 AS TO D. Bonaventure *in 4. dist. 28. dub. 1. litt.* and *in speculo animae, cap. 2.* he gives the general rule from D. Isidore *de contemptu mundi, cap. de voto. In malis promissis rescinde fidem.* Wherefore he seems to stand for this opinion there.

*QUOAD D. Bonavent.* in 4. dist. 28. dub. 1. litt. *et* in speculo animae, cap. 2. *dat regulam generalem ex D. Isidoro* de contemptu mundi, cap. de voto. In malis promissis rescinde fidem. *Quare videtur stare pro hac sententia ibi.*

7 It is PROVED first *ex leg. si plagy. ff. de verb. obligationibus, et in leg. generaliter, ff. eodem.*

*PROBATUR primo* ex leg. si plagy. ff. de verb. obligationibus, et in leg. generaliter, ff. eodem.

8 Fagundez *answers num. 6.* that those laws only wish such conventions to be invalid before the deed is perpetrated; nor is a right of claiming back the promised price afterwards given in the external forum. That this is indeed asserted in the laws, St. Bonaventure teaches *in 4. dist. 15. part. 2. art. 2. quaest. 1. ad 4.* but the law of plagiarism says: *Si plagy faciendi factine causa concepta sit stipulatio, ab initio non valet;* the other law, however, says: *Generaliter novimus turpes stipulationes esse nullius momenti.* Therefore the laws decree something more, as the Saintly Doctor teaches in the first place cited.

*RESPONDET Fagundez* num. 6. *eas leges solum velle, tales conventiones ante opus patratum non valere; neque postea dari ius repetendi promissum pretium in foro externo. Hoc sane in legibus asseri docet S. Bonavent.* in 4. dist. 15. part. 2. art. 2. quaest. 1. ad 4. *sed lex plagii ait:* Si plagy faciendi factine causa concepta sit stipulatio, ab initio non valet; *altera vero lex ait:* Generaliter novimus turpes stipulationes esse nullius momenti. *Itaque aliquid amplius leges decernunt, ut docet S. Doctor loco primo allegato.*

9 He answers secondly that it must be understood of a promise made with a view to baseness; not of one made with a view to labor, danger, and inconvenience.

*RESPONDET secundo, intelligendum de promissione facta in ordine ad turpitudinem; non autem facta intuitu laboris, periculi, et incommodi.*

10 BUT I show that the laws thought nothing of this distinction, nor spoke of the bare right and dominion transferred, so that no restitution would be given; for *lex Generaliter says thus: Generaliter novimus, turpes stipulationes nullius esse momenti, velut si quis homicidium, vel sacrilegium, se facturum promittat,* (but he subjoins) *sed et officio Praetoris continetur huiusmodi obligationibus actionem denegari.* Behold, it decrees both distinctly: first, nullity; second, consequently, that no action is given. But the reason of Fagundez, distinguishing more subtly than is fitting, that he deserves pay for the labor, though not for the malice, vanishes; for the laws take account of crimes, not with a view to barring them, but as a work useful to someone, such as killing an enemy at his own risk, etc.

*SED ostendo, leges nil de hac distinctione cogitasse, neque de solo iure, et dominio translato, ut non detur repetitio, esse locutas; nam* lex Generali-ter, sic ait: Generaliter novimus, turpes stipulationes nullius esse momenti, velut si quis homicidium, vel sacrilegium, se facturum promittat, *(subdit vero)* sed et officio Praetoris continetur huiusmodi obligationibus actionem denegari. *Ecce distinctim utrumque decernit. primo nullitatem; Secundo consequenter, non dari actionem. Ratio vero Fagundez subtilius, quam par est distinguens, mereri ob laborem,*

*esto non ob malitiam, evanescit; nam leges recensent scelera, non praescindendo, sed ut opus alicui utile, puta occidere inimicum suo periculo, etc.*

11 Yet Diana notes *part. 4. tract. 4. miscell. resol. 27.* that one is not bound to pay an immoderate sum, such as 100 gold pieces to a harlot, even if he had promised it by oath, because an oath added obliges only to a sum in which there is no prodigality, as Sotus *lib. 4. quaest. 7. art. 1. ad 2.* Martin Ledesma *2. part. quarti, quaest. 18. art. 5.* Mercatus *de contract. lib. 6. cap. 16.* Palacius *de contract. lib. 5. cap. 11.* Aragon. *2. 2. quaest. 89. art 7.* Salon. *2. 2. quaest. 62. art. 5. controu. 4.* there Bannes *disp. 5. concl. 3.* and others teach, though Molina and others think the opposite probatively.

*ADVERTIT tamen Diana* part. 4. tract. 4. miscell. resol. 27. *non teneri solvere quantitatem immoderatam, puta meretrici 100. aureos, etiamsi id iuramento promisisset, quia iuramentum additum obligat solum ad quantitatem, ubi non est prodigalitas, ut tradunt Sotus* lib. 4. quaest. 7. art. 1. ad 2. *Martin Ledefma* 2. part. quarti, quaest. 18. art. 5. *Mercatus* de contract. lib. 6. cap. 16. *Palacius* de contract. lib. 5. cap. 11. *Aragon.* 2. 2. quaest. 89. art 7. *Salon.* 2. 2. quaest. 62. art. 5. controu. 4. *ibi Bannes* disp. 5. concl. 3. *et alii, licet Molina, et alii oppositum probabiliter sentiant.*

12 Fagundez also notes *num 8.* with the others of the first opinion, that every promise in whose fulfillment there is some sin, even a merely venial one, is void, even if confirmed by an oath. The reason of D. Bonaventure *dub. cit. litt.* is, because no one can be bound to sin, even by an oath, which is not a bond of iniquity. So also Sanchez *lib. 1. de matrim. disput. 52.* Azor *p. p. lib. 11. cap. 7.* Molina *tract. 1. disp. 149.*

*ADVERTIT etiam Fagundez* num 8. *cum caeteris primae sententiae, omnem promissionem, in cuius impletione est aliquod peccatum, etiam tantum veniale, esse irritam, etiamsi iuramento firmetur. Ratio D. Bonavent.* dub. cit. litt. *est, quia nemo potest ad peccatum obligari, etiam iuramento, quod non est vinculum iniquitatis. Ita et Sanchez* lib. 1. de matrim. disput. 52. *Azor* p. p. lib. 11. cap. 7. *Molina* tract. 1. disp. 149.

13 Promises are VOID also which take away the liberty of making a testament, or of disposing freely of one's own things *leg. Pacta, Cod. de pactis,* where it is had: *Pacta, quae contra leges, constitutionesque, vel contra bonos mores fiunt, nullam vim habere indubitati iuris est.*

*IRRITAE sunt etiam promissiones, quae auferunt libertatem testandi, aut disponendi libere de rebus suis* leg. Pacta, Cod. de pactis, *ubi habetur:* Pacta, quae contra leges, constitutionesque, vel contra bonos mores fiunt, nullam vim habere indubitati iuris est.

# Disputation IV: On Donation

1 DONATION also is as it were a contract, therefore we treat of it after promise; but both are called as it were contracts, because they proceed from mere liberality, and place the obligation on one side only, in whose power it is to annul it, until the thing donated, or promised, passes into the power of the other. But lest there be too great license in giving, or rather in throwing away one's goods, the Laws determine the manners and the persons in which donations are valid.

> *DONATIO etiam est quasi contractus, ideo post promissionem de ea agimus; dicuntur vero ambae quasi contractus, quia ex sola liberalitate procedunt, ponuntque obligationem in una sola parte, penes quam est illam irritare, donec res donata, vel promissa in alterius transeat potestatem. Verum ne nimia esset licentia donandi, seu potius bona lapidandi, Iura modos, et personas determinant, in quibus donationes sint validae.*

## Question I: What donation is, and of how many kinds

1 The action of GIVING is called donation, as the Jurisconsult says *leg. senatus. §. Donatio, ff. de donatione causa mortis.* Donation is therefore a free gift, and a giving, as D. Bonaventure teaches in the places adduced, at the beginning of disput. 3. and on ad 7. Lucae in these words: *Cum non haberent, unde redderent, donavit utrique.*

> *DONANDI actio dicitur donatio, ut ait Iurisconsult.* leg. senatus. §. Donatio, ff. de donatione causa mortis. *Est igitur donatio gratuita, et datio, ut docet D. Bonavent. locis adductis, initio disput. 3. et ad 7. Lucae in ea verba:* Cum non haberent, unde redderent, donavit utrique.

2 Donation, however, is made in TWO ways. First, by transferring the right by words, saying: I give you my horse, which I have at home. And although this naturally suffices for transferring dominion from the nature of the thing, nevertheless positive law requires the other manner of donation, by the actual handing over of the thing, *ex Leg. Traditionibus, Cod. de Pactis, ibi: Traditionibus dominia rerum, non nudis pactis transferuntur.* See Bonacina *de contr. disp. 3. quaest. 12. part. 1.*

> *DUPLICITER autem fit donatio. Primo transferendo ius per verba, dicendo: Dono tibi meum equum, quem domi habeo. Et haec licet naturaliter sufficiat ad transferendam dominium ex natura rei, tamen ius positivum requirit alterum modum donationis per actualem rei traditionem,* ex Leg. Traditionibus, Cod. de Pactis, ibi: Traditionibus dominia rerum, non nudis pactis transferuntur. *Vide Bonacinam* de contr. disp. 3. quaest. 12. part. 1.

3 That donation is a NAMED contract, the Doctors teach commonly, cited by Fagundez *lib. 4. de contract. cap. 1. num. 6.*

> *DONATIONEM autem esse contractum nominatum, docent communiter Doctores apud Fagundez* lib. 4. de contract. cap. 1. num. 6.

4 Donation is DIVIDED, however, into Absolute and Conditional, under which is included donation for a day.

> *DIVIDITUR autem donatio in Absolutam, et Conditionalem, sub qua includitur donatio in diem.*

5 A CONDITIONAL donation is a true donation, where the condition is honest, and does not destroy the substance of the donation, as I said *de contractibus in genere, cum D. Bonavent. in 4. dist. 28. quaest. 3.*

and the Gloss has it *in leg. 1. in principio, ff. de donationibus*, Curtius the younger *in leg. 3. num. 73. ff. si certum petat*. Iulius Clarus *§. Donatio, quaest. 2.* Fagundez *lib. 4. cap. 2.*

> *DONATIO Conditionalis est vera donatio, ubi conditio sit honesta, nec destruat donationis substantiam, ut dixi* de contractibus in genere, cum D. Bonavent. in 4. dist. 28. quaest. 3. *et habet Glossa* in leg. 1. in principio, ff. de donationibus*, Curtius iunior* in leg. 3. num. 73. ff. si certum petat. *Iulius Clarus* §. Donatio, quaest. 2. *Fagundez* lib. 4. cap. 2.

6 A donation FOR a day certainly to come, but uncertain when it will come, is valid, for instance if I give you my house for the day of my death, which donation induces an obligation to hand over the thing, but not before that day *leg. omnis stipulatio, versu in diem, ff. de verborum obligatione, et leg. cedere diem, ff. de verb. significat. et leg. certi condictio in principio*, and from the Gloss *ibi, V. Caeterum, ff. si certum petatur*, Molina *disput. 284. § 567.* Fagundez *loco citato.*

> *DONATIO In diem certo venturum, sed incertum, quando futurus sit, est valida, puta si dono tibi meam domum in diem mortis, quae donatio inducit obligationem tradendi rem, sed non ante eam diem* leg. omnis stipulatio, versu in diem, ff. de verborum obligatione, et leg. cedere diem, ff. de verb. significat. et leg. certi condictio in principio*, et ex Glossa* ibi, V. Caeterum, ff. si certum petatur*, Molina* disput. 284. § 567. *Fagundez* loco citato.

7 HENCE you can draw the difference between a donation for a day and a bequest for a day, for a donation obliges at once, and becomes irrevocable; but a bequest becomes irrevocable only at death, *leg. si pupillus, §. qui sub conditione, ff. de donationibus, et ex lib. 12. et 17. tit. 15. part. 5.* Molina teaches *disp. 284 § illud observa.* Therefore if the legatee dies before the testator, nothing of his is owed to the heirs: but if the donee dies before that day fixed for the handing over of the thing, the right passes to the heirs.

> *HINC elicere potes differentiam inter donationem in diem, et legatum in diem, nam donatio statim obligat, et fit irrevocabilis; at legatum solum in morte fit irrevocabile,* leg. si pupillus, §. qui sub conditione, ff. de donationibus, et ex lib. 12. et 17. tit. 15. part. 5. *docet Molina* disp. 284 § illud observa. *Itaque si Legatarius praemoriatur legatori, nihil eius heredibus debetur: at vero si donatarius moriatur ante eam diem, praefixam traditioni rei, transit ius ad heredes.*

8 Donation is DIVIDED also into merely gratuitous, and remuneratory, or antidotal, which is rather called compensation *leg. Attilius Regulus, ff. de donat.* and Reinosus *observat. 31 Covarr. in cap. cum in offic. de testam. num 10.* teach there, Cevallos *tract. 1. commun. contra communes, quaest. 273. num. 11.* Mascardus *de probat. concl. 1236. num. 61.*

> *DIVIDITUR etiam donatio in mere gratuitam, et in remuneratoriam, seu antidotalem, quae potius dicitur compensatio* leg. Attilius Regulus, ff. de donat. *et docent ibi Reinosus* observat. 31 Couar. in cap. cum in offic. de testam. num 10. *Cevallos* tract. 1. commun. contra communes, quaest. 273. num. 11. *Mascardus* de probat. concl. 1236. num. 61.

9 This donation, however, is valid, even if the merits are unknown from elsewhere, and are proved only by the expression of the donor, for no one can know benefits better than he who received them. So Petrus Barbosa *Tom. 2. leg. quae dotis 34. ff. soluto matrim. num. 56.* Iulius Clarus *§. donatio, quaest. 3.* Curtius the younger *consil. 142.* and thus the Parliament of Delphinatus judged, as Guy Papa attests *decis. 95. et Claro already number 2.*

*DONATIO autem haec valet, etiamsi merita aliunde ignorentur, et sola donantis expressione probata sint, nullus enim melius scire potest beneficia, quam qui accepit. Ita Petrus Barbosa* Tom. 2. leg. quae dotis 34. ff. soluto matrim. num. 56. *Iulius Clarus* §. donatio, quaest. 3. *Curtius iunior* consil. 142. *et ita iudicavit Parlamentum Delphinatus, testante Guidone Papa* decis. 95. et Claro iam numero 2.

10 Merits obliging from justice, however, are not pre-required, but it suffices if the donation is made by the judgment of a prudent donor from the debt of a grateful mind, as the Doctors teach commonly, Iulius Clarus *loco cit.* Covarruvas, and Socin. *num. 1.* Molina *disp. 244.* Sanchez *tract. 1. de matrim. lib. 6. disp. 6.* Menoch. *de praesumpt. lib. 4. praesumpt. 67. a num. 1.*

*Non praeexiguntur tamen merita ex iustitia obligantia, sed sufficit, si iudicio prudentis donantis ex grati animi debito fiat donatio, ut docent communiter Doctores, Iulius Clarus* loco cit. *Couar. et Socin.* num. 1. *Molina* disp. 244. *Sanchez* tract. 1. de matrim. lib. 6. disp. 6. *Menoch.* de praesumpt. lib. 4. praesumpt. 67. a num. 1.

11 There is also ANOTHER donation indicated above, which is called *Causa mortis*, and it is a kind of liberal giving, or disposition of the will, from consideration of death, or of the danger of death, present or future. So Sylvester teaches *V. donatio 4. num. 1.* and it is confirmed by death alone without the addition of inheriting, as when a donation causa mortis is made to one present and accepting. For then, for its confirmation, the addition is not required; and in this it is distinguished from the other bequests and fideicommissa, which are not confirmed by death alone, but require the addition, as Bartol. teaches *in leg. et in mortis, ff. de donat. causa mortis*, Molina *de primog. lib. 1. cap. 12. num. 14.* Alexand. *in leg. sciendum, ff. de legatis 1.* and the Doctors commonly, cited by Fagundez *lib. 4. cap. 5.*

*EST et alia donatio supra indicata, quae dicitur:* Causa mortis*, et est quaedam liberalis datio, vel dispositio voluntatis ex consideratione mortis, vel periculo mortis praesentis, vel futurae. Sic docet Sylvester* V. donatio 4. num. 1. *et sola morte confirmatur absque haereditatis adiectione, ut cum donatio causa mortis fit praesenti, et acceptanti. Tunc enim ad illius confirmationem aditio non requiritur; et in hoc a caeteris legatis, ac fideicommissis distinguitur, quae non sola morte confirmantur, sed aditionem requirunt, ut docet Bartol.* in leg. et in mortis, ff. de donat. causa mortis, *Molina* de primog. lib. 1. cap. 12. num. 14. *Alexand.* in leg. sciendum, ff. de legatis 1. *et communiter Doctores apud Fagundez* lib. 4. cap. 5.

12 This kind differs, however, from a donation inter vivos, because the donor causa mortis wishes the thing rather for himself, while he lives, than for the donee: but in a donation inter vivos, he wishes the thing rather for the donee.

*DIFFERT autem haec a donatione inter vivos, quia donator causa mortis, vult magis sibi rem, dum vivit, quam donatario: at in donatione inter vivos, magis vult rem donatario.*

13 NOTE, however, that this donation ought to be liberal, and therefore not made by one freely striking fear of death in an agent in order to extort the donation; otherwise it will be invalid, as I said *disput. 1. quaest. 4.*

*ADVERTE autem, donationem hanc debere esse liberalem, et ideo non metu mortis incusso ab aliquo agente libere ad excutiendam donationem; alioqui erit invalida, ut dixi* disput. 1. quaest. 4.

## Question II: Who can donate, and what

1 ALL those, and those alone, can give, who have the faculty of alienating with dominion.

*OMNES illi, et soli donare possunt, qui habent facultatem alienandi cum dominio.*

2 FIRST there is a doubt about wives; whether they can give from their Paraphernalia goods, which they brought with them beyond the dowry, and from those which they acquire by their work and other weavings and industries.

> *PRIMO quidem dubium est de uxoribus; an possint donare de bonis Paraphernalibus, quae secum extra dotem detulerunt, et de his, quae actu, et aliis textrinis, industriisque acquirunt.*

3 WE RESPOND with D. Bonaventure *in 4. dist. 15. part. 2. art. 2. quaest. 1.* D. Thomas *2. 2. quaest. 32. art. 8. ad 2.* Paludanus, Gabriel, Richardus, Sylvester, Angelus, and others cited by Molina *Tomus 2. de iustitia, disput. 274.* affirmatively, yet standing on the common law; for by the law of Portugal and Castile it is denied. See Fagundez *lib. 4. cap. 5.* Tannetum *disput. 2. quaest. 5. dubio 2.* Bassaeum, *Verbo Donatio.*

> *RESPONDENT cum D. Bonavent.* in 4. dist. 15. part. 2. art. 2. quaest. 1. *D. Thom.* 2. 2. quaest. 32. art. 8. ad 2. *Paludanus, Gabriel, Richardus, Sylvester, Angelus, et alii apud Molinam* Tomo 2. de iustitia, disput. 274. *assertive, stando tamen iuri communi; nam iure Lusitano, et Castellae id negatur. Vide Fagundez* lib. 4. cap. 5. *Tannetum* disput. 2. quaest. 5. dubio 2. *Bassaeum,* Verbo Donatio.

4 SECOND, concerning gifts between husband and wife, whether they can at least be made causa mortis: for some deny it, as Iulius Clarus *lib. 5. sent. §. donatio, quaest. 9.* to whom Fagundez gives greater approval *lib. 5. cap. 4. num. 21.*

> *SECUNDO de donationibus inter virum, et uxorem, an saltem causa mortis possint fieri: Aliqui enim negant, ut Iulius Clarus* lib. 5. sent. §. donatio, quaest. 9. *cui magis plaudit Fagundez* lib. 5. cap. 4. num. 21.

5 The SECOND opinion holds that they are valid. So Emanuel Costa *in cap. si pater, 1. part. v. legavit.* Molina *tract. 2. de iust. disp. 288.* Gomez *ad leg 50. Tauri, num. 66.* It is clear *ex leg. eum servum, §. ult. et ex leg. sed interim, §. sed quod, ff. de donat. inter virum, et uxorem.*

> *SECUNDA opinio asserit, esse validas. Ita Emanuel Costa* in cap. si pater, 1. part. v. legavit. *Molina* tract. 2. de iust. disp. 288. *Gomez* ad leg 50. Tauri, num. 66. *Patet* ex leg. eum servum, §. ult. et ex leg. sed interim, §. sed quod, ff. de donat. inter virum, et uxorem.

6 THIRD it is doubted about gifts made causa mortis by a father-in-law to his daughter-in-law or son-in-law.

> *TERTIO dubitatur de donationibus factis causa mortis a socero suae nurui, vel genero.*

7 Iulius Clar. *§. Donatio, quaest. 6. num. 7.* proclaims these INVALID, where he cites very many, to whom add Couar. *rubric. de testam. part. 3.* Molina *Tom. 2. disput. 288.* The reason is that a father-in-law is deemed one thing with the son or daughter, and therefore while these live, gifts between them are prohibited.

> *INVALIDAS has clamant Iulius Clar.* §. Donatio, quaest. 6. num. 7. *ubi plurimos allegat, quibus adde Couar.* rubric. de testam. part. 3. *Molina* Tom. 2. disput. 288. *Ratio est, qua Socer censetur una res cum filio, vel filia, ideo his viventibus prohibentur donationes.*

8 AS REGARDS the son of a family, it is certain that he can give Castrensian and quasi-Castrensian goods: the reason is that, just as he can dispose of these by testament, so he can also give them; as is taken *ex leg: marcellus, ff. de donationib. causa mortis.*

*QUOAD filium familias, certum est, posse donare bona Castrensia, et quasi Castrensia: Ratio est, quia, sicut de his potest testari, ita etiam donare; ut sumitur* ex leg: marcellus, ff. de donationib. causa mortis.

9 But concerning adventitious goods the son of a family cannot dispose even by testament with his father's consent. So Molina disput. 138. Vallascus Tom. 2. consult. 108. numero 36. The Gloss of Bartolus and the Doctors on leg. *Qui in potestate, ff. de testam.* Nevertheless, concerning these he can give causa mortis with his father's consent, if he be pubescent. So Clar. lib. 4. sent. §. donat. 9. where he says all judge thus. The reason, however, why he can validly give these causa mortis but not make a testament with his father's consent, is that a testament, since it is a last will, cannot hang upon another's volition. So Iason on leg. *si aiunt, C. d. Qui testamentum facere possint.*

*DE bonis autem adventitiis non potest filius familias, etiam de patris consensu testari. Ita Molina disput. 138. Vallascus Tom. 2. consult. 108. numero 36. Glossa Bartol. et Doctores in leg.* Qui in potestate, ff. de testam. *Attamen de his potest donare causa mortis de patris consensu, si pubes sit. Ita Clar. lib. 4. sent. §. donat. 9. ubi ait omnes ita censere. Ratio autem, cur de his valeat donare causa mortis; sed non testari ex patris consensu, est, quia testamentum, cum sit ultima voluntas, nequit ex aliena pendere volitione. Ita Iason in leg.* si aiunt, C. d. Qui testamentum facere possint.

10 For giving, however, the father's consent is essentially necessary, otherwise the gift is invalid. So Couar. de rubric. testam. part. 3. num. 6. Clarus §. *Donatio* 36. Molina disp 288. Tom. 2. Fagundez loco cit. num. 25.

*AD donandum vero necessarius est patris consensus essentialiter, alioquin donatio est invalida. Ita Couar. de rubric. testam. part. 3. num. 6. Clarus §.* Donatio *36. Molina disp 288. Tom. 2. Fagundez loco cit. num. 25.*

11 THERE is moreover a question about minors: whether they can give causa mortis. Minors are those who lack father and mother, and although puberes, are nonetheless under twenty-five years, as Fagundez notes num. 28. These, though puberes, cannot give, even causa mortis, without the consent of curators and a decree of the Judge, although they may dispose by testament. See Molina disp 224. Tom. 1. and disp. 288. Tom. 2. Except, however, Castrensian and quasi-Castrensian goods, for of these they can freely give, both inter vivos and causa mortis, as is clear ex leg. *Pupillus, ff. de acquir. rerum dominio.* And leg. *si curatorem, Cap. de in integro resti.* and it is the common opinion, taught by Baldus, Angel. Salicetus, Paulus de Castro, Alexander, Iason, and all, on *Cod. qui testament. facere possunt. Authent. et sponsal. larg. cap. ex hoc,* where the Gloss on the word *testari,* and Bartol. collar 9.

*QUAESTIO insuper est de minoribus: an donare causa mortis queant. Sunt autem minores, qui carent patre, et matre, et licet puberes, tamen sunt infra vigintiquinque annos, ut notat Fagundez num. 28. Hi licet puberes, non possunt donare, etiam causa mortis absque curatorum consensu, et Iudicis decreto, quamvis testari queant. Vide Molinam disp 224. Tom. 1. et disp. 288. Tom. 2. Excipe tamen bona Castrensia, et quasi Castrensia, de his enim libere donare possunt tam inter vivos, quam causa mortis, ut patet ex leg.* Pupillus, ff. de acquir. rerum dominio. *Et leg.* si curatorem, Cap. de in integro resti. *et est communis sententia, quam docent Baldus, Angel. Salicetus, Paulus de Castro, Alexander, Iason, et omnes in* Cod. qui testament. facere possunt. Authent. et sponsal. larg. cap. ex hoc, *ubi Glossa in verbo* testari, *et Bartol. collar 9.*

12 But if they have no Curator, or obtain release from the age from the King after twenty completed years for a male; and eighteen for a female, they can make gifts of movables, both inter vivos and causa mortis; but of immovables they cannot without a decree of the judge. See Molina Tom. 2. disput. 277. and 278.

*Si autem non habeant Curatorem, vel aetatis veniam obtineant a Rege post viginti annos expletos masculi; et decem, et octo foeminae, possunt donationes facere de mobilibus, tam inter vivos, quam causa mortis; de immobilibus autem nequeunt absque decreto iudicis. Vide Molinam Tom. 2. disput. 277. et 278.*

13 It is DOUBTED also about deportees, who are condemned to perpetual exile, and about the relegated, who are cast into exile for a time, as is had in leg. *relegatus, ff. differentiis, ff. de interdict.*

*DUBITATUR etiam de deportatis, qui perpetuo sunt exilio damnati, et de relegatis, qui ad tempus sunt exilio eiecti, ut habetur in leg.* relegatus, ff. differentiis, ff. de interdict.

14 I SAY therefore that the deported to perpetual exile cannot [in the common course] give causa mortis, testify, or bequeath, and the same holds for those condemned to death; text of leg. *si aliquis, ff. de donat. causa mortis.*

*DICO igitur, deportatos in perpetuum exilium, non posse inte communi donare causa mortis, testare, aut legare, et idem est de morte damnatis; textus leg.* si aliquis, ff. de donat. causa mortis.

15 THOSE ENTERING Religion cannot make a gift and renunciation of goods while they exist as Novices in Religion, except within two months nearest to profession, with the license of the Bishop; which renunciation has no effect unless profession follows, as the holy Council of Trent defines, sess. 25. *de Regular. cap. 16.* Yet this decree does not impede gifts made before entering Religion, even with the intention of entering religion, as the sacred Congregation declares, 18. May 1598. and many follow, Sanchez sum. Tom. 2. lib. 7. cap. 5. num. 4. citing ten Doctors. Add Dianam Tom. 1. tract. *de dubiis regular. resol. 55.* who brings others.

*INGREDIENTES Religionem, donationem, et renuntiationem bonorum facere nequeunt in Religione Nouitii existentes, nisi intra duos menses proximos professioni de licentia Episcopi, quae renuntiatio non habeat effectum, nisi secuta professione, ut definit Sanctum Tridentinum Concilium sess. 25.* de Regular. cap. 16. *Hoc tamen decretum non impedit, donationes factas ante ingressum Religionis, etiam animo ingrediendi religionem, ut declarat sacra Congregatio, 18. Maii 1598. et sequuntur multi, Sanchez sum. Tom. 2. lib. 7. cap. 5. num. 4. decem allegans Doctores. Adde Dianam Tom. 1. tract.* de dubiis regular. resol. 55. *alios adducentem.*

16 OTHERS, however, hold that a gift made before entrance, with the intention and view of entering Religion, is also included. So Fagundez lib. 5. cap. 6: Molina Tom. 1. disp. 149. Guttier. cap. *quamvis pactum, de pactis*, in 6. Lessius lib. 2. cap. 41. dub. 4. num. 40. Azor tract. 1. lib. 13. cap. 9. quaestio 2. who also cites Sanchez, citing sixteen Doctors.

*ALII tamen volunt, includi etiam donationem factam ante ingressum animo, et intuitu ingrediendi Religionem. Ita Fagundez lib. 5. cap. 6: Molina Tom. 1. disp. 149. Guttier. cap.* quamvis pactum, de pactis*, in 6. Lessius lib. 2. cap. 41. dub. 4. num. 40. Azor tract. 1. lib. 13. cap. 9. quaestio 2. qui adducit etiam Sanchez, adducentem sexdecim Doctores.*

17 This seems to me to be the mind of the Council, which prohibits the renunciation of goods, lest being impoverished they be forced to defer profession, as Fagundez notes. The sacred Congregation, however, follows the first opinion.

*HAEC mihi videtur ad mentem Concilii, quod prohibet renuntiationem bonorum, ne cogantur professionem depauperati adire, ut notat Fagundez Sacra vero Congregatio sequitur primam sententiam.*

18 I wish it to be NOTED, that for the renunciation above from the Council to be valid, a male must have sixteen completed years, as many adduce apud Fagundez numero 12.

*NOTARI velim, ut valida sit renunciatio supra ex Concilio, debere masculum habere sexdecim annos completos, ut adducunt multi apud Fagundez numero 12.*

19 FINALLY, the general rule concerning persons who can validly give is this, and it is [the] general rule, that those persons who are under the power of another, although they have dominion over goods, yet lack their free administration, cannot validly give: such are wives, the insane, prodigals, those lacking reason, the impuberes, sons of a family, and minors under twenty years, as all concede apud Fagundez num. 13. with D. Bonavent. in 4. dist. 15. part. 2. art. 2. quaest. 1. ad 4. Husbands indeed can make moderate gifts against the will of their wives; yet if they dissipate goods common to themselves and their wives, they are bound to impute that consumed faculty to themselves in a third of their part, upon dissolution of the marriage or upon divorce being made, with a division of the goods. So Molina tract. 2. disp. 275. Lessius tract. 1. lib. 2. cap. 12. dub. 14. n. 87. Fagundez n. 16. whom see. I have sufficiently explained this Tract. *de Charitate, disp. de eleemosyna, et in hoc tractatu, disp. 1.*

*TANDEM regula generalis est circa personas, quae valide donare possint, hanc regulam et Te generalem, ut personae illae, quae sub alterius potestate sunt, licet dominium habeant bonorum, careant tamen libera administratione illorum; valide donare non posse, ut sunt uxores, amentes, prodigi, carentes ratione, impuberes, filii familias, et minores viginti annis, ut omnes concedunt apud Fagundez num. 13. cum D. Bonavent. in 4. dist. 15. part. 2. art. 2. quaest. 1. ad 4. Mariti vero possunt quidem moderatas donationes facere, inuitis uxoribus, si tamen bona sibi, et uxoribus communia dissipent, tenentur eam consumptam facultatem sibi assumere in tertii sui partem, soluto matrimonio, vel facto diuortio, cum diuisione bonorum. Ita Molina tract. 2. disp. 275. Lessius tract. 1. lib. 2. cap. 12. dub. 14. n. 87. Fagundez n. 16. quem vide. Haec satis explicui Tract.* de Charitate, disp. de eleemosyna, et in hoc tractatu, disp. 1.

20 GIFTS merely liberal and simple, made by a father to his sons placed under his power, are regularly invalid, and must be brought into the partition. So the Doctors commonly apud Fagundez lib. 4. cap. 7. *de contract.* The reason is that the son is one thing with the father, leg. finali, *Cod. de impuber.*; but in gifts there must be, at least, two persons, the giver and the recipient. Yet a gift made to an emancipated son is valid, as the text has it in leg. *Donationes, quae parentes, Cod. de donat. inter virum, et uxorem,* and the Gloss. ordin. and the Doctors commonly on leg. 2. *Cod. de ineff. dof. donat.*

*DONATIONES mere liberales simplices, factae a patre filiis, sub sua potestate positis, regulariter sunt invalidae, et ad partitionem adducendae. Ita communiter Doctores apud Fagundez lib. 4. cap. 7.* de contract. *Ratio est, quia filius cum patre una res est, leg. finali,* Cod. de impuber. *in donationibus autem debent esse, ad minus, duae personae, donans, et donatarius. Valet tamen donatio facta filio emancipato, ut habet text. in leg.* Donationes, quae parentes, Cod. de donat. inter virum, et uxorem, *et Gloss. ordin. et communiter Doctores ad leg. 2.* Cod. de ineff. dof. donat.

21 A gift made by a father to his son under the title of dowry is also valid, nor is he bound to bring it into the division with his brothers or other heirs after the father's death, leg. *Pomponius, ff. familiae erciscundae, et ff. et Cod. de collat. bonorum,* throughout.

*VALET etiam donatio a patre filio suo facta dotis titulo, nec tenetur cum fratribus, vel aliis heredibus eam adducere in diuisionem post mortem patris, leg.* Pomponius, ff. familiae erciscundae, et ff. et Cod. de collat. bonorum, *per totum.*

22 CONCERNING gifts, however, which are made by a bridegroom to the bride, or by the parents of the bridegroom, so that he may appear more honored, see Fagundez cap. 7; yet the custom of the region must always be kept, for men are not held to give except according to such a custom, leg.

penult. *ff. soluto matrim.* and the Law adds: *Indeed, prodigal garments, which modern abuse has introduced, I do not think are to be held as gifts, nor pearls, nor precious stones, because no one is presumed to wish to use his substance with such enormity of loss to himself.* See also Matthaeum de Afflictis decis. 315.

> *CIRCA donationes vero, quae fiunt a sponso sponsae, vel a parentibus sponso, ut honoratior appareat, vide Fagundez cap. 7. semper tamen seruandus est mos regionis, quia viri non censentur donare, nisi iuxta talem morem, leg. penult.* ff. soluto matrim. *et addit Lex:* Sane prodigalia vestimenta, quae modernus abusus induxit, donata censeri non puto, nec perlas, nec lapides pretiosos, quia nemo praesumitur mali velle uti substantia sua cum damni sui enormitate. *Vide etiam Matthaeum de Afflictis decis. 315.*

23 SIMILARLY, what was said of the dowry for corporeal nuptials must also be said of the dowry for spiritual nuptials to Religion; for the argumentation holds in favorable matters from one to the other, c. *inter corporalia, de translat. Episcop.* Bartol. on leg. 1. §. *si parentes, ff. si quis a parente*, Vallascus in praxi de partit. cap. 13. num. 31.

> *SIMILITER quod dictum est dote pro nuptiis corporalibus, dicendum etiam de dote pro nuptiis spiritualibus ad Religionem; valet enim in fauorabilibus ab uno ad alterum argumentatio c.* inter corporalia, de translat. Episcop. *Bartol. in leg. 1. §.* si parentes, ff. si quis a parente*, Vallascus in praxi de partit. cap. 13. num. 31.*

24 A gift of ALL present and future goods cannot be made. So the Doctors commonly, Bartol. on leg. *stimulatio hoc modo concepta, ff. de verb. oblig. et in lege ult. Cod. de pactis*, and others apud Fagundez lib. 4. cap. 10. The reason is that one thus takes from himself the power of making a testament, which cannot be taken away, since it is of the law of nations. The same is signified, if you give an inheritance.

> *NON potest fieri donatio omnium bonorum praesentium, et futurorum. Ita Doctores communiter, Bartol. in leg.* stimulatio hoc modo concepta, ff. de verb. oblig. et in lege ult. Cod. de pactis*, et alii apud Fagundez lib. 4. cap. 10. Ratio est, quia sic aufert sibi potestatem testandi, quae non potest adimi, cum sit de iure gentium. Idem significatut, si dones hereditatem.*

25 WHETHER, however, one can give all present goods: I hold it more probable that it is invalid, with Iulius Claro, Couar. and Gamma, apud Fagundez lib. 4. cap. 10.

> *AN vero possint donare omnia bona praesentia. Probabilius reor, esse invalidum cum Iulio Claro, Couar. et Gamma, apud Fagundez lib. 4. cap. 10.*

26 A GIFT, however, of all goods, even future ones, if the usufruct be reserved, or something by which one may be sustained, is valid; so Bartol. on *Leg. stipulatio hoc modo concepta, ff. de verb. oblig.* Iulius Clar. *lib. IV. sent. §. Donatio, quaest. 19.* Socinus iunior *consil. 142. num. 39.*

> *DONATIONEM vero omnium etiam futurorum, si reserventur usus fructus, aut aliquid quo possit sustentari, valida est; ita Bartol. in* Leg. stipulatio hoc modo concepta, ff. de verb. oblig. *Iulius Clar.* lib. IV. sent. §. Donatio, quaest. 19. *Socinus iunior* consil. 142. num. 39.

27 Indeed, if a gift of all, even future, goods be made to the Church, or to a pious place, it is valid *ex text. in leg. Iubemus, 2. vers. patrimon. Cod. de sacrosanctis Ecclesiae.* Bartolo *in l. ult. numero 13. Cod. de pactis,* and Gomez attests the common view *ad leg. 69. Tauri.* Iulius Clarus also teaches this *lib. IV. sentent. §. Donatio, quaest. 20.* and others cited by him. The reason is that if one can validly consecrate oneself to the Church, much more one's goods; and although many apud Clarum hold the opposite, yet for this opinion in favor of the Church it must be said.

*Imo si donatio omnium, etiam futurorum fiat Ecclesiae, vel loco pio, est valida* ex text. in leg. Iubemus, 2. vers. patrimon. Cod. de sacrosanctis Ecclesiae. *Bartolo* in l. ult. numero 13. Cod. de pactis, *et communem testatur Gomez* ad leg. 69. Tauri. *Id docet etiam Iulius Clarus* lib. IV. sentent. §. Donatio, quaest. 20. *et alii apud eum. Ratio est, quia si potest quis seipsum valide Ecclesiae consecrare, multo magis sua, et licet oppositum teneant multi apud Clarum; tamen pro hac sententia in favorem Ecclesiae dicendum.*

28 GIFTS also of all present and future goods, made for an onerous cause of dowry or marriage, are valid. So Molina *lib. II. de primog. cap. 10. num. 77.* and the other Molina, the Theologian *tract. 2. disp. 280.* Rainos *observ. 41.* Menchaca *de success. creat. leg. 5. 1. num. 32.* Fagundez *lib. II. cap. 10. num. 12.*

*DONATIONES etiam omnium bonorum praesentium, et futurorum, factae ob causam onerosam dotis, vel matrimonii, validae sunt. Ita Molina* lib. II. de primog. cap. 10. num. 77. *et alter Molina Theologus* tract. 2. disp. 280. *Rainos* observ. 41. *Menchaca* de success. creat. leg. 5. 1. num. 32. *Fagundez* lib. II. cap. 10. num. 12.

29 AS REGARDS gifts between spouses, they were of old regularly null, lest the spouses, by a mutual bond of love, strip themselves of their own goods, as is clear *ex Leg. cum hic status, ff. eodem.* Antoninus the Emperor decreed that it should remain free for the giving spouse to revoke a gift made to the other spouse while the giver himself lived; yet if he did not revoke it, it would be confirmed by death, so that afterwards the heirs of the giver could not revoke it. This indeed differs little from a legacy, and from a gift causa mortis. Therefore, just as spouses are not prohibited from giving to each other causa mortis, and from bequeathing, so neither ought this to be denied; and this holds even today *ex leg. cum hic status cit. et leg. 1. et 3. et leg. quas parentes, Cod. de donat. inter virum, et uxorem, et cap. ultimo, eodem titulo.*

*QUOAD donationes inter coniuges, olim regulariter fuere nullae, ne coniuges mutuo amoris nexu propriis se bonis spoliarent, ut patet* ex Leg. cum hic status, ff. eodem. *Antoninus Imperator sancivit, ut liberum maneret coniugi donanti revocare donationem alteri coniugi factam, dum viveret ipse donator; si tamen illam non revocaret, morte confirmaretur, ita ut postea heredes donatoris non possent eam revocare. Hoc sane a legato, et donatione causa mortis parum differt. Itaque sicuti non prohibentur coniuges sibi invicem donare causa mortis, et legare, ita neque hoc debuit denegari, et hoc viget etiam hodie* ex leg. cum hic status cit. et leg. 1. et 3. et leg. quas parentes, Cod. de donat. inter virum, et uxorem, et cap. ultimo, eodem titulo.

30 This gift, however, is confirmed also by civil death, which is threefold: first, by perpetual exile, or a long one of ten years. Second is the penalty of servitude. Third, profession in Religion. So Sancius *lib. VI. de matrim. disp. 17.* Fagundez *lib. IV. de contract. cap. 11. num. 6.* Molina *Tract. 2. de Iustitia, disp. 289.*

*HAEC autem donatio confirmatur etiam morte civili, quae est triplex: Prima per exilium perpetuum, vel longum decennii. Secunda est servitutis poena. Tertia professionis in Religione. Ita Sancius* lib. VI. de matrim. disp. 17. *Fagundez* lib. IV. de contract. cap. 11. num. 6. *Molina* Tract. 2. de Iustitia, disp. 289.

31 Moreover, a gift made between spouses of the future was formerly absolute and irrevocable, but now it has a tacit condition, and is valid if marriage follows and is consummated. The former part is had *in leg. 1. v. igitur, ff. de donat. et leg. 2. et leg. si filia, et leg. si tibi, Cod. de donat. ante nupt.* That the aforesaid conditions are now required is had in *leg. cum veterum, Cod. de donat. ante nupt. et lib. III. tit. 11. part. 4.* See Sanchez *lib. VI. de matrim. disp. 18. et 19.* Molina *Tom. 1. Tract. 2. disp. 290.*

*DONATIO porro facta inter sponsos de futuro, antea erat absoluta, et irrevocabilis, sed nunc habet tacitam conditionem, et valet, si sequatur matrimonium, et consumetur. Prior pars habetur* in leg. 1. v. igitur, ff. de donat. et leg. 2. et leg. si filia, et leg. si tibi, Cod. de donat. ante nupt. *Quod vero nunc requirantur conditiones allatae,*

*habetur* leg. cum veterum, Cod. de donat. ante nupt. et lib. III. tit. 11. part. 4. *Vide Sanchez* lib. VI. de matrim. disp. 18. et 19. *Molinam* Tom. 1. Tract. 2. disp. 290.

32 By positive law, for a gift to be valid, insinuation before a judge is required, *leg. sancimus, Cod. de donatione;* wherefore a gift without insinuation, exceeding 500. solidi, is null as to the excess, and *eodem tit. lib. penult.* it is enacted that a gift is valid without insinuation if it does not exceed the sum of 500. solidi. Now five hundred solidi are worth 700 Spanish scudi. See Clarum *quaestione 5.*

*Ex iure positivo, ut valida sit donatio, requiritur insinuatio coram iudice,* leg. sancimus, Cod. de donatione, *quare donatio sine insinuatione, excedens 500. solidos, est nulla, quo ad excessum, et* eodem tit. lib. penult. *statutum est, ut valida sit donatio absque insinuatione, si non excedat summam 500. solidorum. Solidi autem quingenti valent scuta Hispanica 700. Vide Clarum* quaestione 5.

## Question III: On the revocations of donations

1 GIFTS, especially inter vivos, I suppose to be irrevocable *ex D. Bonavent. in Diaeta, Tit. 3. cap. 1. et in Psalm. 111.*

***De revocationibus donationum.***

*DONATIONES, maxime inter vivos irrevocabiles suppono* ex D. Bonavent. in Diaeta, Tit. 3. cap. 1. et in Psalm. 111.

2 A gift, perfected by traditio, and made irrevocable, is vitiated chiefly by three voiding causes. First by ingratitude. Second by supervening children. Third by an inofficious gift. Other causes are also reduced to these heads, as Iulius Clar. notes *lib. IV. sent. §. donatio, quaest. 1.*

*DONATIO, quae traditione perfecta est, atque reddita irrevocabilis, inficitur a tribus praecipue vomitoriis. Primo ingratitudine. Secundo supervenientia filiorum. Tertio inofficiosa donatione. Ad haec capita reducuntur etiam alia, ut advertit Iulius Clar.* lib. IV. sent. §. donatio, quaest. 1.

3 AS REGARDS the first, we speak of a liberal gift; for one made by way of remuneration has already had its counterpart.

*QUOAD primum, sermo est de donatione liberali; nam quae sit ex remuneratione, iam habuit correspondentiam.*

4 FIRST, then, it is revoked if the recipient has inflicted grave and atrocious injuries on the giver, even if only once. So Molina *Tract. 2. disp. 281. et alii.* What injuries are such is left to the judgment of the prudent man, and these injuries can be done by words or by deeds.

*PRIMO igitur revocatur, si donatarius graves, et atroces iniurias, etiamsi semel, in donantem iecit. Ita Molina* Tract. 2. disp. 281. et alii. *Quae autem sint tales iniuriae, remittitur iudicio prudentis, et possunt istae iniuriae verbis, vel factis confici.*

5 SECOND, if the recipient strikes the giver, or lays violent hands on him with the intention of injuring him.

*SECUNDO si donatarius percutiat donantem, vel manus violentas immittat animo ipsum laedendi.*

6 THIRD, if he has inflicted grave damage on the giver's goods, provided he does this unjustly.

*TERTIO si grave damnum bonis donantis intulit, dummodo iniuste haec faciat.*

7 FOURTH, if the recipient has plotted danger to the giver's life.

> *QUARTO si donatarius donatori vitae periculum fuit machinatus.*

[8] FIFTH, if the recipient has not fulfilled another gift imposed on him by the giver, or has not discharged a condition imposed and accepted in the gift by the giver.

> *QUINTO si donatarius alteram donationem, a donatario impositam, non impleverit, vel conditionem a donante in donatione impositam, et acceptatam, non absolverit.*

[9] Since, however, these revoke a gift in punishment of a crime, the recipient is not bound to restore before the sentence of a judge.

> *CUM autem haec revocent donationem in poenam criminis, non cogitur donatarius ante sententiam iudicis restituere.*

[10] OTHER causes are adduced by others, but Molina *§. nobis vero, ait,* holds that hatreds are not to be extended in this matter.

> *ALIAS causas apponunt alii, sed Molina* §. nobis vero, ait, *non esse odia hac in re dilatanda.*

[11] The SECOND head is the supervening offspring; for gifts are sometimes made at a time when the giver lacked succession: The question is asked: whether upon offspring supervening the gift is revoked.

> *SECUNDUM caput est proles superveniens; solent enim aliquando fieri donationes tempore, quo donator carebat successione: Quaeritur vero: an superveniente prole revocetur donatio.*

[12] I ASSERT that it is revoked ipso facto *leg. si unquam, Cod. de revocand. donat.* and indeed although this law speaks of a gift made to children, it must nevertheless be understood of any other gift made to another stranger, as Iulius Clar. notes *lib. IV. §. Donatio, quaest. 22. et Gloss. in leg. si nunquam;* and the Doctors commonly.

> *ASSERO, ipso facto revocari* leg. si unquam, Cod. de revocand. donat. *et quidem licet haec lex loquatur de donatione facta liberis, est tamen intelligenda de quacunque alia donatione facta alteri extraneo, ut advertit Iulius Clar.* lib. IV. §. Donatio, quaest. 22. et Gloss. in leg. si nunquam; *et communiter Doctores.*

[13] Note that this revocation takes place by the law itself upon children being born; hence the law says: *Revertatur*, etc.

> *Adverte, istam revocationem fieri ipso iure natis filiis, ideo lex ait:* Revertatur, *etc.*

[14] IF, however, the gift was made to the Church, it is revoked not in whole, but insofar as it bites. See Tiraquellum copiously *in leg. si unquam,* Baldum *consil. 215.* Molinam *tract. 2. cap. 2. disp. 292.* Bartolum *in leg. Titiae, §. Imperator, ff. de legat. 2.* Couar. *lib. I. var. cap. 19.* Ripam *ad leg. si unquam.*

> *SI tamen donatio facta est Ecclesiae, revocatur non in totum, sed quantum mordet. Vide Tiraquellum copiose* in leg. si unquam, *Baldum* consil. 215. *Molinam* tract. 2. cap. 2. disp. 292. *Bartolum* in leg. Titiae, §. Imperator, ff. de legat. 2. *Couar.* lib. I. var. cap. 19. *Ripam* ad leg. si unquam.

[15] AND the Doctors note that a father cannot renounce the benefit of *legis, si unquam Cod. de revocando donat.*; for he can renounce only insofar as he does not prejudice the legitims of his children, which are owed to them by natural law. And so Clarus says this opinion is the best, and that judgment has always been rendered according to it.

> *ET advertunt Doctores, non posse patrem renunciare, beneficio* legis, si unquam Cod. de revocando donat. *solum enim potest renunciare, quatenus non praeiudicet filiorum legitimis, quae sunt illis iure naturali debitae. Et ideo ait Clarus, hanc sententiam esse optimam, et secundum eam semper iudicatum.*

16 The THIRD head is the inofficious gift, which is twofold. One in fact only, not in intention, when a father injures the Legitim of his children in the thing, although he does not intend to injure: then it is inofficious both in fact and in intention when he both injures in the thing and intended to injure.

> *TERTIUM caput est donatio inofficiosa, quae duplex est. Alia re tantum, non consilio, quando pater in re laedit Legitimam filiorum; licet non intendat laedere: tunc est inofficiosa re, et consilio quando, et in re laedit, et laedere intendebat.*

17 THEREFORE if the gift has been made to one son, it is not revoked except up to the injury of the legitim of the other sons. So Clar. lib. IV. §. Donatio, quaest. 24. Molina tract. 2. disp. 283.

> *IGITUR si donatio facta sit uni filio, non revocatur, nisi usque ad laesionem legitimae aliorum filiotum. Ita Clar. lib. IV. §. Donatio, quaest. 24. Molina tract. 2. disp. 283.*

18 If it is made to a stranger, and is inofficious in intention, it is revoked in fact also, up to the legitim. So the Doctors cited; and this is true, even if the father had confirmed the gift by oath, because an oath is not a bond of iniquity, as the S. Doctor warns in 4. dist. 28. in dubiis litterae.

> *Si fiat extraneo, et sit inofficiosa consilio, etiam re revocatur usque ad legitimam. Ita Doctores citati, et hoc verum est, etiamfi pater donationem iuramento firmasset, quia iuramentum non est vinculum iniquitatis, ut monet S. Doctor in 4. dist. 28. in dubiis litterae.*

19 But if it is inofficious in fact only, not in intention, I hold it more probable that the whole is revoked in its entirety. So Bartol. cit. Iullius Clar. quaest. 24. where he calls it the common opinion.

> *Si vero sit inofficiosa re tantum, non consilio, probabilius reor, revocari totam in solidum. Ita Bartol. cit. Iullius Clar. quaest. 24. ubi eam communem vocat sententiam.*

# Disputation V: On Buying and Selling

1 These Contracts, among others, are the more celebrated, since nearly the whole commerce of human society subsists on them; they are nonetheless most perilous, both on account of the defects that very often lie hidden in the thing sold unknown to the buyer; and on account of the avarice of merchants, which, cloaked under this specious pretext, sells their wares through fair means and foul, and heaps up for itself the Denarii of the poor, by selling worse goods to them at a dearer price; these things are chiefly practiced in places where there is no tax on price; but everyone is permitted with impunity to exchange his goods either according to the buyer's necessity, or according to his own pleasure.

> *Hi Contractus inter caeteros celebriores sunt, cum totum fere humanae societatis commercium ex eis subsistat; periculosissimi tamen sunt, tum propter vitia, saepenumero in re vendibili inscio emptore latentia; tum propter avaritiam mercatorum, quae specioso hoc praetextu palliata, per fas, et nefas suas merces venditat, cumulatque sibi pauperum Denarios, viliores res charius ipsis vendendo; haec maxime actitantur in locis, ubi nulla sit pretii taxatio; sed cuique impune permittitur, res suas vel pro emptoris necessitate, vel pro suo libito commutare.*

## Question I: What buying and selling are

1 VERY MANY definitions of these are handed down, from which is drawn the very brief definition which the S. Doctor indicates in the Speculum animae, cap. 2. *Venditio est passio mercedis pro pretio, Emptio vero Passio pretii pro mercede,* Caspensis uses it *Tract. 19. disp. 4.* and others apud Fagundez *lib. 5. de contract. cap. 1. Bassaeum, verb. Emptio.*

> *PLURIMAS tradunt de his definitiones, ex quibus elicitur definitio perbrevis, quam indicat S. Doctor in speculo animae, cap. 2.* Venditio est passio mercedis pro pretio, Emptio vero Passio pretii pro mercede, *ea utitur Caspensis* Tract. 19. disp. 4. *et alii apud Fagundez* lib. 5. de contract. cap. 1. Bassaeum, verb. Emptio.

2 NOTE here that the name merx properly signifies only movable things that are sellable *lib. 66. ff. de verb. signific.* But here merces is taken for merces in the sense of price, insofar as it has the rational character of the object to be priced. It is so taken by Lessius *Tom. 1. lib. 2. cap. 11. dub. 1.* with the Jurists on *leg. 1. ff. de contract. emptionis, et venditionis,* and Molina *Tom. 2. de iust. tra. 2. disp. 336.* who so define it. Therefore it is taken here as signifying the payment, not the merchandise. In this Fagundez is deceived, along with Bassaeus.

> *ADVERTE hic, nomen mercis proprie significare tantum res mobiles vendibiles* lib. 66. ff. de verb. signific. *At hic sumitur merces pro mercede, quatenus habet rationem obiecti pretiandi. Sic accipitur a Lessio* Tom. 1. lib. 2. cap. 11. dub. 1. *cum Iuristis ad* leg. 1. ff. de contract. emptionis, et venditionis, *et Molina* Tom. 2. de iust. tra. 2. disp. 336. *qui sic eam definiunt. Igitur sumitur hic prout dicit mercedem, non mercem. In quo decipitur Fagundez cum Bassaeo.*

3 It is called *Passio,* because it is a mutual contract, and this stands in the place of the genitive. It is called *mercedis pro pretio, et pretii pro mercede,* because of old, before money was invented, there were only exchanges of a horse for an ox; of wine for oil; and of wheat for cloth; but afterwards money was invented on account of the inequality of things, which at the beginning was stamped with the foot of cattle; whence also it was called pecunia, as Pliny testifies *lib. 33. cap. 3.* and among the Romans it

was impressed with the foot of an ox. Hence that proverb of Martius: *Bovem habet in lingua*, that is, he has been corrupted by money. Hence also Depeculatores were called those who take away moneys by violence, theft, etc. Soon, however, on account of inequality, money was stamped with various metals, at whose price Purchases and Sales began to be made by the law of nations, although as regards the equality of price they are made by the law of nature. On these see Fabianum de monte *de empt. et vendit. quaest. 1.* Molinam *Tom. 2. tract. 2. disp. 336.* Fagundez in Prooemio *ad lib. 5. de Emptione, etc.*

> *DICITUR* Passio*, quia est mutuus contractus, et hoc est loco genetis. Dicitur* mercedis pro pretio, et pretii pro mercede*, quia olim ante inventam pecuniam erant solae permutationes equi cum bove; vini cum oleo; et tritici cum panno; post vero pecunia inventa est ob rerum inaequalitatem, quae, initio, pede pecudum excusa fuit; unde et pecunia dicta est, teste Plinio* lib. 33. cap. 3. *et apud Romanos pede bouino imprimebatur. Unde illa Martii paroemia:* Bovem habet in lingua*, idest, pecunia corruptus est. Hinc etiam Depeculatores dicti sunt, qui pecunias vi, furto, etc. auferunt. Mox vero metallis variis, ob inaequalitatem, pecunia excusa est, cuius pretio incoeperunt fieri Emptiones, et Venditiones, iure gentium, licet quo ad aequalitatem pretii fiant iure naturae. De his vide Fabianum de monte* de empt. et vendit. quaest. 1. *Molinam* Tom. 2. tract. 2. disp. 336. *Fagundez in Prooemio* ad lib. 5. de Emptione, etc.

4 On this (as the S. Doctor says above) perilous matter I shall treat of some things, as being necessary, although very few are found in the Seraphic Doctor.

> *DE hac (ut ait S. Doctor supra) periculosa materia, aliqua agam, ut pote necessaria, tametsi paucissima in Seraphico inveniantur.*

5 THREE things, however, are gathered as necessary to Emptionem, et Venditionem, namely Consent, the Thing, and the Price. Concerning Consent it is clear *ex Leg. omnibus, ff. de verb. oblig.* Concerning the thing it is established *ex lege, Nec emptio, ff. de contrahend. empt.* Concerning the price it is established *ex dicta lege*, and the Doctors commonly teach it.

> *TRIA autem colliguntur necessaria ad Emptionem, et Venditionem, nempe Consensus, Res, et Pretium. De Consensu patet* ex Leg. omnibus, ff. de verb. oblig. *De re constat* ex lege, Nec emptio, ff. de contrahend. empt. *De pretio constat* ex dicta lege*, et docent communiter Doctores.*

6 It is PROVED, because this contract is obligatory in both directions; but there is no obligation without consent.

> *PROBATUR, quia hic contractus est ultro citroque obligatorius; obligatio autem sine consensu non est.*

7 NOTE, however, that the simple contract of Emptionis, et Venditionis entered into with the agreement of forming a written instrument is not perfect unless the writing is made; and any of the contracting parties can withdraw, because under that agreement and condition the contract was entered into, and therefore it is not held to be perfect unless purified, with the condition fulfilled. So the Doctors note on *leg. 2. ff. de contract. empt. et leg. contractus, Cod. de fide instrument. et Instit. de empt. et vendit. §. 1.* See Molinam *tom. 2. de Iustitia, tract. 2. disp. 337.* Fagundez *lib. 5. cap. 2.*

> *ADVERTE autem, simplicem contractum; Emptionis, et Venditionis initum cum conventione formandi scripturam non esse perfectum, nisi facta scriptura, et potest quilibet contrahentium resilire, quia sub ea conventione, et conditione initus fuit contractus, et ideo non censetur perfecta, nisi purificata, impletaque conditione. Ita advertunt Doctores ad* leg. 2. ff. de contract. empt. et leg. contractus, Cod. de fide instrument. et Instit. de empt. et vendit. §. 1. *Vide Molinam* tom. 2. de Iustitia, tract. 2. disp. 337. *Fagundez* lib. 5. cap. 2.

[8] But if mention of the writing has been made, the contract being already perfect, the writing is not necessary. Yet one of the contracting parties can compel the other that the writing be made for the easier proof of the contract, because what does not harm himself and benefits the other, each of the contracting parties is bound to effect. Now the instrument must be paid for by the one who compels the other in this case. See Molinam above with Fagundez.

> *QUOD si de scriptura facta est mentio, perfecto iam contractu non est necessaria scriptura. Potest tamen alter contrahentium compellere alium, ut scriptura fiat ad faciliorem probationem contractus, quia quod sibi non obest, et alteri prodest, tenetur quilibet contrahentium efficere. Instrumentum autem tenetur solvere, qui alium hoc casu cogit. Vide Molinam supra cum Fagundez.*

[9] IF, however, at the beginning of the contract there was agreement about making a writing, it is doubted whether they agreed to this for the greater firmness of the writing and its easier proof; or for the validity of the contract.

> *SI vero initio contractus conveniente de scriptura facienda, et dubitatur, an ad hoc convenerint ad maiorem scripturae firmitatem, et faciliorem probationem; an ad valorem contractus.*

[10] COMMONLY they respond that it must be held sufficient for the validity of the contract; others, however, say the opposite.

> *COMMUNITER respondent, eam censendam esse sufficientem ad valorem contractus; alii tamen oppositum dicunt.*

## Question II: Which persons can buy, and sell

[1] MOST certainly those who do not have the dominion and administration of things cannot perform these, as minors, wards (pupilli), the insane, sons of a family, and others, whom the S. Doctor relates as enumerated in *4. dist. 15. part. 2. art. 2. quaest. 1. ad 4. et disp. de contractibus in genere*.

> *CERTISSIME haec praestare nequeunt, qui non habent rerum dominium, et administrationes, ut minores, pupilli, amentes, filii familias, et alii, quos refert S. Doctor in* 4. dist. 15. part. 2. art. 2. quaest. 1. ad 4. et disp. de contractibus in genere*, sunt recensiti.*

[2] LUCRATIVE trading is illicit for Clerics and Religious, cap. *consequens*, where suspension is introduced, *dist. 88. et cap. fornicati, eodem titulo, et cap. negotiatorum, ibidem, et cap. ultimo, de vita, et honestate cleric.* Clement. V. *eodem titulo, et cap. 1. Ne clerici, vel monachi.* So most commonly the Doctors, and *in eo cap.* excommunication ferendae sententiae is imposed. Similarly the leasing of lands for the sake of gain and avarice is forbidden, *cap. pervenit, dist. 86.* where it is permitted only for sustenance.

> *MERCATURA lucrativa est Clericis, et Religiosis illicita, cap.* consequens*, ubi suspensio inducitur* dist. 88. et cap. fornicati, eodem titulo, et cap. negotiatorum, ibidem, et cap. ultimo, de vita, et honestate cleric. *Clement. V.* eodem titulo, et cap. 1. Ne clerici, vel monachi. *Sic communissime Doctores, et* in eo cap. *imponitur excommunicatio ferenda. Similiter vetita est conductio agrorum causa lucri, et avaritiae,* cap. pervenit, dist. 86. *ubi permittitur tantum ad sustentationem.*

[3] It is understood, however, of Clerics only in sacred orders. See Molinam *Tom. 2. disp. 342.*

> *INTELLIGITUR autem de clericis tantum in sacris. Vide Molinam* Tom. 2. disp. 342.

[4] JUDGES also, and others representing the Prince, are prohibited from buying and selling in the lands governed by themselves; see Molinam *disp. 343.*

*PROHIBENTUR etiam Iudices, et alii Principem repraesentantes, in terris a se gubernatis emere, et vendere, vide Molinam* disp. 343.

5 GUARDIANS, however, by the common law are bound, if wishing to buy the goods of their wards, to have a decree of the judge openly, and with the contract entered into in good faith. So Gama *decis. 217.* It is proved by *leg. si in Emptione, §. finali, verbo tutor, ff. de contrah. empt.;* provided it is done openly and in good faith, for those buying secretly through a friend are presumed to act in fraud. See Molinam *Tom. 1. disp. 224.*

*TUTORES vero iure communi tenentur, volentes emere bona suorum pupillorum, habere decretum iudicis palam, et bona fide inito contractu. Ita Gama* decis. 217. *Probatur* leg. si in Emptione, §. finali, verbo tutor, ff. de contrah. empt. dum fiat *palam et bona fide, nam secreto per amicum ementes praesumuntur de fraude. Vide Molinam* Tom. 1. disp. 224.

6 SPOUSES also can have such contracts with each other, and a son with his father concerning things that are his own. Concerning spouses it is had in *text. in leg. Aurelius, §. finali, ff. de liber. legat.* Concerning Father and son as regards Castrensian and quasi-Castrensian goods it is certain; for these belong entirely to the son.

*POSSUNT etiam coniuges invicem, et patri filius de his, quae sunt propria, habere tales contractus. De coniugibus habetur* text. in leg. Aurelius, §. finali, ff. de liber. legat. *De Patre, et filio quo ad bona Castrensia, et quasi Castrensia certum est; haec enim sunt penitus filii.*

7 The FATHER, however, cannot sell any of his goods to one son without the consent of the other sons; nor to one grandson without the consent of the other grandsons, or without the license of the King or Prince, when the latter cannot, or will not, give such consent; otherwise such contracts are void, and the purchasing son in punishment loses the price of those things, *leg. 2. ff. de contrah. empt.* See Molinam *tract. 2. disp. 343. alias 245.* And say the same of sons selling their things to their parents, by the rule of correlatives, as Fagundez notes *lib. 5. cap. 15. num. 4.* Rebell. *de oblig. iustit. part. 2. lib. 9. quaest. finali, sect. 3. num. 17.*; for the same reason holds in the ascendents.

*PATER vero nequit vendere filio uni aliqua sua bona absque consensu aliorum filiorum; neque uni nepoti absque consensu aliorum nepotum, aut sine licentia Regis, vel Principis, quando illi talem consensum praestare nequeunt, aut nolunt; alias tales contractus sunt irriti, et filius emptor in poenam amittit earum rerum pretium* leg. 2. ff. de contrah. empt. *Vide Molinam* tract. 2. disp. 343. alias 245. *Et idem dic de filiis vendentibus res suas parentibus ex regula correlativorum, ut notant Fagundez* lib. 5. cap. 15. num. 4. *Rebell.* de oblig. iustit. part. 2. lib. 9. quaest. finali, sect. 3. num. 17. *eadem enim ratio in ascendentibus militat.*

8 HENCE Fagundez deduces *num. 12.* that a Father cannot contract a loan with his son, nor a father with the son of a prior marriage, while others exist from the second.

*HINC deducit Fagundez* num. 12. *neque posse Patrem cum filio mutuum contrahere, neque patrem cum filio prioris matrimonii, existentibus e secundo aliis.*

9 SIMILARLY, if a father gives a field to this son for the payment of some money which he owed, it will be invalid, because it takes the place of a sale.

*SIMILITER, si pater donet filio huic agrum pro solutione alicuius pecuniae, quam debebat, erit invalida, quia habet vicem venditionis.*

## Question III: Which things can be sold

1 I SAY first, that a free man cannot be sold. Therefore if he is sold in bad faith as a slave, the seller is bound to the buyer for the price, and for all profit ceasing and loss accruing, and the sale is void of itself. If, however, he sold in good faith, thinking him to be a slave, the sale is void; yet he is not bound for the damages. See Molina *tract. 2. de Iust. disp. 340.* Lessius *lib. 2. cap. 14. dub. 13. num. 19.* Tannerus *disp. 4. quaest. 7. num. 55.*

> *DICO primo, Hominem liberum non posse vendi. Itaque si mala fide vendatur ut mancipium, tenetur venditor emptori de pretio, et de omni lucro cessante, et damno emergente, et venditio est nulla ipso facto. Si autem bona fide vendidit, putans, eum servum esse, venditio est nulla; non tamen tenetur damnis. Vide Molinam* tract. 2. de Iust. disp. 340. *Lessium* lib. 2. cap. 14. dub. 13. num. 19. *Tannerum* disp. 4. quaest. 7. num. 55.

2 HERE a doubt arises: Whether he to whom you have given your thing to sell can retain something of the price; as if you give him a horse, saying: sell it for at least forty gold pieces, and he sells it for forty-two, can he keep those two gold pieces; or if I have given a garment saying, if they give you ten gold pieces, give it; and he received twelve.

> *HIC oritur dubium: An ille, cui dedisti tuam rem vendendam, possit aliquid de pretio retinere, ut si ei des equum, dicens: vende quadraginta aureis saltem, et ille vendat quadraginta duobus, an possit haec duo aurea retinere; vel si dederim vestem dicens, si tibi decem aureos dederint, da; et ipse duodecim acceperit.*

3 I SAY that he is bound to give the whole to the seller, because he acquires no right in the price, neither by reason of the thing sold, which is another's, nor by reason of the labor, which I suppose is not esteemed so much, even though it be agreed that a reward for his labor be paid.

> *DICO, teneri totum dare venditori, quia nihil acquirit iuris in pretium, nec ratione rei venditae, quae est aliena, nec ratione laboris, quem suppono tanti non aestimari, etsi condictum sit solui mercedem laboris.*

4 IT IS ALSO DOUBTED: whether anyone can buy a chirograph containing a credit for a lesser price than the writing attests, on account of the anticipated payment; as if I hold a chirograph for a credit of one hundred gold pieces against John at S. Martin's: whether Peter can now anticipate in the month of June and buy the chirograph for ninety-five gold pieces.

> *DUBITATUR etiam: an possit aliquis emere Chirographum continentem creditum minoris pretii, quam scriptura testetur ob anticipatam solutionem, ut si ego habeo Chirographum centum aureorum crediti cum Ioanne ad S. Martinum: An Petrus possit nunc anticipare in mense Iunio emere Chirographum nonaginta quinque aureis.*

5 I SAY first that it is usurious, on account of the deferral alone, apart from a cause of profit ceasing or loss accruing, to buy such credits for less. So the Doctors commonly hold, with D. Bonavent. *in speculo animae, cap. 2. §. the second branch of the principal vice of avarice, etc.*

> *DICO primo, usurarium esse ob solam dilationem, excepta causa lucri cessantis, vel damni emergentis, talia credita minoris emere. Ita communiter DD. cum D. Bonavent.* in speculo animae, cap. 2. §. secundus ramus principalis avaritiae, etc.

6 I SAY second: if the chirograph contains a credit that is difficult and liable to litigation, you may buy the credit for less on account of these difficulties, in the judgment of a prudent man. Also by reason of profit ceasing, or loss accruing, you may buy these credits at a lesser price. So Valentia *quaest. 20. puncto 2. §. concl. 5.* Lessius *lib. 2. c. 21. dub. 18. num. 65.* Navar. *cap. 17. num. 231.* Tanner. *dub. 4. quaest. 7. num. 46.* Medina *Cod. de restit. quaest. 38.* D. Antonin. *2. tit. 1. cap. 8. §. 3. and 4.* Molina *disp. 361.*

*DICO secundo; si Chirographum continet creditum difficile, litigiis obnoxium, potes quid minus emere creditum ob has difficultates iudicio prudentis. Ratione etiam lucri cessantis, vel damni emergentis potes minori pretio emere haec credita. Ita Valentia* quaest. 20. puncto 2. §. concl. 5. *Lessius* lib. 2. c. 21. dub. 18. num. 65. *Navar.* cap. 17. num. 231. *Tanner.* dub. 4. quaest. 7. num. 46. *Medina* Cod. de restit. quaest. 38. *D. Antonin.* 2. tit. 1. cap. 8. §. 3. et 4. *Molina* disp. 361.

7 THE REASON is, because those difficulties diminish the price of the credit, and the labors spent in overcoming those difficulties demand a price. The same reason holds for profit ceasing.

*RATIO est, quia illae difficultates minuunt pretium crediti, et labores in illis evincendis difficultatibus, pretium exigunt. Eadem etiam ratio est de lucro cessante.*

8 THE WHOLE difficulty is, what is to be done when none of these applies.

*TOTA difficultas est, quid agendum, quando nihil horum subest.*

9 THE FIRST opinion grants that they may be bought for less for these reasons. First, because such chirographs are esteemed by the judgment of prudent men at less than the value of present money; but the just price is that which is judged by the judgment of prudent men, as Couar. *lib. 2. var. cap. 3.* teaches, and others cited in Fagundez *lib. 5. cap. 16. num. 11.* and Tannerus above. Bellarmine is cited among them.

*PRIMA opinio concedit, posse minoris emi ob has rationes: Prima est, quia talia Chirographa iudicio prudentum minoris aestimantur, quam valor pecuniae praesentis; iustum autem pretium illud est, quod iudicio prudentum iudicatur, ut docet Couar.* lib. 2. var. cap. 3. *et alii apud Fagundez* lib. 5. cap. 16. num. 11. *et Tannerum supra. Inter eos citatur Bellarminus.*

10 FURTHER, because he who buys those chirographs buys a right to recover the money they contain, *leg. minus, ff. de regulis iuris.* This right, throughout the whole time it is not paid, is useless and sterile to the buyer.

*DEINDE, quia emens illa Chirographa, emit ius ad recuperandam pecuniam, quam continent* leg. minus, ff. de regulis iuris. *Hoc autem ius toto tempore, quo non soluitur, est inutile, et sterile ementi.*

11 THIRDLY, otherwise the purchases of personal rents would be iniquitous, which are received in many places. Others subscribe with Diana *part. 1. tract. 8. resol. 49.*

*TERTIO, alioqui iniquae erunt emptiones censuum personalium, quae in pluribus locis sunt receptae. Subscribunt alii cum Diana* part. 1. tract. 8. resol. 49.

12 THE SECOND opinion wholly denies that in that case credits can be bought for less. So Medina *Cod. de restitut. quaest. 38.* Sotos *lib. 6. de Iust. quaest. 4. art. 3. ad 3.* Sylvester *V. usura, 2. quaest. 14.* Gabriel. *4. dist. 15. q. 11. dub. 14.* Lessius *lib. 2. cap. 21. dub. 8. num. 21.* Rebell. *2. part. de oblig. iust. lib. 5. quaest. 13.* Angelus *V. usura 1. num. 63.* Molina *Tom. 2. disp. 361.* Fagundez *lib. 5. cap. 16. num. 13.* Tanner. *loco cit.* Valentia *supra,* Sot. *lib. 6. quaest. 4. art. 1.* Bassaeus, *V. emptio, num. 18.* though he does not refuse the opposite.

*SECUNDA sententia negat omnino, posse eo casu minoris emi credita. Ita Medina* Cod. de restitut. quaest. 38. *Sotos* lib. 6. de Iust. quaest. 4. art. 3. ad 3. *Sylvester* V. usura, 2. quaest. 14. *Gabriel.* 4. dist. 15. q. 11. dub. 14. *Lessius* lib. 2. cap. 21. dub. 8. num. 21. *Rebell.* 2. part. de oblig. iust. lib. 5. quaest. 13. *Angelus* V. usura

1. num. 63. *Molina* Tom. 2. disp. 361. *Fagundez* lib. 5. cap. 16. num. 13. *Tanner.* loco cit. *Valentia* supra, *Sot.* lib. 6. quaest. 4. art. 1. *Bassaeus,* V. emptio, num. 18. *etsi oppositam non renuat.*

13 THE REASON is, because there is no foundation for this gain, and it opens the way to disguised usuries; for that right does not bring, as is supposed, any loss in that deferral of the real acquisition of the thing.

*RATIO est, quia nullum est fundamentum huius lucri, et aperit viam usuris palliatis; Illud enim ius non affert, ut supponitur, aliquod damnum in illa dilatione realis acquisitionis rei.*

14 AS FOR the works to which we are bound by justice, I have already shown in the *disp. de Iudice* that they cannot be sold. See Molina *Tom. 1. disp. 89.* and Lessius *lib. 2. cap. 14. dubio 8.*

*QUOAD opera, quibus ex iustitia tenemur, iam ostendi in* disp. de Iudice*, non posse ea vendi. Vide Molinam* Tom. 1. disp. 89. *et Lessium* lib. 2. cap. 14. dubio 8.

15 SIMILARLY, the works to which we are bound by vow are unsellable, because by these the one vowing is bound toward God by a kind of justice.

*SIMILITER et opera, ad quae tenemur ex voto, invendibilia sunt, quia his tenetur vovens ex quadam iustitia ad Deum.*

16 SAY the same of the works owed to a Prince, or Prelate, by virtue of obedience. They can, however, receive stipends for their sustenance, as D. Bonavent. notes, *ad 3. Lucae on the words: Contenti estote stipendiis vestris.*

*IDEM dic de operibus debitis Principi, vel Praelato ex virtute obedientiae. possunt tamen accipere stipendia ad suam sustentationem, ut notat D. Bonavent.* ad 3. Lucae in ea verba: Contenti estote stipendiis vestris

17 SIMILARLY, neither can they receive payment for works commanded by the Church. See Molina *disp. 91.*

*SIMILITER neque pro operibus praeceptis ab Ecclesia possunt mercedem accipere. Vide Molinam* disp. 91.

18 AS FOR prostitutes, although they receive a price validly and justly, and without obligation of restitution, it is indeed a payment for labor, yet they do not receive it licitly. Wherefore it is a sin, not against justice, but against the sixth precept, not to commit fornication, as D. Bonav. notes, in 4. dist. 15. p. 2. art. 2. quaest. 1. ad 4. Fagundez l. 5. cap. 18. num. 21.

*QUOAD meretrices, licet pretium accipiant valide, et iuste, et sine obligatione restituendi, quidem laboris, non tamen licite illud accipiunt. Quare peccatum est, non contra iustitiam, sed contra sextum praeceptum non moechandi, ut notat D. Bonav. in 4. dist. 15. p. 2. art. 2. quaest. 1. ad 4. Fagundez l. 5. cap. 18. num. 21.*

19 AS FOR works of mercy outside the appointed time, when we are compelled by precept, such as teaching even Theology, serving the infirm, etc., they can be sold; for not all things spiritual are invisible, but those which are from the Holy Spirit. These, to be sure, are sold simoniacally.

*QUOD ad opera misericordiae extra tempus, cum ex praecepto cogimur, ut docere etiam Theologica, servire infirmis, etc. potest vendi; neque enim omnia spiritualia invisibilia sunt, sed ea quae sunt a Spiritu sancto. Haec sane venduntur simoniace.*

20 AS FOR sacred things, they cannot be sold. See Fagundez l. 5. cap. 19. but we treat of this below, Tract. de votis, disput. 12. quaest. 3. They can, however, be sold by reason of the material, as Tanner. num. 55. Azor. T. 3. l. 8. cap. 5. quaestio 1. notes, according to the C. Ligna, de consecrat. dist. 1. can.

Aurum, and can. Apostolicos, and can. Sacrorum, 12. quaest. 2. on which matter I spoke briefly, tom. 4. disp. 17. quaest. 10. ad proposit. 22.

> *QUOD res Sacras nequeunt vendi. Vide Fagundez l. 5. cap. 19. sed nos de hoc infra Tract. de votis, disput. 12. quaest. 3. Possunt tamen vendi ratione materiae, ut notat Tanner. num. 55. Azor. T. 3. l. 8. cap. 5. quaestio 1. iuxta C. Ligna, de consecrat. dist. 1. can. Aurum, et can. Apostolicos, et can. Sacrorum, 12. quaest. 2. de qua re egi laconice tom. 4. disp. 17. quaest. 10. ad proposit. 22.*

21 AS FOR entering Religion, although to receive something for entering religion on account of a price is simoniacal, nevertheless a price for food and clothing can be received. See Less. l. 2. cap. 35. dub. 12. num. 71. Suarez T. 1. de relig. l. 4. cap. 17. with D. Thom. in 4. dist. 25. quaest. 3. art. 3. quaest. 1.

> *QUOD ad Religionem, tametsi accipere aliquid ad religionem ob pretium sit simoniacum, tamen potest accipi pretium victus, et vestitus. Vide Less. l. 2. cap. 35. dub. 12. num. 71. Suarez T. 1. de relig. l. 4. cap. 17. cum D. Thom. in 4. dist. 25. quaest. 3. art. 3. quaest. 1.*

22 THE REASON is, because what is sold is the temporal, not the spiritual, nor is there any decree forbidding it. If, however, the monastery is wealthy, then the interpreters of law commonly cry out that it is simony; and it is gathered from the chapter Tua nos, de simonia; and the C. veniens ad nos, and the chapter dilectus 2. of the same title.

> *RATIO est, quia venditur temporale, non autem spirituale, neque est aliquod decretum id vetans. Si tamen monasterium opulentum sit, tunc simoniam esse conclamant communiter Iuris interpretes, et colligitur ex cap. Tua nos, de simonia; et C. veniens ad nos, et cap. dilectus 2. eodem titulo.*

23 There REMAINS labor in spiritual works. Many distinguish labor as intrinsic and extrinsic. The intrinsic is that which is morally included in the sacred action, as the labor of a priest in singing Mass, of a preacher in preaching. The other is extrinsic labor, for instance in going to a remote place to preach or celebrate. So Fagundez l. 5. de contract. cap. 21.

> *REMANET labor in operibus spiritualibus. Distinguunt autem multi laborem in intrinsecum, et extrinsecum. Intrinsecus est, qui in actione sacra moraliter includitur, ut labor in cantando Missam, Concionatoris in concionando. Alter est labor extrinsecus, puta eundo ad locum remotum ad concionandum, vel celebrandum. Ita Fagundez l. 5. de contract. cap. 21.*

24 D. BONAVENT. in speculo animae, cap. 2. says that to sell something spiritually annexed is simony. But it is lawful to receive, or give, for labor and sustenance according to good customs.

> *D. BONAVENT. in speculo animae, cap. 2. ait, vendere aliquid spiritualiter adnexum, esse simoniam. Licere autem pro labore, et sustentatione secundum bonas consuetudines accipere, seu dare.*

25 The spiritual ANNEX making it simoniacal the holy Doctor seems to understand as that which is itself also spiritual, as appears in 4. dist. 25. dub. 5. litt. or something intrinsically joined, as the sacrament of order joined to it, which is the very consecration intrinsically joined to the spiritual, or when a prebend is sold, or if the spiritual annexed to the spiritual is sold; as preaching. So p. 1. Censit. sect. 30.

> *ADNEXUM autem spirituale faciens simoniacum videtur S. Doctor accipere id, quod est etiam spirituale, ut patet in 4. dist. 25. dub. 5. litt. aut aliquid intrinsece coniunctum, ut ordinationem sacram adiunctam, quae est ipsa sacratio*

*intrinsece coniuncta spirituali, vel cum venditur praebenda, vel si venditur spirituale adnexum spirituali; ut praedicatio. Ita p. 1. Censit. sect. 30.*

26 WHEREFORE he does not seem to understand labor in the way those cited above understand it, such that to sell the labor I expend per se in singing Mass, or preaching, would be simony; but I judge that labor is unsellable which is spent on devotion, attention, or intention; but the labor which I expend per se, not only in undertaking a long journey, but in standing in the church, singing, and crying out, I judge to be priceable; and in this sense (as I believe) D. Thom. spoke in 4. dist. 25. quaest. 4. art. 2. Durand. there, quaest. 3. Sylvester v. Simonia, quaest. 9. Malder. de simonia, tract. 9. cap. 3. dub. 6. Filliuc. cap. 1. quaest. 11. Reginald. l. 23. disp. 228. Sotus l. 9. quaest. 6. art. 1. Less. T. 1. l. 2. cap. 35. dub. 8. Suarez T. 1. de Relig. l. 4. de simonia, cap. 21. num. 10.

*QUAPROPTER non videtur eo modo accipere laborem, sicut accipiunt supra allati, ita, ut vendere laborem, quem insumo per se cantando missam, vel praedicando, sit simonia; sed arbitror, eum laborem esse invendibilem, qui in devotione, attentione, seu intentione collocatur: at labor, quem per se insumo, non modo longum iter assumendo, sed stando in Ecclesia, canendo, et clamando, esse appretiabilem arbitror, et hoc sensu (ut reor) locuti sunt D. Thom. in 4. dist. 25. quaest. 4. art. 2. Durand. ibi, quaest. 3. Sylvester v. Simonia, quaest. 9. Malder. de simonia, tract. 9. cap. 3. dub. 6. Filliuc. cap. 1. quaest. 11. Reginald. l. 23. disp. 228. Sotus l. 9. quaest. 6. art. 1. Less. T. 1. l. 2. cap. 35. dub. 8. Suarez T. 1. de Relig. l. 4. de simonia, cap. 21. num. 10.*

27 Others, however, assert it more clearly, whom Malderus cites loc. cit. and Bonacina de simonia, quaest. 6. p. 5. saying that the labor per se enjoined on a spiritual work can licitly be priced, and for the greater labor a greater price demanded, for instance, if the priest is fatter, or the preacher feeble. Nay, Valentia says something more, disp. 6 quaest. 16. p. 1. citing Gabriel, Caietan, Soto, and others; and Tanner. 2. 2. dist. 5. quaest. 8. dub. 3. num. 76. and Suarez loc. cit. num. 17. with whom Diana adheres, p. 1. tract. 16. resol. 29. Bassaeus v. Emptio, num. 5. warning that the price of a thing cannot be increased on account of the spiritual annexed, for instance of a chalice, etc. or of a field on account of the right of patronage, though he does not wholly refuse the opposite.

*CLARIUS autem id asserunt alii, quos refert Malderus loc. cit. et Bonacina de simonia, quaest. 6. p. 5. dicentes, posse licite laborem appretiari per se iniunctum operi spirituali, et pro maiori labore, maius pretium exigi, puta, si Sacerdos est pinguior, vel Concionator imbellis. Imo aliquid amplius dicit Valentia disp. 6 quaest. 16. p. 1. referens Gabrielem, Caietanum, Sotum, et alios, ac Tanner. 2. 2. dist. 5. quaest. 8. dub. 3. num. 76. atque Suarez loc. cit. num. 17. quibus adhaeret Diana p. 1. tract. 16. resol. 29. Bassaeus v. Emptio, num. 5. monens, non posse augeri pretium rei ob spirituale adnexum, puta calicis, etc. vel agri ob ius patronatus, etsi non renuat omnino oppositum.*

28 But if payment may be received only for the extrinsic, per accidens occurring labor, as Fagundez says n. 3., such as a long journey to Mass, or fasting for many hours; alas, how many simoniacs shall we stuff into that class? D. Bonav. teaches, ad cap 2. Ioan. that Christ cast out those selling oxen, that is, those who sell the labor of preaching for a temporal price.

*QUOD si tantum ob extrinsecum, et per accidens occurrentem laborem, liceat mercedem accipere, ut ait Fagundez n. 3. qualis est longi itineris ad missam, vel ieiunii ad multas horas; heu quot simoniacos infarsiemus? Docet D. Bonav. ad cap 2. Ioan. Christum eiecisse vendentes boves, idest, qui laborem praedicationis pretio temporali vendunt.*

29 AS FOR secular offices: whether they can be sold, many indeed deny; because such offices are the object of distributive justice, and are to be conferred on the worthier. So Medina C. de restit. quaest. 4. de usuris, Adrian. in 4. quaest. de usura Torrianus 2. 2. T. 2. disp. 23. dub. 2. num. 5. and to this

end the sole law contributes, Cod. ad Legem Iuliam de ambitu, which forbids anyone to be promoted to public office for a price and by ambition.

> *QUOAD officia saecularia: an vendi possint, multi quidem negant; eo quod talia officia sint obiectum distributivae, et dignioribus conferenda. Ita Medina C. de restit. quaest. 4. de usuris, Adrian. in 4. quaest. de usura Torrianus 2. 2. T. 2. disp. 23. dub. 2. num. 5. et facit ad hoc Lex unica, Cod. ad Legem Iuliam de ambitu, quae prohibet, aliquem promoveri ad officium publicum pro pretio, et ambitione.*

30 Castaneus smiles upon this, p. 1. Catal. gloriae mundi, consider. 60. elsewhere fol. 38. The Gloss on the C. sicut 1. quaest. 6. Bouët. decis. 149. Caietan. in offi.. Avendan. resp. 9. col. 2. Fagundez l. 5. cap. 13.

> *ARRIDET Castaneus p. 1. Catal. gloriae mundi, consider. 60. alias autem fol. 38. Glossa in C. sicut 1. quaest. 6. Bouët. decis. 149. Caietan. in offi.. Avendan. resp. 9. col. 2. Fagundez l. 5. cap. 13.*

31 Others, however, allege that Princes can sell those offices, provided they dispense them moderately, and to worthy men, and for the utility of the Republic, so that some great sum may be raised which would otherwise not be had. So teach Less. l. 1. cap. 32. dub. 4. num. 29. Aragon. 2. 2. quaest. 63. art. 2. Villalobos T. 1. tract. 8. difficult. 7. Ioan. de Cruz in directorio, p. 2. punct. 7. quaest. 7. art. 2. dub. 10. con. l. 3. Ledefma in summa, T. 2. tract. 7. cap. 1. concl. 15. Salon. 2. 2. T. 1. quaest. 63. art. 2. controu. 8. Ibidem Sylvius, Tanner. disp. 5. quaest. 7. p. 2. §. 5. ad 3. Malderus 2. 2. tract. 9. cap. 1. Bassaeus num. 8. dub. 5. Rebell. l. 9. quaest. 18. sect. 2. num. 24. and others in Diana tract. 5. Miscell. resol. 108. he adds Azorius T. 3. l. 8. cap. 7. quaest. 3. Filliuc. t. 1. tract. 24. p. 2. cap. 2. Corduba summa quaest. 117. Fagundez adds l. 5. cap. 23. Valentiam disp. 5. quaest. 7. p. 2. §. 5. ad 3.

> *ALII vero afferunt posse Principes vendere illa officia, dummodo moderate, et dignis ea dispensentur, et ob Reipublicae utilitatem ad Summam aliquam conflandam, quae aliter non haberetur. Ita docent Less. l. 1. cap. 32. dub. 4. num. 29. Aragon. 2. 2. quaest. 63. art. 2. Villalobos T. 1. tract. 8. difficult. 7. Ioan. de Cruz in directorio, p. 2. punct. 7. quaest. 7. art. 2. dub. 10. con. l. 3. Ledefma in summa, T. 2. tract. 7. cap. 1. concl. 15. Salon. 2. 2. T. 1. quaest. 63. art. 2. controu. 8. Ibidem Sylvius, Tanner. disp. 5. quaest. 7. p. 2. §. 5. ad 3. Malderus 2. 2. tract. 9. cap. 1. Bassaeus num. 8. dub. 5. Rebell. l. 9. quaest. 18. sect. 2. num. 24. et alii apud Dianam tract. 5. Miscell. resol. 108. addit is Azorium T. 3. l. 8. cap. 7. quaest. 3. Filliuc. t. 1. tract. 24. p. 2. cap. 2. Cordubam summa quaest. 117. Addit Fagundez l. 5. cap. 23. Valentiam disp. 5. quaest. 7. p. 2. §. 5. ad 3.*

32 D. Thom. also grants it licit in his reply to the Duchess of Brabant, opusculo 21. Sylvester, v. dignitas, num. 4. Baldus l. Barbarius, lectura 1. num. 6. ff. de offic. Praetoris, Vallascus in praxi de partitionibus, cap. 13. num. 67.

> *EAM licitam concedit etiam D. Thom. in resp. ad Ducissam Brabantiae, opusculo 21. Sylvester, v. dignitas, num. 4. Baldus l. Barbarius, lectura 1. num. 6. ff. de offic. Praetoris, Vallascus in praxi de partitionibus, cap. 13. num. 67.*

33 D. Thom. APPENDS, however, certain inconveniences, on account of which he does not readily adopt this.

> *APPONIT tamen D. Thom. aliqua inconvenientia, ob quae haec non expedite assumit.*

34 AS FOR S. Bonav., I judge him to be for the second opinion; for in speculo animae, cap. 2., toward the end, §. Item, ut dictum est, to prove simony illicit, he argues, because we are not lords of spiritual things; but concerning temporal dignities he does not say in that entire division of sins that their sale

is illicit; nay, he seems to infer that it is licit from the opposite reason adduced, and because there, where he sets forth all the species of sins as in a mirror to the soul itself, he deliberately omits this sale.

> *QUOAD S. Bonav. arbitror, esse pro secunda sententia; nam in speculo animae, cap. 2. finem versus §. Item, ut dictum est, ut probet illicitam simoniam, arguit, quia rerum spiritualium non sumus Domini; de temporalibus autem dignitatibus non dicit in illa tota divisione integra peccatorum, esse illicitam venditionem, imo videtur inferre, esse licitam ex ratione allata opposita, et quia inibi, ubi omnes species peccatorum obiicit, tanquam in speculo, ipsi animae, consulto hanc venditionem omittit.*

35 FURTHER, he seems to be of this opinion also in 3. dist. 40. dub. 2. litt. at the words: *Non concupisces domum proximi tui*, where he puts forward this argument: *What Peter may acquire, he may desire:* and answers that it is licit to desire moderately what is licit to buy, and at once adds concerning honors and dignities, insofar as they are useful temporally, whose pursuit belongs to avarice, he says, they may be moderately desired; and he infers that they may also be bought.

> *DEINDE videtur huius sententiae etiam in 3. dist. 40. dub. 2. litt. ad illud:* Non concupisces domum proximi tui, *ubi opponit Argumentum hoc:* Quod licet Petro acquirere, licet concupiscere: *Et respondet licere desiderare moderate, quod licet emere, et statim addit de honoribus, et dignitatibus sane, ut utiles sunt temporaliter, quarum ambitus ad avaritiam spectat, ait, posse moderate appeti; et infert, posse et emi.*

36 THE BEST reason is that included in D. Bonav., while he supposes these things buyable by public and ancient custom. For thus Princes and Kings sell offices, having even jurisdictions annexed, and indeed usefully, not only for the treasury, but also for the peoples: these, fearing to lose those dignities which they had bought at such a price, are held the more to their duty. It is confirmed because, as S. Bonav. tacitly indicates in that Opuscle in which he sets forth all sins to a nicety, and adduces the laws, he professes to find no law against this. I do not indeed judge that all Princes are destitute of counsel, or of counselors; but I hold as most certain that they act on these matters most prudently with the counsels of wise Theologians, especially because even the most holy Princes exercised these things in practice with the same upright men. Nor do these things harm distributive justice, for they can be sold to the better men.

> *OPTIMA ratio est, quae in D. Bonav. includitur, dum haec supponit publica, et antiqua consuetudine vendibilia. Sic enim Principes, et Reges vendunt officia, habentia etiam iurisdictiones adnexas, et quidem utiliter non modo aerario, sed etiam populis: hi timentes eas dignitates, quas tanti emerant, perdere, magis in officio continentur. Confirmatur, quia, ut S. Bonan. tacite indicat eo Opusculo, in quo omnia ad unguem peccata menti obiicit, Iuraque adducit, nullum contra hoc ius se invenire profitetur. Non arbitror sane, omnes Principes consilii esse inopes, vel consiliariorum;sed certo certius existimo, prudentissime eos sapientum Theologorum consiliis haec agere, maxime quia etiam sanctissimi Principes, iisdem probis, haec in praxi exercerent. Neque haec distributio iustitiae obsunt, possunt enim vendi melioribus.*

37 By the counsel indeed of Justinian's wife a law was made that henceforth the offices of the judiciary should not be sold in amb. So that judges be made without any suffrages, as Cassanaeus, cited above, relates. And S. Louis, King of France, ordained the same, as Gaguinus relates, l. 6. cap. 2. And Pius V. by his motu proprio *Etsi Romani*, and Sixtus V. *Cum pro suprema*, forbid the procurement and assertion of any dignities having that right for a middling price, under penalties of confiscation of goods, etc. See Diana *p. 3. tract. 5. resol. 108. Miscellan.*

*Uxoris sane Iustiniani consilio facta est lex, quod de caetero officia Iudicaturae non vendantur in camera. Ut Iudices sine quaequo suffragia fiant, ut refert Cassanaeus allatus. Et S. Ludovicus Rex Franciae id ordinavit, ut refert Gaguinus l. 6. cap. 2. Et Pius V. motu proprio* Etsi Romani*, et Sixtus V.* Cum pro suprema*, vetant procurationem, et assersionem aliquarum dignitatum habentium ius medio pretio sub poenis confiscationis bonorum, etc. Vide Dianam* p. 3. tract. 5. resol. 108. Miscellan.

38 I CONFESS the matter is ill done, since what should be done by virtue is treated with money, as Cicero says, whom Baldus cites in the *Leg. Barbarius*.

*FATEOR, rem male agi, cum quod virtute fieri debet, pecunia tractatur, ut dicit Cicero, quem refert Baldus in* Leg. Barbarius.

39 I say, these things were said with the best zeal, lest justice be sold, *Leg. Quisquis, C. si certum patet;* they enacted this cautiously as regards the power of judging, on account of the great peril of avarice; for those who buy praetorian offices so dearly wish to stuff the crimes of their subjects into them, as I have often seen in the praetorships of rhetors, where all offices are for sale. Yet if this is done cautiously and prudently, the dangers will be removed.

*Dico, haec optimo zelo dicta, ne iustitia vendatur* Leg. Quisquis, C. si certum patet*, hoc caute sanxerunt quoad potestatem iudicandi ob grande periculum avaritiae; qui enim tam caro emunt officia praetoria, volunt in criminibus subditurum refarciri, ut saepius vidi in Praetoriis Rhetorum, ubi omnia venalia sunt officia. Attamen si caute, et prudenter id fiat, auferentur pericula.*

40 A QUESTION, namely, concerning those who hold such offices with the power of transferring them to another, for instance to a kinsman or friend; whether they can also sell it.

*QUAESTIO vel id est de his, qui habent talia officia cum potestate transferendi ea in alium, puta in consanguineum, vel amicum; an possint etiam illud vendere.*

41 THE Doctors COMMONLY affirm it. So Corduba, *quaest. 117.* Ioan. de la Cruz *in doct. p. 1. praecept. 7. quaest. 7. art. 2. dub. 10* and others with Diana *Tract. 5. Miscell. resol. 109.* and Fagundez *de contract. l. 5. cap. 23. num. 21.* The reason is, because that liberty tacitly includes also the power of selling, since the manner of transferring is not limited. Bassaeus *num. 8.* accedes to these.

*COMMUNITER affirmant DD. Ita Corduba,* quaest. 117. *Ioan. de la Cruz* in doct. p. 1. praecept. 7. quaest. 7. art. 2. dub. 10 *et alii cum Diana* Tract. 5. Miscell. resol. 109. *et Fagundez* de contract. l. 5. cap. 23. num. 21. *Ratio est, quia ea licentia includit tacite etiam potestatem vendendi, cum non limitetur modus transferendi. Accinit his Bassaeus* num. 8.

42 Many ADD, with Diana, that he can reserve to himself some pension in transferring such an office; but Fagundez, struck with fear, does not smile upon this.

*ADDUNT multi cum Diana, posse hunc reservare sibi aliquam pensionem in transferendo tali officio; sed Fagundez timore perculsus, huic non arridet.*

43 Things are SELLABLE even in hope, as the offspring of handmaids, of cattle, the cast of fisheries, hunts, and fowling: for these can be given in pledge, *L. et quae nondum sunt, ff. de pignoribus:* therefore also sold. Yet among these some are sold conditionally, as the fruits of a field, the offspring of a handmaid, namely if they be born; others absolutely, as the cast of a fishery, etc. So Molina *T. 2. disp. 340.* Gomez *t. 2. variar. cap. 2.* Fagundez *cap. 24. Libri 5. man. 6.*

*VENDIBILES sunt res etiam in spe, ut partus ancillarum, pecorum, iactus piscationum, venationes, et aucupia: Haec enim possunt dari hypothecae* L. et quae nondum sunt, ff. de pignoribus: *Ergo et vendi. In his tamen aliqua venduntur conditionate, ut fructus agri, partus ancillae, nempe si nascantur; alia vero absolute, ut iactus piscationis, etc. Ita Molina* T. 2. disp. 340. *Gomez* t. 2. variar. cap. 2. *Fagundez* cap. 24. Libri 5. man. 6.

44 Poisons are also SELLABLE, which can serve for colors or other uses of pure mixture, but not the rest. See Molina *disp. 340.*

*VENDIBILIA sunt etiam venena, quae vel ad colores, vel alios usus, purae commixtionis, inservire possunt, non autem caetera. Vide Molinam* disp. 340.

45 All goods present and future are also SELLABLE. So Molina *loc. cit.* Fagundez *lib. 5. cap. 25.*

*VENDIBILIA sunt etiam omnia bona praesentia, et futura. Ita Molina* loc. cit. *Fagundez* lib. 5. cap. 25.

46 AS FOR things belonging to another, I suppose, with D. Bonav. in *speculo animae, cap. 2. and in 4. dist. 15. p. 1. art. 2. quaest. 1.* that one can be a possessor of another's thing, which he sells, in two ways. First in good faith; second in bad faith. The possessor in good faith is he who thinks the thing to be his; in bad faith, he who knows it to be another's. See Panormitanum in the *cap. gravis, de resti. spoliatorum, and it appears from the cap. si virgo, 24. quaest. 1. in se. unam parte decreti.* I have said enough of these, when treating of restitution and the rest.

*QUOAD res alienas, suppono cum D. Bonav. in* speculo animae, cap. 2. et in 4. dist. 15. p. 1. art. 2. quaest. 1. *dupliciter posse aliquem esse possessorem rei alienae, quam vendit. Primo bonae fidei: Secundo malae fidei. Possessor bonae fidei est, qui putat, rem esse suam: malae fidei est, qui novit, esse alienam. Vide Panormitanum in* cap. gravis, de resti. spoliatorum, et patet ex cap. si virgo, 24. quaest. 1. in se. unam parte decreti. *De his satis egi, cum de restitutione, et caeteris.*

47 It is CERTAIN, therefore, that a possessor in bad faith cannot sell. The reason of D. Bonaventure, which all use, is, because by a sale dominion ought to be transferred from the seller to another: but such a possessor has no dominion of the thing; nay, he is in continuous delay of the obligation of restitution, even of the fruits.

*CERTUM est igitur, possessorem malae fidei vendere non posse. Ratio D. Bonaventurae, qua omnes utuntur, est, quia Venditione transferri debet dominium a vendente in alium: at talis possessor non habet rei dominium, imo est in continua mora obligationis ad restitutionem etiam fructuum.*

48 A possessor in good faith CAN also sell the thing, as long as he prudently thinks it his own: but as soon as he has recognized the thing to be another's, he is bound to restore it to its lord, as I said concerning restitution.

*POTEST etiam possessor bonae fidei rem vendere, quamdiu prudenter putat esse suam: statim vero ac rem esse alienam agnoverit, tenetur eam domino restituere, ut dixi de restitutione.*

49 It SOMETIMES happens that, by reason of place or time, a sale is illicit; as to bring things for sale to a church or a sacred place, that they may be sold there, is a mortal sin. So D. Thom. *prima Corinth. 2.* on the words: *Numquid domos non habetis ad manducandum, et bibendum?* And he alleges the deed of Christ *cap. 2. Ioan.* when he cast out all who were selling.

*EVENIT aliquando, ut ratione loci, vel temporis, venditio sit illicita, ut deferrentur venalia ad Ecclesiam, vel locum Sacrum, ut vendantur, peccatum est mortiferum. Ita D. Thom.* prima Corinth. 2. *ad ea verba:* Numquid domos

non habetis ad manducandum, et bibendum? *Et allegat factum Christi* cap. 2. Ioan. *quando eiecit omnes vendentes.*

50 By the same argument it is proved by D. Bonavent. *ad cap. 2. Ioan.* and he confirms it by the authority of D. Chrysostom *homil. 22. in Matt. and l. 2. de civitate, cap. 20.* from which the holy Doctor deduces that it was a grave fault, that is, a grave irreverence. The same teach Molina *t. 1. de iustitia, disp. 44.* Sylvest. *v. immunitas,* Panorm *in cap. cum Ecclesia, de immunit.* and the Council of Trent smiles upon it, *Sess. 22. in the decree on what is to be observed and avoided in the celebration of Mass.*

*EODEM argumento probatur a D. Bonavent.* ad cap. 2. Ioan. *et confirmat authoritate D. Chrysostomi* homil. 22. in Matt. et l. 2. de civitate, cap. 20. *ex quo deducit S. Doct. fuisse culpam gravem, idest, gravem irreverentiam. Idem docent Molina* t. 1. de iustitia, disp. 44. *Sylvest.* v. immunitas, *Panorm* in cap. cum Ecclesia, de immunit. *et arridet Concilium Trident.* Sess. 22. decreto de observandis, et vitandis in celebr. miss.

51 FURTHERMORE, in perjuries, lies, and other vices which arise not from the sale itself, but from the wickedness of the sellers and buyers, the sale is rendered entangling and sinful, as all confess with D. Bonav. *in speculo animae, cap. 2.* Nay, if a lie and perjury are committed to deceive the buyer, that he may buy beyond and above the just price, it is mortal against justice, and the seller is bound to restitution under mortal sin, if the buyer for that reason buys beyond the rigorous price, and if the excess is grave; but it will be venial if he slightly exceeds the just price, as D. Bonav. teaches *loc. cit.* Molina *T. 2. disp. 346.* Fagundez *l. 5. cap. 27.*

*PRAETEREA in periuriis, mendaciis, et aliis vitiis, quae proveniunt, non ex ipsa venditione, sed ex vendentium, et ementium nequitia, illicia, et peccaminosa redditur venditio, ut omnes fatentur cum D. Bonav.* in speculo animae, cap. 2. *Imo, si mendacia, et periuria fiam ad fallendum emptorem, ut ultra, et supra iustum pretium emat, mortale est contra iustitiam, et tenetur venditor ad restitutionem sub mortali, si emptor ideo ultra rigorosum pretium emat, et si excessus sit gravis: Veniale autem erit, si leviter iustum pretium excedat, ut docet D. Bonav.* loc. cit. *Molina* T. 2. disp. 346. *Fagundez* l. 5. cap. 27.

52 There are, however, certain things having no determined price, as exotic things from the new world, about which it is asked: whether their lords can sell them for whatever they wish.

*SUNT vero res aliquae, non habentes pretium terminatum, ut peregrinae e novo mundo, de quibus quaeritur: an possint vendi, quanti velint domini earum.*

53 It seems to me MORE PROBABLE that some price is to be held, to be set by the judgment of a prudent man, reckoning what must be reckoned. So Navar. *sum. l. 23. num. 78.* Less. *l. 2. cap. 21. dub. 3.* Caiet. *2. 2. quaest. 77. art. 1.* Caspens. *Tract. 19. disp. 4. sect. 2.* and others commonly, in Fagundez *l. 5. de contract. cap. 28.* Although some, in him and in Diana *p. 1. Tract. 8. resol. 36.* hold the opposite; whom Bassaeus also cites *num. 8.* thinking with us.

*MINI probabilius est, haberi pretium aliquod iudicio prudentis apponendum; computatis computandis. Ita Navar.* sum. l. 23. num. 78. *Less.* l. 2. cap. 21. dub. 3. *Caiet.* 2. 2. quaest. 77. art. 1. *Caspens.* Tract. 19. disp. 4. sect. 2. *et alii communiter apud Fagundez* l. 5. de contract. cap. 28. *Tametsi nonnulli apud hunc, et Dianam* p. 1. Tract. 8. resol. 36. *oppositum sentiant; quos refert etiam Bassaeus* num. 8. *nobiscum sentiens.*

54 THE REASON is, because things for sale are not to be determined by the seller alone; otherwise most grave inconveniences would arise; nor are these of better condition than other things; nay, since they are not necessary, they ought not to plunder the peoples.

*RATIO est, quia res venales non sunt determinandae a solo venditore; alioqui gravissima inconvenientia orientur; Neque haec sunt melioris conditionis, quam res caeterae, imo; cum necessariae non sint; non debent expilare populos.*

55 Things also NECESSARY for life ought to be sold in great necessities, and men can be compelled for the public good; and to hide such things is a most grave sin, if otherwise their price rises, or the poor suffer gravely. So D. Bonavent. *in speculo animae, cap. 2. at the end.* He proves it from that *Lucae 12.* of the man who had indeed gathered many goods, to whom the sentence of death and damnation was pronounced: *Stulte, hac nocte animam tuam repetent a te.* He proves the same ad 12. *Lucae.* And this also concerning cloth and other necessaries teach *Barthol. l. 1. C. de Episcopali audient. Tabiena v. emptio, num. 6. Couar. l. 3. var. cap. 14.* binding others *Panormit. and alii in cap. 1. de empt. et vendit. and l. 2. ff. de nundinis, and l. 1. Cod. ne nemini liceat in empt. Matth. de Afflictis quaest. 3. in prooem. constit. Neapol. Felinus in cap. 1. de Iudaeis.* Therefore a Judge, in time of charity or famine, can fix the price and impose penalties on victuals, as *Molina T. 2. de Iustitia, disp. 341. Syluest. v. emptio, quaest. 4. Couar. l. 3. var. cap. 14. Gomez t. 2. var. cap. 2.* teach, and it is clear *from l. 1. §. cura carnis, ff. de offici. Praetoris urbis.*

*RES quoque victui necessariae debent in magnis necessitatibus vendi, et cogi possunt homines ob bonum publicum, et ea abscondere gravissimum peccatum est, si alioqui pretio ascendant, vel patiantur graviter pauperes. Ita D. Bonavent.* in speculo animae, cap. 2. ad finem. *Quod probat illo* Lucae 12. *Qui multa bona sua quidem congregaverat, cui indicta est mortis sententia, et damnationis:* Stulte, hac nocte animam tuam repetent a te. *Idem probat ad 12.* Lucae. *Et hoc etiam de panno, et aliis necessariis docent* Barthol. l. 1. C. de Episcopali audient. Tabiena v. emptio, num. 6. Couar. l. 3. var. cap. 14. *alligans alios* Panormit. et alii in cap. 1. de empt. et vendit. et l. 2. ff. de nundinis, et l. 1. Cod. ne nemini liceat in empt. Matth. de Afflictis quaest. 3. in prooem. constit. Neapol. Felinus in cap. 1. de Iudaeis. *Itaque potest Iudex tempore charitatis, aut annonae, praefigere pretium, et poenas imponere victualiis, ut docent* Molina T. 2. de Iustitia, disp. 341. Syluest. v. emptio, quaest. 4. Couar. l. 3. var. cap. 14. Gomez t. 2. var. cap. 2. *et patet* ex l. 1. §. cura carnis, ff. de offici. Praetoris urbis.

56 FINALLY I add, that it is licit to buy things so that the same, when altered, may be sold dearer, for the sake of gain, and this toward the good end of supporting a family, etc. So *D. Bonau. loco citato* whom *Molina T. 2. disp. 239. Less. l. 2. cap. 21. dub. 1. D. Thom. 2. 2. quaest. 77. art. 4. Sotus de Iustitia, l. 6. quaest. 2. art. 1. Benuenutus tract. de mercatura, cap. 1. num. 28. Cuniaph. 1. decret. ord. C. Fornicari disp. 88.* follow, where it is proved also from *D. Augustino.*

*TANDEM addo, licere emere res, ut eaedem immutatae carius vendantur causa lucrandi, et hoc ad bonum finem alendae familiae, etc. Ita* D. Bonau. loco citato *quem sequuntur* Molina T. 2. disp. 239. Less. l. 2. cap. 21. dub. 1. D. Thom. 2. 2. quaest. 77. art. 4. Sotus de Iustitia, l. 6. quaest. 2. art. 1. Benuenutus tract. de mercatura, cap. 1. num. 28. Cunha l. 1. decret. ord. C. Fornicari disp. 88. *ubi id probatur etiam ex* D. Augustino.

57 Nor does *D. Chrysost. cited in that C.* stand in the way, where he says, *a merchant cannot please God.* For he speaks of those who place their ultimate end in trade, being ready to offend God mortally.

*NEQUE obstat* D. Chrysost. relatus eo C. *ubi ait,* mercatorem non posse Deo placere. *Loquitur enim de ponentibus in mercatura ultimum finem, parati mortifere Deum offendere.*

## Question IV: Of how many kinds is the price of things

1 SALES, and purchases are just or unjust chiefly by reason of the price.

*EMPTIONES, et venditiones ex pretio potissimum iustae sunt, vel iniustae.*

2 NOW the just price is twofold. One is fixed by public law, as when a pound of flesh, a jar of oil, or a measure of wine is sold for so much. This price consists in an indivisible sum, and is called by *Aristotle, first Ethics, chapter 7,* the legal price, which the Doctors commonly follow. The other is the natural price, which is imposed by nature itself according to prudent estimation. That this is just appears *from the law pretium, ff. ad Legem Falcidiam.* This price, however, does not consist in an indivisible sum, because it depends on many circumstances, on which see *Nauar. cap. 23. num. 79. Medina C. de restis. quaest. 31. Couar. l. 2. var. cap. 3.* In it, therefore, there is a certain latitude, within which justice is not violated, as *D. Bonau. in speculo animae, cap. 2. Molina T. 2. disp. 347. Less. l. 1. cap. 21. dub. 2. num. 8. Fagundez l 5. de contract. cap. 29. Caspens. Tract. 19. sect. 2. Tanner. disp. 4. quaest. 7. num. 27.* teaches.

> *EST autem pretium iustum duplex: Alterum lege publica taxatum, ut quod carnis libra, cadus olei, vel metrera vini, tanti vendatur. Hoc autem pretium consistit in indiuisibili, et vocatur ab* Aristotele primo Eth. cap. 7. *legitimum pretium, cui subscribunt communiter Doctores. Alterum pretium naturale est, quod ex natura ipsa secundum prudentem aestimationem imponitur. Hoc autem iustum esse, patet* ex l. pretio, ff. ad Legem Falcidiam. *Non consistit autem hoc pretium in indiuisibili, quia pendet ex multis circumstantiis, de quibus videatur* Nauar. cap. 23. num. 79. Medina C. de restis. quaest. 31. Couar. l. 2. var. cap. 3. *In hoc igitur datur quaedam latitudo, intra quam non violatur iustitia, ut docet* D. Bonau. in speculo animae, cap. 2. Molina T. 2. disp. 347. Less. l. 1. cap. 21. dub. 2. num. 8. Fagundez l 5. de contract. cap. 29. Caspens. Tract. 19. sect. 2. Tanner. disp. 4. quaest. 7. num. 27.

3 HENCE the natural price is threefold. The highest, or rigorous; the middle, or moderate; and the lowest, or charitable. For example, let the middle price be one hundred; the rigorous will be 105; the lowest will be 95. Again, let the middle be 10; the lowest 8; the highest 12. Such examples are given by *Couar. l. 2. var. cap. 3. Lessius, and Molina above, Caspensis num. 7.* who, however, computing the accrescence in the hundred, holds that in tens it is increased only by five, and decreased only by one and a half.

> *HINC igitur pretium naturale est triplex. Supremum, seu rigorosum: Medium, seu moderatum; et Infimum, seu pium. Exempli gratia, pretium medium sit centum; Rigorosum erit 105. Infimum erit 95. Rursus medium sit 10. Infimum 8. Supremum 12. quae exempla ponunt* Couar. l. 2. var. cap. 3. Lessius, et Molina supra, Caspensis num. 7. *qui tamen computans accrementum in centum, tantum quinque ponit in decenis augeri, et decrescere solum unum, et dimidium.*

4 WITHIN the limits of these three prices there cannot be injustice, so that a thing may be sold dearer on credit than for cash in hand, provided one keeps within these bounds. So it is gathered from *D. Thom. 2. 2. quaest. 77. art. 1. Caietano there, Molina t. 1. disp. 347. Less. l. 2. cap. 21. dub. 2. num. 11. Soto l. 6. de iust. quaest. 2. art. 3. Couar. l. 2. var. cap. 3. Scoto in 4. dist. 15. quaest. 2. Maiore quaest. 29. and 40. Conrado de contract. cap. 3. quaest. 56. Nauar. in C. qualitas, de poenis. disp. 5. num. 43. Fagundez l. 5. cap. 29. Casp. num. 7.* who, however, with others notes that the price must be determinate. Wherefore, if you sell on this condition: *I sell for whatever you wish*, it is invalid.

> *INTER horum trium pretiorum fines non potest esse iniustitia, ita ut carius possit vendi res credito, quam pecunia numerata, dummodo stetur inter hos limites. Ita colligitur ex* D. Thom. 2. 2. quaest. 77. art. 1. Caietano ibi, Molina t. 1. disp. 347. Less. l. 2. cap. 21. dub. 2. num. 11. Soto l. 6. de iust. quaest. 2. art. 3. Couar. l. 2. var. cap. 3. Scoto in 4. dist. 15. quaest. 2. Maiore quaest. 29. et 40. Conrado de contract. cap. 3. quaest.

56. Nauar. in C. qualitas, de poenis. disp. 5. num. 43. Fagundez l. 5. cap. 29. Casp. num. 7. *qui tamen cum aliis aduertit, pretium debere determinari. Quare, si vendas tali pacto:* Vendo, quanti volueris, *est inualida.*

## Question V: Whether, for certain causes, it is lawful to reduce below the minimum price, or raise above the maximum

1 FROM many circumstances the Doctors teach that the natural price of things can change.

*MULTIS e circumstantiis tradunt Doctores mutari posse rerum pretium naturale.*

2 THE FIRST is from the abundance of money, of goods, and of buyers; for just as by the scarcity of buyers and the abundance of goods merchandise becomes cheap, so on the contrary, etc. Hence also at the end of market days the price of goods falls. So *Sotus l. 6. de iustitia quaest. 2. art. 3. Rebell. 2. p. de oblig. iust. l. 9. quaest. 1. sect. 1. num. 34.. Couar. l. 2. var. cap. 3. num. 4. Caiet. 2. 2. quaest. 77. art. 1. Tannet. disp. 4. quaest. 7. num. 28. Fagundez l. 5. de contract. cap. 30. and he indicates the S. Doctor does in speculo animae, cap. 2.*

*PRIMUM est ex pecunia mercium, et emptorum abundantia; sicut enim emptorum paucitate, et mercium copia vilescunt merces; ita e contra, etc. Ideo enim in fine nundinarum decrescit mercium pretium. Ita* Sotus l. 6. de iustitia quaest. 2. art. 3. Rebell. 2. p. de oblig. iust. l. 9. quaest. 1. sect. 1. num. 34.. Couar. l. 2. var. cap. 3. num. 4. Caiet. 2. 2. quaest. 77. art. 1. Tannet. disp. 4. quaest. 7. num. 28. Fagundez l. 5. de contract. cap. 30. et indicat S. Doct. in speculo animae, cap. 2.

3 SECOND, from the abundance of money: There are some regions in which gold and silver abound, as the Indies and almost the whole New World, where more gold and silver can be poured out. Add that this also often happens from the difficult transport of goods. So *Fagundez num. 30.*

*SECUNDO ex abundantia pecuniae: Sunt enim aliquae regiones, in quibus aurum, et argentum abundat, ut Indiae, et totus fere nouus orbis, ubi amplius auri, et argenti effundi potest; Adde etiam id saepe euenire ex difficili mercium aduectione. Ita* Fagundez num. 30.

4 THIRD, the manner of selling is a cause; things are sold dearer piecemeal, as *Bass. num. 5. Rebell. num. 36. Syluester v. emptio, quaest. 20. Molina T. 2. disp. 348. Fagundez num. 4.* notes. To this are reduced sales *sub hasta*, or by brokers, or when students leave at the end of term. So *Nauar. in Manuali, cap. 23. num. 78. Caiet. and Soto above. Tannerus num. 19.*

*TERTIO, causa est modus vendendi; carius enim venduntur res minutatim, ut notat* Bass. num. 5. Rebell. num. 36. Syluester v. emptio, quaest. 20. Molina T. 2. disp. 348. Fagundez num. 4. *Ad hoc reducantur venditiones* sub hasta, *aut per proxenetas, vel quando studentes ultimo discedunt. Ita* Nauar. in Manuali, cap. 23. num. 78. Caiet. et Soto supra. Tannerus num. 19.

5 THE Doctors ask, then, what is the just price for a sale *sub hasta*.

*QUAERUNT autem Doctores, quodnam sit pretium iustum venditioni* sub hasta.

6 COMMONLY they answer that it is that which does not exceed half the just price, nor is lowered below half. So *Gregorius Lopes de contract. l. 1. cap. 19. Filliuc. t. 2. tract. 35. cap. 6. num. 141. Mercado l. 2. cap. 12. Garcia l. 1. cap. 21. Corduba quaest. 8. Rodriguez tom. 1. cap. 174. Ioan. Franc. Suarez l. 1. under the word venditio, et emptio, §. 14.*

*COMMUNITER respondent, esse illud, quod non excedit dimidium iusti pretii, nec minuit infra dimidium. Ita* Gregorius Lopes de contract. l. 1. cap. 19. Filliuc. t. 2. tract. 35. cap. 6. num. 141. Mercado l. 2. cap. 12. Garcia l. 1. cap. 21. Corduba quaest. 8. Rodriguez tom. 1. cap. 174. Ioan. Franc. Suarez l. 1. verbo venditio, et emptio, §. 14.

7 SOME, however, say it is that which is last offered, if frauds are absent. So *Iacobus Gordon. T. 1. Theolog. Mor. l. 4. quaest. 5. cap. 8. num. 98. Villalobos t. 2. cap. 21. diffic. 5. and he cites others, Fagundez l. 5. de contract. cap. 30. num. 6.* Others say that worthless goods lose a third of their value. So *Caietanus*, but it does not please *Tannero num. 29.*

*ALIQUI tamen dicunt, esse illud, quod ultimo offertur, si fraudes absint. Ita* Iacobus Gordon. T. 1. Theolog. Mor. l. 4. quaest. 5. cap. 8. num. 98. Villalobos t. 2. cap. 21. diffic. 5. et citat alios Fagundez l. 5. de contract. cap. 30. num. 6. *Alii dicunt, merces vitroneas vilescere pro tertia parte. Ita* Caietanus*, sed non placet* Tannero num. 29.

8 FOURTH, the price is increased by the appetite and desire for novelties, in the fruits of the earth, the fish of the sea, and certain curiosities: Thus the Ethiopians greatly value red caps, and the Japanese certain antiquities. See *Caspensem tract. 19. disp. 4. sect. 4.*

*QUARTO augetur pretium ex appetitu, et affectu rerum nouarum circa fructus terrae, pisces maris, et quaedam curiosa: Sic AEthiopes rubeos pileos magni pendunt, et Iaponii antiquitates quasdam. Vide* Caspensem tract. 19. disp. 4. sect. 4.

9 *Tannerus num. 32.* indeed warns that the matter is full of danger. The same is held by *Molina disp. 351.* Therefore they say it is to be discouraged. *Tanner. num. 34.* adds that something may be taken for curious things. Bassaeus joins the affection of the seller, by which he wishes to cling to his own thing, and how dearly he parts with it.

*MONET vero* Tannerus num. 32. *rem esse periculi plenam. Idem habet* Molina disp. 351. *Ideo dissuadendum aiunt. Addit* Tanner. num. 34. *pro curiosis rebus posse aliquid accipi. Bassaeus adiungit affectum venditoris, quo suae rei velit adhaerescere, et qua dure se priuat.*

10 FIFTH, on account of the greater common utility. See *Molinam disp. 348. Tomo 2. Fagundez num. 8.*

*QUINTO ob maiorem utilitatem communem. Vide* Molinam disp. 348. Tomo 2. Fagundez num. 8.

11 I say the common utility, because the cheapness or necessity of a few is not a cause for increasing the just price; for just as the price of things does not depend on the estimation of a single seller, so neither does it depend on the necessity of a single buyer; otherwise it would be lawful to sell dearer to a poor man than to a rich man, because he needs the thing more. So S. Bonav. in speculo animae, chapter 2. §. concerning frauds, which occur in buying. D. Thom. 2. 2. quaest. 11. art. 1. Rebell. 2. p. de oblig. iust. l. 9. quaest. 15. Molina loc. cit. Fagund. num. 8.

*Dico utilitatem communem, quia vilitas, vel necessitas paucorum non est causa, ut augeatur iustum pretium; sicut enim pretium rerum non pendet ab unius vendentis aestimatione, ita nec a necessitate unius ementis; alioqui fas esset carius vendere paupeti, quam diviti, quia magis ea re indiget. Ita S. Bonav. in speculo animae, capite 2. §. circa fraudes, quae in emendo. D. Thom. 2. 2. quaest. 11. art. 1. Rebell. 2. p. de oblig. iust. l. 9. quaest. 15. Molina loc. cit. Fagund. num. 8.*

12 SIXTH, the price is increased by the goodness of things, as Pinellus shows from many laws, 3. p. C. de rescind. vendit. C. ult. num. 32.

*SEXTO augetur pretium ex bonitate rerum, ut ex multis iuribus ostendit Pinellus 3. p. C. de rescind. vendit. C. ult. num. 32.*

13 SEVENTH, from the transport of goods to the place where they are sold dearer, and the improvement made upon them by human industry, or by nature and the passage of time, as if a horse has grown, etc. So Molina disput. 348. Fagundez num. 11. Tanner. num. 31.

*SEPTIMO ex translatione mercium ad locum, ubi carius venduntur, et melioratio illis facta per humanam industriam, vel per naturam, et tempus currens, ut si equus creverit, etc. Ita Molina disput. 348. Fagundez num. 11. Tanner. num. 31.*

14 Scottus adds another cause, 4. dist. 15. quaest. 2. art. 2. Maior quaest. 41: that expenses, and the merchant's industry in carrying goods, and the reckoning of the dangers to which he exposed himself in navigation, or in transport by lands infested with robbers, contribute much to increasing the price.

*ALIAM causam addit Scottus 4. dist. 15. quaest. 2. art. 2. Maior quaest. 41. multum facere ad pretium augendum expensas, industriam mercatoris in mercibus vehendis, et computanda pericula, quibus se exposuit in navigatione, aut devectione per terras, latronibus obvias.*

15 Fagundez num. 12. criticizes this rule, because it is not the merchant's industry that increases the price, nor the dangers, etc., as is clear from the law reg. pretia rerum, ff. ad Legem Falcidiam, and from the text in cap. 1. de empt. et vendit. and from the law si servum meum, ff. ad l. Aquiliam.

*HANC regulam reprehendit Fagundez num. 12. quia non est industria mercatoris augendum, vel periculis etc. ut patet ex L. reg. pretia rerum, ff. ad Legem Falcidiam, et ex text. in cap. 1. de empt. et vendit. et ex l. si servum meum, ff. ad l. Aquiliam.*

16 These, however, if rightly understood, do not refute Scotus's view, which does not want prices increased immoderately for these reasons, or the shipwreck of other goods to be stuffed full by an immoderate excess of price; this Scotus does not assert.

*HAEC tamen, si recte intelligantur, non refellunt modum Scoti, qui non vult, immoderate augeri pretia his de causis, aut posse naufragia mercium aliarum refarciri, excessu pretii immoderati; hoc enim Scottus non praetendit.*

17 I shall discuss the other causes in questions.

*ALIAS causas per quaestiones discutiam.*

## Question VI: Whether on account of ceasing profit, or emerging loss, the price can be raised above the maximum

1 I ASSERT that this is lawful. So Fagundez l. 5. cap. 31. Less. l. 2. cap. 21. dub. 4. num. 18. Tanner. disp. 4. quaest. 7. num. 36. Couar. l. 2. var. cap. 3. num. 6. Valentia quaest. 10. p. 2. Therefore, if someone has wheat which he wishes to sell only in the month of May, when now urged to sell, he can demand the price which it will be worth in May, deducting the danger of corruption and deterioration, and by prudent judgment where there is greater danger for the provider, etc. But in truth it is not lawful to sell for that time of year at which it will be worth more; for it is uncertain at what time of year it will be worth more, and the avaricious are often deceived by deferring to May, etc. Wherefore the seller assumes a certain gain, and leaves the danger to the buyer, which is usury, as D. Bonav. teaches, cap. 1. of the Speculum, and Fagundez book 5. chapter 37, and Bassaeus v. Venditio, num. 5.

An ratione lucri cessantis, vel damni emergentis possit pretium augeri ultra summum.

*ASSERO, id licere. Ita Fagundez l. 5. cap. 31. Less. l. 2. cap. 21. dub. 4. num. 18. Tanner. disp. 4. quaest. 7. num. 36. Couar. l. 2. var. cap. 3. num. 6. Valentia quaest. 10. p. 2. Itaque si quis habet triticum, quod vult vendere solum mense Maii; interpellatus nunc, ut vendat, potest exigere pretium, quod valebit in Maio, detracto periculo corruptionis, deteriorationis, et prudentis iudicio, provi est maius periculum, etc. At vero non licet vendere pro illo anni tempore, quo valebit plus; nam incertum est, quo anni tempore plus valitura sit, et saepe decipiuntur avari, differentes ad Maium, etc. Quare venditor assumit certo commodum, et relinquit periculum emptori, quod est usura, ut docet D. Bonau. cap. 1. Speculi, et Fagundez lib. 5. capite 37. ac Bassaeus v. Venditio, num. 5.*

2 HENCE you will easily resolve another question, whether it is lawful to demand something above the just price on account of the danger of the capital, to which the seller is sometimes exposed on credit.

*HINC etiam facile aliam resolves quaestionem, utrum liceat exigere aliquid supra iustum pretium ratione periculi sortis, cui interdum vendens credito exponitur.*

3 They proclaim this usurious: Scotus de iust. l. 6. quaest. 4. art. 1. disp. 2. Nauar. cap. 23. num. 81. Lopes in Instruct. p. 2. cap. 120. Palacius de contract. l. 4. cap. 3. concl. 8. Garcias de contract. l. 1. cap. 23. Toletus de septem peccatis, cap. 5. Azorius p. 1. l. 8. cap. 8. quaest. 7. Rebell. de oblig. Iust. p. 2. l. 9. quaest. 12. This opinion is safe and to be counseled, as Caspens. says, for the following one is dangerous and opens the way to usuries. Bassaeus subscribes, num. 11. The reason is, because these are the fruits of merchants.

*ID usurarium conclamant Scotus de iust. l. 6. quaest. 4. art. 1. disp. 2. Nauar. cap. 23. num. 81. Lopes in Instruct. p. 2. cap. 120. Palacius de contract. l. 4. cap. 3. concl. 8. Garcias de contract. l. 1. cap. 23. Toletus de septem peccatis, cap. 5. Azorius p. 1. l. 8. cap. 8. quaest. 7. Rebell. de oblig. Iust. p. 2. l. 9. quaest. 12. Haec secura est, et suadenda, ut ait Caspens. nam sequens est periculosa, et viam aperit usuris. Subscribit Bassaeus num. 11. Ratio est, quia hi sunt fructus mercatorum.*

4 The OPPOSITE opinion seems probable: Medina de restit. quaest. 38. causa tertia, and 4. Petto Nauar. l. 3. de restit. cap. 2. p. 1. dub. 11. and p. 2. cap. 3. dub. 10. Valentia Tom. 3. disp. 5. quaest. 20. p. 2. Sà v. venditio, Rodriquez p. 2. cap. 83. Lessius l. 2. cap. 21. dub. 6. num. 54. and others whom he cites, and Sancarellus follows, p. 1. quaest. 47. num. 17. and Salas tract. de usuris, disp. 27. and Diana p. 1. tract. 8. resol. 57. — provided, however, that in the contract it is explained to the buyer that something is taken on account of the danger; which condition is always necessary in every excess of ceasing gain or emerging loss, as Molina notes, disp. 356. and Caspens. disp. 4. sect. 6, so that it be a true danger, and then, he says, it must be reckoned into the price.

*OPPOSITA sententia probabilis videtur Medina de restit. quaest. 38. causa tertia, et 4. Petto Nauar. l. 3. de restit. cap. 2. p. 1. dub. 11. et p. 2. cap. 3. dub. 10. Valentia Tom. 3. disp. 5. quaest. 20. p. 2. Sà v. venditio, Rodriquez p. 2. cap. 83. Lessius l. 2. cap. 21. dub. 6. num. 54. et aliis, quos citat, et sequitur Sancarellus p. 1. quaest. 47. num. 17. et Salas tract. de usuris, disp. 27. et Diana p. 1. tract. 8. resol. 57. si tamen emptori explicetur in contractu ob periculum, aliquid sumi; quae conditio necessaria semper est in omni excessu lucri cessantis, vel damni emergentis, ut notat Molina disp. 356. et Caspens. disp. 4. sect. 6. ut sit verum periculum, et tunc ait esse pretio aestimandum.*

5 Others ADD that the merchant must not propose this danger while inviting the buyer, and first seek a command of faith, or a pledge, to secure it; otherwise, let him demand something on account of the danger.

*ADDUNT alii, ne mercator hoc periculum proponat invitando emptorem, et prius petat fidei iussionem, vel pignus ad assecurandum; alioqui exigat aliquid ob periculum.*

6 HENCE step by step you will define: whether a merchant who foresees that abundance will shortly arrive with the incoming supply of goods, and that a loss will arise for himself, can now sell his merchandise immediately at the current price.

*HINC pedetentim definies: an mercator, qui praevidet, brevi superventuram e mercium adveniente copia abundantiam, ac sibi damnum emersurum, possit nunc merces illico pretio currenti vendere.*

7 The FIRST opinion denies it. So Conradus de contract. quaest. 63. and 64. Ioan. Medina C. de restit. quaest. 35. after Cicero with Antipater l. 3. de off.

*PRIMA opinio negat. Ita Conradus de contract. quaest. 63. et 64. Ioan. Medina C. de restit. quaest. 35. post Ciceronem cum Antipatro l. 3. de off.*

8 They PROVE it, because imminent abundance is considered present; for things little distant in time are considered present in law. Therefore also the Evangelists, relating the consecration of the Eucharist, say: *This is the blood, which will be shed for you*, Matth 26. Luke 22; namely of the body Luke says: *Which is given for you*; and yet at the same time both the blood was shed and the body dead, or rather the blood shed first, in which the soul is dispositively, or conservatively.

*PROBANT, quia imminens abundantia censetur praesens, quae enim parum distant, praesentia censentur in iure. Ideo et Evangelistae referentes consecrationem Eucharistiae, dicunt:* Hic est sanguis, qui pro vobis effundetur*, Matth 26. Lucae 22. scil de corpore ait Lucas:* Quod pro vobis traditur*; cum tamen simul et sanguis sit effusus, et corpus mortuum, imo prius effusus sanguis, in quo est anima dispositiue, seu conseruatiue.*

9 Yet the OPPOSITE they judge: D. Thom. 2. 2. quaest. 77. art. 3. ad 4. Caietanus there, Syluester under the word emptio, quaest. 15. Valentia disp. 5. quaest. 2. punct. 4. Tanner. disp 4. quaest. 7. num. 53. Scotus l. 6. quaest. 3. art. 2. ad 3. Couar. ad regulam peccatum, 2. p. §. 4. Molina t. 2. disp. 354. Less. l. 2. cap. 21. dub. 5. num. 4. Pinellus l. 2. C. de rescind. vendit. p. 3. cap. 2. num. 24. Fagundez l. 5. cap. 31. de contract. num. 10. Faustus in speculo conf. disp 6. quaest. 15. Molfes. t. 2. tract. 12. cap. 5. num. 69. Nauar. de restit. l. 3. cap. 2. num. 67. Caspens. disp. 4. sect. 9. Diana p. 1. tract. 8. resol. 40. and others among these.

*OPPOSITUM tamen censent D. Thom. 2. 2. quaest. 77. art. 3. ad 4. Caietanus ibi, Syluester verbo emptio, quaest. 15. Valentia disp. 5. quaest. 2. punct. 4. Tanner. disp 4. quaest. 7. num. 53. Scotus l. 6. quaest. 3. art. 2. ad 3. Couar. ad regulam peccatum, 2. p. §. 4. Molina t. 2. disp. 354. Less. l. 2. cap. 21. dub. 5. num. 4. Pinellus l. 2. C. de rescind. vendit. p. 3. cap. 2. num. 24. Fagundez l. 5. cap. 31. de contract. num. 10. Faustus in speculo conf. disp 6. quaest. 15. Molfes. t. 2. tract. 12. cap. 5. num. 69. Nauar. de restit. l. 3. cap. 2. num. 67. Caspens. disp. 4. sect. 9. Diana p. 1. tract. 8. resol. 40. et alii apud istos.*

10 OPTIMAL is the reason which I gather from D. Bonaventura serm. ultimo Hexaëmer. and on cap. 10. of Wisdom, where he notes that it is ascribed to divine Wisdom and to its holy sagacity, that Joseph should gather the grain in the time of abundance from the kingdom of Egypt at a price remitted, and store it to sell more dearly in the time of impending scarcity, Genes. 41. Therefore it is lawful to do these things; otherwise that holy Patriarch would have sinned, and would have been bound to restitution, as Fagundez infers, num. 10 — which is absurd, since Wisdom cap. 10. ascribes all those actions of his to himself as Divine Wisdom. Add moreover that Joseph did this that he

might come to the aid of the people in scarcity — which is fictitious, as S. Bonav. says, cap. 2. of the Speculum animae, §. 35, the fruits are principally of justice.

> *OPTIMA est ratio, quam colligo ex D. Bonaventura serm. ultimo Hexaëmer. et ad cap. 10. Sap. ubi advertit, Sapientiae divinae adscribi, et sanctae sagacitati, ut Ioseph frumenta tempore abundantiae ex AEgypti regno colligeret remisso pretio, et servaret carius vendendum, tempore penuriae imminentis Genes. 41. Igitur licet haec facere, alioqui vero peccasset Sanctus ille Patriarcha, et ad restitutionem fuisset ligatus, ut infert Fagundez num. 10. quod est absonum, cum Sapientiae cap. 10. eas omnes illius actiones sibi sapientia Divina adscribat. Adde vero, id fecisse Ioseph, ut populo in penuria subveniret, quod est ficitum, ut ait S. Bonav. cap. 2. speculi animae, §. 35. fructus principaliter iustitiae.*

11 I INFER, however, with D. Bonav. in speculo animae, cap. 2. Molina cited, Rebell. t. 1. de oblig. iustitiae, l. 9. quaest. 6. num. 5. Fagundez num. 14, that it would be against justice and charity if by deceit, fraud, or lying he induced buyers, whence a great loss would follow for them from so much merchandise imprudently amassed together. Some indeed add, with Diana p. 1. *Tract. 8. resol. 46.* — if asked about the arrival of the goods, etc., whereby the price becomes cheap, both the one denying, even if he knows, that he is not bound to restitution, if the other buys dearly.

> *INFERO tamen cum D. Bonav. in speculo animae, cap. 2. Molina citato, Rebell. t. 1. de oblig. iustitiae, l. 9. quaest. 6. num. 5. Fagundez num. 14. futurum contra iustitiam, et charitatem, si dolo, fraude, aut mendacio induceret emptores, unde magnum eis damnum ex tot mercibus importune adunatis sequeretur. Addunt vero aliqui cum Diana p. 1.* Tract. 8. resol. 46. *resol. 46. interrogatum de adventu mercium, etc. unde vilescat pretium, et negantem, etiamsi sciat, non teneri restitutioni, si ille caro emat.*

12 SIMILARLY it seems to be against charity, if he gives so great a multitude of those goods to one man, to whom, with abundance pressing in, a grave loss in reselling would fall.

> *SIMILITER videtur contra charitatem, si daret tantam multitudinem illarum mercium uni, cui, ingruente copia, damnum grave in reuendendo obveniret.*

13 *Fagundez num. 21.* ADDS finally: if the goods, say wine, oil, and wheat, belonged to some magistrate who knew from the Prince that a law was to be promulgated diminishing the goods or the monies, and he warned his own, that it would be expedient for them immediately to dispose of the goods or monies soon to be suddenly cast down, these would be held to restitution, even if it were the Prince himself, because from justice they are bound to procure goods for all the subjects. So also *Rebell. 2. p. l. 9. quaest. 6. Less. l. 2. cap. 21. dub. 5. num. 48. and others.* Nevertheless the opposite is taught by *Turrian. 2. 2. disp. 18. dub. 3.*, citing others. And *Couar. in regulam peccatum, p. 2. §. 4., nor does Diana dissent, p. 1. Tract. 8. resol. 42.*

> *ADDIT tandem* Fagundez num. 21. *si merces, puta vinum, oleum, et triticum essent alicuius magistratus, qui a Principe sciret, legem promulgandam decrementi mercium, vel monetarum, et suos admoneret, ut statim merces, vel monetas subito deiiciendas expedirent, tenerentur hi ad restitutionem, etiamsi esset ipse Princeps, quia ex iustitia tenentur omnibus subditis procurare bona. Ita etiam* Rebell. 2. p. l. 9. quaest. 6. Less. l. 2. cap. 21. dub. 5. num. 48. et alii. *Attamen oppositum docent* Turrian. 2. 2. disp. 18. dub. 3. *alios citans. Et* Couar. in regulam peccatum, p. 2. §. 4. nec dissentit Diana p. 1. Tract. 8. resol. 42.

## Question VII: Whether it is lawful to sell above the highest price when payment is deferred, rather than for ready money

[1] Within the limits of the just price they concede it is lawful in common, because that whole price is just. So *D. Thom. 2. 2. quaest. 77. art. 1. Valentia disp. 5. quaest. 20. p. 2. § 8. Caietanus ad art. D. Thomae, Less. lib. 2. cap. 21. dub. 6. num. 50. Rebell. t. 1. 2. p. l. 9. quaest. 15. Molina t. 2. disp. 355. Baffaeus v. Vendit. Fagundez l. 5. cap. 32. and others in common. See also Caspensem disp. 4. sect. 6.* But in truth to buy back more cheaply a thing already sold, on account of the delay of the price, when a cheaper price is offered, smells bad, as *Tannerus disp. 4. quaest. 7. num. 52. Carbo quaest. 52. Less. dub. 16. Nauar. cap. 23. num. 51. Petr. Nauar. num. 169.* says; and even if *Baffaeus num. 4.* grants it lawful, yet not to enter first into a pact of buying back, because this is a usurious loan.

> ***Utrum liceat carius vendere supra summum pretium, expectata solutione, quam numerata pecunia.***
>
> *INTRA limites iusti pretii licere concedunt communiter, quia totum illud pretium iustum est. Ita* D. Thom. 2. 2. quaest. 77. art. 1. Valentia disp. 5. quaest. 20. p. 2. § 8. Caietanus ad art. D. Thomae, Less. lib. 2. cap. 21. dub. 6. num. 50. Rebell. t. 1. 2. p. l. 9. quaest. 15. Molina t. 2. disp. 355. Baffaeus v. Vendit. Fagundez l. 5. cap. 32. et alii communiter. Vide etiam Caspensem disp. 4. sect. 6. *At vero venditam rem catius ob dilationem pretii statim reemere, viliori exhibito pretio, male olet, ut ait* Tannerus disp. 4. quaest. 7. num. 52. Carbo quaest. 52. Less. dub. 16. Nauar. cap. 23. num. 51. Petr. Nauar. num. 169. et si Baffaeus num. 4. *annuat licere; non tamen primo inire pactum retroemendi, quia hoc est mutuum usurarium.*

[2] For in truth to exceed the rigorous price on account of a merely deferred payment is veiled usury. So the cited authors, with *D. Bonau. in speculo animae, cap. 2. §. the third fruit is principally of injustice. And §. the second branch principally of avarice. And again D. Thom. quaest. cit. art. 2. ad 7. Toletus l. 5. Summae, cap. 28. Soto l. 6. de iust. quaest. 1. art. 3. and others adduced.* The reason is, because to await payment is nothing else than to lend that money which was to be repaid at once for the whole time during which it is awaited; but for a loan it is not lawful to take anything beyond the capital, as *S. Bonav.* says. Therefore. Whence *Fagundez* with *Soto* condemn merchants who at the end of the market days, when the price is cheaper, sell their goods on credit, or awaiting payment, at that rigorous price at which they were being sold at the beginning of the market days.

> *ENIM vero transcendere pretium rigorosum ob solam dilatatam solutionem, est usura palliata. Ita allegati cum* D. Bonau. in speculo animae, cap. 2. §. tertius fructus principalis iniustitiae. Et §. secundus ramus principalis avaritiae. Et rursus D. Thom. quaest. cit. art. 2. ad 7. Toletus l. 5. Summae, cap. 28. Soto l. 6. de iust. quaest. 1. art. 3. et alii adducti. *Ratio est, quia nihil est aliud expectare solutionem, quam mutuare illam pecuniam, quae statim reddenda erat pro toto illo tempore, quo expectatur; sed pro mutuo non licet accipere aliquid ultra sortem, ut ait* S. Bonav. *Ergo. Unde* Fagundez *cum* Soto *damnant mercatores, qui in fine nundinarum, quando vilius est pretium, vendunt merces credito, seu expectando solutionem, eo pretio rigoroso, quo initio nundinae vendebantur.*

[3] They ADD, however, that if at the time of payment the goods will be worth more, they can be sold above the present rigorous price, at that price at which they will be sold when he pays. So *Lessius l. 2. cap. 21. dub. 6. num. 52. Rebellus 2. p. l. 9. quaest. 11. num. 3.* Yet it must be known with certainty.

> *ADDUNT tamen, si tempore solutionis valiturae sint merces amplius; posse vendi supra rigorosum pretium praesens, eo pretio, quo vendentur tunc, cum solvet. Ita* Lessius l. 2. cap. 21. dub. 6. num. 52. Rebellus 2. p. l. 9. quaest. 11. num. 3. *Debet tamen sciri certo.*

4 Some add that this more can be taken even if the seller had not decided to sell those goods at that time.

> *Addunt aliqui, posse illud plus accipi, etiamsi venditor non constituisset eo tempore vendere merces illas.*

5 BUT this is veiled usury, as *Couar. l. 2. var. cap. 3. num. 6. Medina C. de restit. quaest. 38. causa quinta, Lessius, Rebellius, and Fagundez.* teach.

> *SED haec est usura palliata, ut docent* Couar. l. 2. var. cap. 3. num. 6. Medina C. de restit. quaest. 38. causa quinta, Lessius, Rebellius, et Fagundez.

6 The REASON is, because it will be to demand the price of another's goods; for the goods belong to the buyer absolutely at that time at which the price grows, for the seller had not thought to have them then.

> *RATIO est, quia, id erit exigere pretium rei alienae; nam merces sunt ementis absolute eo tempore, quo crescit pretium, nec enim cogitarat venditor eas tunc habere.*

7 NOTE finally that it is possible (as is customary in some parts of the world) for goods to be sold at a lesser price for money counted out; because that money, exposed by the seller immediately to business dealings, yields more, whence from the credit and deferral of the money arises ceasing gain, or emerging loss.

> *ADVERTE tandem, posse (ut in nonnullis partibus mundi solet) vendi res numerata pecunia minori pretio; eo quod illa pecunia vendenti, illico negotiis exposita, reddit amplius, unde ex credito, et dilatione pecuniae oritur cessatio lucri, vel damnum emergens.*

8 From what has been said you will also define: whether prices can be remitted on account of payment anticipated. And indeed within the breadth of the just price it was already defined at the beginning of the question.

> *Ex dictis etiam definies: an ob anticipatam solutionem possint pretia remitti. Et quidem intra latitudinem iusti pretii, iam primo definitum est initio quaestionis.*

9 THEREFORE from the precise anticipation it is not lawful to go beyond the limits of the just price; nevertheless on account of emerging loss, or ceasing gain, from that money which I pay in advance, and which, spent in business dealings, I would augment, it will be lawful. See *Fagundez cap. 33. l. 5. de contract. Caspensem disp. 4. sect. 7.*

> *IGITUR ex praecisa anticipatione non licet egredi limites iusti pretii, attamen ob damnum emergens, vel lucrum cessans, ex illa pecunia, quam anticipate solvo, quamque negotiis impensam augerem, licebit. Vide* Fagundez cap. 33. l. 5. de contract. Caspensem disp. 4. sect. 7.

10 For THIS reason many Doctors justify that contract of Wools in Spain on account of anticipated payment, below the lowest price. *Fagundez num. 8.* reports them. The reason is, because those merchants, anticipating that price, would struggle with that money which they pour out in advance. See *Molinam Tom. 1. disp. 360.*

> *HAC de causa multi Doctores iustificant contractum illum Lanarum in Hispania ex anticipata solutione, infra pretium infimum. Eos refert* Fagundez num. 8. *Ratio est, quia mercatores illi, pretium illud anticipantes, ea pecunia luctarentur, quam anticipate profundunt. Vide* Molinam Tom. 1. disp. 360.

## Question VIII: Whether the contracts called stocolia and barocolia in Italian, and mohatra in Spanish, are lawful

1 This contract is of such a kind: Titius asks 100 gold pieces on loan from the merchant Claudius, who does not wish to give money, but exhibits goods to the value of the summit price of 100 gold pieces, that he may sell them for money counted out and satisfy his need; but the buyer Titius immediately offers those very goods to the merchant Claudius himself, who buys the same goods at the middle, or lowest price.

> ***An licita sint Stocolia, et Barocolia Italice, Stocch Hispanice MOHATRA.***
>
> *CONTRACTUS hic talis est: Titius petit 100. aureos mutuo a mercatore Clodio, qui non vult dare pecuniam, sed exhibet merces ad valorem summi pretii 100. aureorum, ut ille vendat pecunia numerata, et suae inopiae satisfaciat; sed emptor Titius statim eas merces offert ipsi mercatori Clodio; qui easdem merces emit pretio medio, vel infimo.*

2 HERE at first sight flabby usury is evident. Therefore by the laws of Castile and Portugal they are interdicted under grave penalties; accordingly they assert it to be usury: *Rebell. 2. p. l. 9. quaest. 7. num. 7. Medina l. 1. Summae, cap. 14. §. 23. D. Antonin. p. 3. tit. 8. cap. 4. §. 4.*

> *HIC prima facie usura fracida est. Ideo legibus Castellae, et Lusitaniae sub gravibus poenis interdicuntur; esse igitur usuram afferunt* Rebell. 2. p. l. 9. quaest. 7. num. 7. Medina l. 1. Summae, cap. 14. §. 23. D. Antonin. p. 3. tit. 8. cap. 4. §. 4.

3 OTHERS, however, with conditions appended attempt to redeem it from usury. The first is, that one stand within the just price. Another, that all scandal be removed, by explaining that in such a contract there is no iniquity, since it always stands within the limits of the just price. So *Nauar. cap. 23. num. 91. Petrus e Navar. l. 3. cap. 2. num. 170. Homobon. in Exam. p. 2. tract. 9. cap. 10. Regius in suis resol. casu 14. and 34. Summa Corona, p. 2. cap. 7. Less. l. 2. cap. 21. dub. 16. num. 130.*

> *ALII tamen appositis conditionibus eum ab usura redimere conantur. Prima est, ut stetur intra iustum pretium. Altera, ut tollatur omne scandalum, explicando in tali contractu, nullam esse iniquitatem, cum semper sistatur intra limites iusti pretii. Sic* Nauar. cap. 23. num. 91. Petrus e Navar. l. 3. cap. 2. num. 170. Homobon. in Exam. p. 2. tract. 9. cap. 10. Regius in suis resol. casu 14. et 34. Summa Corona, p. 2. cap. 7. Less. l. 2. cap. 21. dub. 16. num. 130.

4 NOR does it avail to object that there is deceit, since the seller and the buyer are the same, because if another can buy at that price, why not also the merchant? Indeed the seller is freed from the care of selling through the Broker. Yet he cannot compel this, nor have a pact about it, as *Graff. p. 1. l. 1. cap. 209. Bonac. de contract. disp. 3. quaest. 3. p. 3. num. 20. Baffaeus num. 4.* notes.

> *NEC valet opponere, esse dolum, quippe idem est venditor, et emptor, quia si potest alius eo pretio emere, cur non etiam mercator? imo venditor liberatur a cura vendendi per Proxenetam. Non tamen potest ad hoc cogere, nec pactum de hoc habere, ut notat* Graff. p. 1. l. 1. cap. 209. Bonac. de contract. disp. 3. quaest. 3. p. 3. num. 20. Baffaeus num. 4.

5 Some ADD another condition, that this sale not be made with the intention of buying back at a cheaper price. So *Molina T. 2. disp. 310. Angel. v. usura, n. 60. Lopes l. 1. de contract. cap. 34. Vegha in Summa, T. 2. cap. 131. cas. 62. Azor. p. 3. l. 8. cap. 11. and Fagundez l. 5. cap. 34. num. 2. seems to approve.*

> *ADDUNT aliqui aliam conditionem, ut non fiat haec venditio ea intentione reemendi viliori pretio. Sic* Molina T. 2. disp. 310. Angel. v. usura, n. 60. Lopes l. 1. de contract. cap. 34. Vegha in Summa, T. 2. cap. 131. cas. 62.

Azor. p. 3. l. 8. cap. 11. et arridere videtur Fagundez l. 5. cap. 34. num. 2.

6 BUT *Salas de empt. disp. 37. and Diana p. 1. Tract. 8. resolut. 58.* reject this third condition, because where nothing beyond the capital is drawn into the pact, nor hoped for as a premium, or a debt of justice for the loan, there is no usury, if an increase is intended, as Molina wishes, T. 2. disput. 305. Valentia disp. 5. quaest. 21. p. 1. Nauar. de restit. lib. 3. cap. 1. dub. 2. num. 19. and the same Salas tract. de usuris, disput. 5. numero 5.

*SED hanc tertiam conditionem refellant* Salas de empt. disp. 37. et Diana p. 1. Tract. 8. resolut. 58. *quia ubi nihil ultra sortem deducitur in pactum, nec speratur, ut praemium, aut debitum de iustitia pro mutuo, nulla est usura, si auctarium intendatur, ut vult Molina T. 2. disput. 305. Valentia disp. 5. quaest. 21. p. 1. Nauar. de restit. lib. 3. cap. 1. dub. 2. num. 19. et idem Salas tract. de usuris, disput. 5. numero 5.*

7 I confess this contract stinks to me, because no foundation of this gain is present except usury, and the very thing which does not belong to the one gaining, and it is usury in hope, as the holy Doctor argues in *speculo animae, cap. 2. §. the third fruit is principally of injustice.* Just as usury is manifest when the promise intervenes by pact, as the holy Doctor notes.

*Fateor mihi hunc contractum foetere, quia nullum adest huius lucri fundamentum, nisi foenus, et ipsa res, quae non est lucrantis, et est usura in spe, ut arguit S. Doct. in* speculo animae, cap. 2. §. tertius fructus principalis iniustitiae. *Sicuti usura est manifesta, cum promissum ex pacto intervenit, ut notat S. Doctor.*

8 Nor do many Casuists defend it soundly, pretending with empty subtleties that there is nothing evil if the merchant sells his own goods, if he buys them from another, and the prior seller buys them back; since he is not here in a worse condition than the other merchant, who can buy them. I say, they do not soundly urge these things, since moral matters are not to be handled so that the individual circumstances are examined separately; for even to touch another's goods with the hand is harmless; and to handle them with a closed hand, and finally to leave the house, has no fault; but join these, and it is theft. Similarly, to sell, to buy, and to resell are innocent; but if they are done so that the seller gives a horse to the Young man for 100 gold pieces, with some time agreed for payment, and the Young man gives the horse back to the seller for 60, in money counted out: who will be able to vindicate such a contract from usury, at least in hope?

*Nec solide eum tuentur plures Casuistae, inanibus argutiis praetendendo, nihil mali esse, si mercator suas vendat merces, si eas alter emat, redimatque prior venditor; cum non sit hic deterioris conditionis, quam alter mercator, qui potest eas emere. Non inquam solide haec obtendunt, cum res morales non ita tractandae sunt, ut seorsim singulae circumstantiae inspiciantur; nam etiam rem alienam manu tangere, innoxium est; sicut et eam manu clausam tractare, ac demum e domo excedere, nihil culpae habet; verum haec iunge, furtum est. Similiter, vendere, emere, ac revendere innocua sunt; at si ita fiant ut venditor equum det Iuveni pro 100. Aureis, inita aliquod tempus solvendis, Iuvenisque equum venditori reddat pro 60. numerata pecunia: quis talem contractum ab usura, saltem in spe, vindicare poterit.*

9 Avarice has devised other similar contracts, which see in Fagund. 2 cap. 34. Molina disp. 362. Rebellio l. 9. quaest. 7. num. 7. Bassaeo loc. cit.

*Alios similes contractus avaritia excogitavit, quos vide in Fagund. 2 cap. 34. Molina disp. 362. Rebellio l. 9. quaest. 7. num. 7. Bassaeo loc. cit.*

10 I set out one that is frequent. Certain rich men give flocks of sheep, or herds of cattle, to some shepherds or herdsmen, that they may pasture them, demanding the wool in part, but leaving the

milk, cheese, and lambs, yet so that they perish for the shepherds, meanwhile perishing.

> *Unum frequentatum appono. Divites aliqui dant greges ovium, vel armenta boum quibusdam pastoribus, vel armentariis, ut pascant, exigentes lanas ex parte, sed lac, caseum, et agnos relinquendo, ita vero, ut pereant pastoribus, interim pereuntes.*

11 Others buy, e.g., a hundred sheep at the common price with money counted out. But with a pact that they be kept unharmed until the month of June; meanwhile demanding all the fruits of milk, wool, etc.

> *Alii emunt v. g. centum oves, pretio communi numerato. Sed cum pacto ut usque ad mensem Iunium serventur illaesae; interim fructus omnes exigentes lactis, lanae etc.*

12 I say with D. Bonav. in *speculo animae, cap.* 2. loc. cit. that it is tacit usury, when someone has something in common with another, whatever it may be, and the danger, or loss, is not in common; Fagundez lib. 5. cap. 34. num. 15. Molina T. 1. disp. 362. subscribe.

> *Dico cum D. Bonav. in* speculo animae, cap. 2. *loc. cit. esse tacitam usuram, cum quis aliquid commune habet cum aliquo, quidquid sit illud, et periculum, vel damnum non sit commune; subscribunt Fagundez lib. 5. cap. 34. num. 15. Molina T. 1. disp. 362.*

13 The reason of D. Bonau. is clear, because the thing, just as it bears fruit for the Lord, so also perishes for him.

> *Ratio D. Bonau. est clara, quia res, sicuti Domino fructificat, ita et illi perit.*

## Question IX: To what extent buying and selling in monopolies is unlawful

1 Monopoly, as Molina says, disput. 345, is called as it were one selling. Now a Monopoly arises when one, or a few, bring it about that they alone sell some kind of merchandise at whatever price has pleased them.

> ***Quo usque Emptio, et Venditio in Monopoliis sit illicita.***
>
> *Monopolium, ut ait Molina disput. 345. dicitur quasi unus vendens. Fit autem tunc Monopolium, quando unus, vel pauci efficiunt, ut ipsi soli aliquod mercionis genus vendant eo pretio, quo ipsis collibuerit.*

2 Moreover a Monopoly is defined: *It is a convention, machination, and industry of certain merchants, by which they bring it about that they alone either sell some kind of goods, or sell at a certain price.*

> *Definitur autem Monopolium:* Est conventio, machinatio, et industria aliquorum mercatorum, qua efficiunt, ut ipsi soli, vel aliquod mercium genus vendant, vel certo pretio vendant.

3 Now this can be done in four ways: either conspiring among themselves about the price, so that no one sell cheaper. Or bringing it about that they alone sell certain goods, or buying up all the goods of a certain kind, and suppressing them, until the price of them has risen very much. Or impeding that they be carried off elsewhere by others. I shall discuss all these.

> *Hoc autem quatuor modis fieri potest, vel conspirando inter se de pretio, ut nullus vendat minori. Vel faciendo ut ipsi soli vendant aliquas merces, vel emendo omnes merces certi generis, easque supprimendo, donec pretium illarum multum ascenderit. Vel impediendo, ne aliunde asportentur ab aliis. Hos omnes discutiam.*

4 I suppose, moreover, with D. Bonavent. in *speculo animae, cap.* 2. at the end, that the gathering is unjust when someone gathers even his own goods, say the fruits of the earth, from the mere ardor of growing rich, or that scarcity be procured, and the goods stored be afterwards sold more dearly, and again the price be restored.

> *Suppono autem cum D. Bonavent. in* speculo animae, cap. 2. *ad finem, Iniustam congregationem esse, cum quis bona etiam sua, puta fructus terrae, congregat solo ardore ditescendi, vel ut caristia procuretur, et res servatae postea carius vendantur, et iterum pretium reponatur.*

5 Therefore as to the first case: if the merchants do not sell beyond the limits of the just price, nor is it ordered to the bringing in of scarcity, I say it is not iniquitous against justice. So Less. lib. 2. cap. 21. dub. 20. num. 145. Molina t. 2. disp. 345. Navar. in sum. Lat. cap. 23. num. 42. Maior in 4. dist. 15. quaest. 4. Sylvester v. emptio, quaest. 18. Fagundez l. 5. cap. 35. Bass. num. 24. nevertheless say that such men sin against charity. Nauarrus indeed speaks in general. And the holy Doctor indicates this same thing, while he says that those making monopolies from the mere ardor of having, sin. Some, however, among those cited by Fagundez say they sin against justice, whom they certainly violate, exceeding the just price.

> *Igitur quoad primum casum; Si mercatores non vendant extra limites iusti pretii, nec ad caristiam ordinetur inducendam, dico non esse iniquum contra iustitiam. Ita Less. lib. 2. cap. 21. dub. 20. num. 145. Molina t. 2. disp. 345. Navar. in sum. Lat. cap. 23. num. 42. Maior in 4. dist. 15. quaest. 4. Sylvester v. emptio, quaest. 18. Fagundez l. 5. cap. 35. Bass. num. 24. tamen dicunt, peccare huiusmodi contra charitatem. Nauarrus vero loquitur in genere. Et hoc idem indicat S. Doctor, dum ait, monopolia facientes solo ardore habendi, peccare. Aliqui tamen apud Fagundez aiunt, peccare contra iustitiam, quam certo violant, iustum pretium excedentes.*

6 As to the second case: it is certain that the Prince can grant, as some say, the faculty (in Italian *Appalto*), and the merchants can accept it, provided it not be to the public loss. So Molina t. 2. disp. 345. Fagundez l. 5. cap. 35. and others. But let the just price be observed, says Bassaeus num. 25.

> *Quoad secundum casum; certum est, posse Principem dare, ut aiunt aliqui, facultatem (Italice* Appalto*) posseque mercatores acceptare, dummodo non sit in damnum publicum. Ita Molina t. 2. disp. 345. Fagundez l. 5. cap. 35. et alii. At servetur iustum pretium, ait Bassaeus num. 25.*

7 As to the third way, when many together buy goods, that they may afterwards sell at a dearer time at their pleasure. I say with D. Bonav. that they sin against justice, and are held to restitution. So also Gabr. 4. dist. 15. quaest. 10. art. 3. Medin. de restit. quaest. 36. Sylvest. v. emptio, quaest. 10. Angelus v. negotiatio, Sums l. 6. de iust. quaest. 2. art. 2. Maior in 4. dist. 15. quaest. 4. alioqui 41. Fagund. l. 5. cap. 35. Azor. 3 p. l. 8. cap. 28. Regin. l. 25. num. 327. Sylvest. quaest. 77. art. 1. quaest. 2. Conrad. de contr. quaest. 51 Rebell. 2. p. de oblig. iust. l. 9. quaest. 5. Bassaeus num. 27. where, with Fill. tract. 35. num. 214. Less. l. 2. dub. 21. num. 153. Molin. disp. 345. adds that it is not done against commutative justice, but Legal, and therefore they are not held to restore. But they are deceived: for by the law of nations buying ought to be free to individuals in the whole breadth of the just price, and accordingly an injury is done to the buyers by that whole agreed increase of the price.

> *Quoad tertiam modum, cum multi simul emunt merces, ut postea vendant pro libito tempore cariori. Dico cum D. Bonav. peccare eos contra iustitiam, et teneri restitutioni. Ita etiam Gabr. 4. dist. 15. quaest. 10. art. 3. Medin. de restit. quaest. 36. Sylvest. v. emptio, quaest. 10. Angelus v. negotiatio, Sums l. 6. de iust. quaest. 2. art. 2. Maior in 4. dist. 15. quaest. 4. alioqui 41. Fagund. l. 5. cap. 35. Azor. 3 p. l. 8. cap. 28. Regin. l. 25. num. 327. Sylvest. quaest. 77.*

*art. 1. quaest. 2. Conrad. de contr. quaest. 51 Rebell. 2. p. de oblig. iust. l. 9. quaest. 5. Bassaeus num. 27. ubi cum Fill. tract. 35. num. 214. Less. l. 2. dub. 21. num. 153. Molin. disp. 345. addit, non agi contra iustitiam commutativam, sed Legalem, et ideo non teneri restituere. Sed decipiuntur: nam iure gentium libera esse debet singulis emptio in tota latitudine iusti pretii, ac proinde fit emptoribus iniuria toto illo condicto pretii augmento.*

8 But to buy up all the goods, or so great a supply, that scarcity is brought in, or the liberty of buying at the just current price in due time is taken from individuals; is an injustice compelling to restitution. See Medin. de restit. quaest. 36. §. penult. Sylvest. v. emptio, quaest. 10. Ang. v. Negotiatio, Sot. l. 6. de Iust. quaest. 2. and the others cited above.

*Emere autem omnes merces, aut tantam copiam, ut penuria inducatur, vel singulis auferatur libertas tempore debito emendi iusto pretio currente; est iniustitia ad restitutionem cogens. Vide Medin. de restit. quaest. 36. §. penult. Sylvest. v. emptio, quaest. 10. Ang. v. Negotiatio, Sot. l. 6. de Iust. quaest. 2. et alii supra citati.*

9 Wherefore in vain does Fagund. num. 7. say it is licit; if liberty and abundance remain.

*Quare frustra Fagund. num. 7. id licitum ait; si maneat libertas, et abundantia.*

10 The fourth mode of monopoly is unjust by the consent of all, as Fagund. num. 9. says. In vain indeed does Bassaeus num. 27. add, that this is true if the merchants are diverted by force, or fraud; not, if by prayers, or persuasions. Certainly they still inflict injustice on the citizens against the law of nations; even if not on the arriving merchants, who nevertheless, for the most part, suffer some loss.

*Quartus modus monopolii est omnium consensu iniustus, ut ait Fagund. num. 9. Frustra vero Bassaeus num. 27. addit, id verum, si mercatores vi, vel fraude divertantur; non, si precibus, vel suasoribus. Sane adhuc iniustitiam inferunt civibus contra ius gentium; esto non mercatoribus advenientibus, qui tamen, ut plurimum, aliquam patiuntur amissionem.*

## Question X: Whether the seller is bound to disclose a grave defect of the thing

1 I ASSERT that the seller is held to reveal a grave defect of the thing known to himself; otherwise he is held to all damage, even resulting; for instance, if he gives a diseased sheep which infects the flock. *l. Iulian. ff. de act. empt. et l. 1. C. de aedilit. says* D. Thom. 2. 2. *quaest. 77. art. 3.* D. Bonan. *in speculo animae, cap. 2. §. secundus ramus principalis,* Molin. *t. 2. disp. 353.* Nauar. *cap. 23. num. 89.* Medin. *C. de Restit. quaest. 34.* Tanner. *disp. 4. quaest. 7. num. 56.* Fagund. *de contract. l. 5. cap. 38.* Baldus, *v. Venditio, num. 14. and the rest with these; and* Diana *Tract. de contr. after* D. Ambr. *l. 1. de offi.*

An teneatur venditor defectum rei gravem aperire.

*ASSERO, venditorem teneri revelare defectum rei gravem, notum sibi, alioqui tenetur ad omne damnum etiam resultans; puta si ovem morbidam det, quae gregem inficiat,* l. Iulian. ff. de act. empt. et l. 1. C. de aedilit. ait *D. Thom.* 2. 2. quaest. 77. art. 3. *D. Bonan.* in speculo animae, cap. 2. §. secundus ramus principalis, *Molin.* t. 2. disp. 353. *Nauar.* cap. 23. num. 89. *Medin.* C. de Restit. quaest. 34. *Tanner.* disp. 4. quaest. 7. num. 56. *Fagund.* de contract. l. 5. cap. 38. *Baldus,* v. Venditio, num. 14. et caeteri apud hos: Et *Dianam* Tract. de contr. post *D. Ambr.* l. 1. de offi.

2 But if a hidden grave defect gave the buyer cause for the contract, which knowing it he would not have entered, the contract is void, and there is given to him the redhibitory action for taking back his price, the thing being returned: *l. 1. et l. si sciendum, 19. ff. de aedilit. edicto,* which action lasts for six months, *l. si tam: n. 4. vers. Non nocebit l. Per sex menses, ff. eodem.* If he has not used it within those six

months, he can within another half-year bring the action of estimation, which lasts for a year, *l. si tamen cit.* The time of both actions begins from the day of the buyer's knowledge.

> *QUOD si emptori defectus absconsus gravis dedit causam contractus, quem sciens non iniisset, irritus est contractus, et datur ei actio redhibitoria ad rehabendum suum pretium, reddita re,* l. 1. et l. si sciendum, 19. ff. de aedilit. edicto*, quae actio durat per sex menses* l. si tam: n. 4. vers. Non nocebit l. Per sex menses, ff. eodem. *Si ea sex mensibus non est usus, potest intra aliud semestre actionem intentare aestimatoriam, quae durat per annum* l. si tamen cit. *Incipit autem utriusque actionis tempus a die notitiae emptoris.*

3 But if ignorance of the defect does not give cause to the contract, but falls only into this, that the buyer would still have bought, even at a lesser price, the contract is valid, as D. Anton. says, *2. p. t. 1. cap. 17. §. 6.* Caiet. *loc. cit.* D. Thom. Sotus *l. 6. de iust. quaest. 3. art. 2.* Less. *l. 2. cap. 7.* Fagund. *num. 10.* Baldaeus *num. 14.* Yet the seller is held to give back the greater amount. The same *says num. 15.* if the defect is not grave. But the buyer is to be warned not to resell it dear in turn.

> *AT si vitii ignoratio non dat causam contractui, sed in hunc cadit, adeo, ut emptor adhuc emeret, etsi minori pretio; contractus est validus, ut ait D. Anton.* 2. p. t. 1. cap. 17. §. 6. *Caiet.* loc. cit. *D. Thom. Sotus* l. 6. de iust. quaest. 3. art. 2. *Less.* l. 2. cap. 7. *Fagund.* num. 10. *Baldaeus* num. 14. *Tenetur tamen venditor reddere id maius. Idem* ait num. 15. *si vitium non est grave. Monendus vero emptor, ne et ipse charo revendant.*

4 SOME ADD, however, that if the buyer, trusting his own judgment, chooses some one thing out of many, asking nothing except about the price, the seller does not sin against justice even if he does not disclose the hidden defect, provided he does not sell above the just price, but deducts from the price an estimate of the defect. So D. Thom. *art. 2. and 3.* Sotus *l. 6. quaest. 3. art. 2.* Antonin. *2. p. tit. 1. cap. 14. §. 6.* Less. *t. 1. de Iustitia l. 2. cap. 21. num. 91. dubit. 11.* Molina *disp. 352.* Ludou. Lopes *2. p. Instruct. consc. cap. 42.* Tanner. *num. 59.* — provided, however, the seller does not cover the defect by deceit, mixing that thing with other excellent ones.

> *ADDUNT tamen aliqui, quod si emptor suo iudicio fidens, rem aliquam e multis eligat, nihil interrogans, praeterquam de pretio; non peccat venditor contra iustitiam, etiamsi occultum vitium non aperiat, dummodo non vendat supra iustum, sed detrahat de pretio aestimationem vitii. Ita D. Thom.* art. 2. et 3. *Sotus* l. 6. quaest. 3. art. 2. *Antonin.* 2. p. tit. 1. cap. 14. §. 6. *Less.* t. 1. de Iustitia l. 2. cap. 21. num. 91. dubit. 11. *Molina* disp. 352. *Ludou. Lopes* 2. p. Instruct. consc. cap. 42. *Tanner.* num. 59.*, dummodo tamen venditor dolo vitium non contegat, miscendo rem illam cum aliis optimis.*

5 But if the defect is patent and manifest, in the external forum no action is given against the seller, unless the buyer is defrauded beyond half the just price. It is gathered *from Leg. 1. §. si intelligatur. And Leg. si tamen §. si quis, ff. de aedilit. edict.* See Fagundez *num. 23.*

> *QUOD si vitium patens est, et manifestum, in foro Soli nulla datur actio adversus venditorem, nisi emptor ultra dimidium iusti pretii defraudetur. Colligitur* ex Leg. 1. §. si intelligatur. Et Leg. si tamen §. si quis, ff. de aedilit. edict. *Vide Fagundez* num. 23.

6 In the internal forum, however, if the price be equal, he is held to nothing. So D. Thom. *quaest. 77. art. 3.* Yet if the seller perceives that the buyer is ignorant of the defect, he is held to warn him, by the common opinion with Molina *disp. 353.* But D. Thom. with others holds the opposite, nor does Tannerus refuse it, *num. 62.*

> *IN interiori vero foro, si pretium sit aequale, ad nihil tenetur. Ita D. Thom.* quaest. 77. art. 3. *si tamen venditor advertit, emptorem ignorare vitium; tenetur monere, ex communi apud Molinam* disp. 353. *at D. Thom. cum aliis*

*oppositum tenet, nec renuit Tannerus* num. 62.

7 For further understanding, note: when someone sells or buys beyond half the just price, there is given in the external forum an action against him who commits the injustice, and he is bound either to restore the excess or defect of price, or to have the contract rescinded, *l. 1. C. de rescindenda vendit. cap. cum dilecti, et cap. cum causa de emptione et venditione.* Moreover it is a mortal sin to violate the mean of the just price, in which justice consists, namely by exceeding the highest in selling, and by diminishing below the lowest in buying. The reason is, because each departs from the mean in which the virtue of justice consists; otherwise even fraudulent measures would be licit against that, *Deuter. 29. Thou shalt not have diverse weights in thy sack*, as the holy Doctor infers in speculo animae, cap. 2.

*PRO ulteriori intelligentia adverte; quando quis ultra dimidium iusti pretii vendit, aut emit, dari in foro exteriori actionem contra eum, qui iniustitiam committit, et obligari vel ad restituendum excessum, aut defectum pretii, vel ad rescindendum contractum* l. 1. C. de rescindenda vendit. cap. cum dilecti, et cap. cum causa de emptione et venditione. *Est praeterea peccatum mortale laedere medium iusti pretii, in quo iustitia consistit, nempe excedendo in venditione summum, et in emptione minuendo infra infimum. Ratio est, quia egreditur uterque medium, in quo iustitiae virtus consistit, alioqui licitae essent etiam mensurae dolosae contra id* Deuter. 29. Non habebis in sacculo diversa pondera, ut infert S. Doct. in speculo animae, cap. 2.

8 I CONCLUDE as a general rule that in every sale there is to be deducted as much as the defect of the thing itself is worth; otherwise there will be injustice, as Caspens. notes, *sect. 10.* adding that the seller can keep a merely negative silence, demanding, however, only the just price, if he cannot find a just price for his good elsewhere. And this is true even if he knew the buyer would not have bought, had he known the defect, and so bought involuntarily; nor would he act against this, *in rebus. §. Item, qui sciens, ff. commodati, statuentem*, that the seller reveal the hidden defects of the thing; otherwise an action is granted against him.

*CONCLUDO pro regula generali, in omni venditione diminuendum esse, quantum valet ipsum vitium rei; alioqui erit iniustitia, ut notat Caspens.* sect. 10. *addens, posse venditorem se habere mere negative, exigendo tamen iustum pretium tantum, si aliunde nequeat rei suae iustum pretium invenire. Et hoc verum, etiam si sciret, emptorem non fuisse empturum, si vitium nosset, atque adeo involuntarius emit; neque contra hoc faceret,* in rebus. §. Item, qui sciens, ff. commodati, statuentem, *ut venditor revelet occulta rei vitia; alioqui actionem contra eum concedit.*

9 He says this is the COMMON opinion; for if we wished to make such contracts invalid, innumerable lawsuits and dispensations would arise, which are demanded in this way even if they would be invalid without falsehood, since some things are tacitly not to be expressed by law, which, if expressed, would not be granted. It is the same in donations, almsgivings, legacies, testaments, elections, presentations, and other things of this kind. Therefore otherwise almost nothing in human dealings would ever be firm, nothing ratified, as Valentia says, *quaest. 20. p. 4.* and innumerable lawsuits would boil up to void purchases, to the great inconvenience and detriment of the Republic.

*HANC ait communem esse sententiam, quod si velimus huiusmodi contractus invalidos facere, orientur innumerae lites, atque dispensationes, quae hoc modo postulantur, etiam si absque mendacio essent invalidae, cum tacentur aliqua de iure non exprimenda, quibus expressis, non concederentur. Idem est in donationibus, eleemosynis, legatis, testamentis, electionibus, praesentationibus, et aliis huiusmodi. Itaque alioqui nihil fere unquam in humanis commerciis esset solidum, nihil ratum, ut ait Valentia* quaest. 20. p. 4. *innumeraeque lites ebullirent ad irritandas emptiones, magno Reipublicae incommodo, et detrimento.*

10 THEREFORE he answers the opposite reason thus: that a contract of this kind is voluntary, unless the buyer was deceived simply. But this is not true, as I said.

> *ITAQUE ad rationem oppositam respondet, contractum huiusmodi esse voluntarium, nisi emptor explicetus simpliciter. Sed hoc non est verum, ut dixi.*

11 On that law, Molina says, *disp. 392.*, it is to be understood when the defect is grave, and a harmful and less useful thing is sold. In this sense I do not refute Caspensem, as I said.

> *AD Legem illam ait Molina* disp. 392. *intelligi, quando vitium est grave, et res noxia, et minus utilis venditur. Hoc sensu Caspensem non refello, ut dixi.*

12 On the other hand, even the buyer of a gem from a peasant who does not know it, ought to buy at the just price, not cheaply, as Tanner. warns, *num. 67.* and Molina *disp. 253. num. 12.* Yet that a field can be bought, in which I know there is a treasure, at the common price, they teach with D. Thom. *quaest. 66. art. 5. ad 2.* Valentia *quaest. 20. p. 4. Sù under the word emptio*, Tanner. *num. 66.*

> *E contra etiam emptor Gemmae a rustico ignorante, debet iusto pretio emere, non autem vili, ut monet Tanner.* num. 67. *et Molina* disp. 253. num. 12. *Posse tamen emi agrum, in quo sciam esse Thesaurum, communi pretio, docent cum D. Thom.* quaest. 66. art. 5. ad 2. *Valentia* quaest. 20. p. 4. Sù verbo emptio, *Tanner.* num. 66.

### Question XI: Whether a thing sold, not yet delivered, perishes to the buyer

1 I SUPPOSE that if the thing has already been delivered, it will perish to the buyer. See Molinam *disp. 366.* The reason is, because by delivery ownership has been transferred to the buyer. But a thing perishes to its owner and deteriorates, as the Doctors note, *in l. Quod si ff. de periculo, et commod. rei vendit.*

> An res vendita, non adhuc tradita, pereat emptori.
>
> *SUPPONO, quod si iam res sit tradita peribit emptori. Vide Molinam* disp. 366. *Ratio est quia per traditionem translatum est dominium in emptorem. Res autem domino suo perit, et deterior fit, ut notant DD.* in l. Quod si ff. de periculo, et commod. rei vendit.

2 I ASSERT first, that if the thing has not yet been delivered, and is determinate, as this horse, this ox, etc., it perishes to the buyer. So the Doctors commonly, with Fagundez *cap. 47.*; for thus do the Laws dispose, and deservedly; for the right has already been acquired by the buyer, and the very sale of a determinate thing, the law of nations being regarded, is sufficient to transfer ownership to the buyer; for that it is not really transferred before delivery comes from the disposition of the civil law, which for certain reasons, to avoid lawsuits, so established; yet the civil law does not thereby wish to prevent the commodities and incommodities of the thing from belonging to the buyer.

> *ASSERO primo, si res non adhuc sit tradita, et sit determinata, ut hic equus, hic bos, etc. perire emptori. Ita communiter Doctores apud Fagundez* cap. 47. *sic enim disponunt Iura, et merito; nam ius acquisitum est iam ab emptore, et ipsa venditio rei determinatae spectato iure gentium sufficiens est ad transferendum dominium in emptorem; nam quod realiter non transferatur ante traditionem, id provenit ex dispositione Iuris civilis, quod ob certas causas ad vitandas lites id statuit, non tamen per hoc ius civile vult impedire, ne commoda, et incommoda rei ad emptorem pertineant.*

3 I EXCEPT, however, first, if the thing perishes or deteriorates through the fault of the seller, for instance if through gross or light fault he does not guard the thing.

*EXCIPE tamen primo, si res culpa venditoris perit, aut deterior fit, puta si ex culpa lata, vel levi non custodiat rem.*

4 SECOND, if the seller was in default in delivering the thing sold; for then he himself is at fault, as D. Bonav. notes in *speculo animae, cap. 2. ad finem.* Then therefore it perishes to the seller, as is gathered *from l. illud, ff. de periculo, et commodo rei vendit.* and they teach, Less. *l. 2. cap. 21. dub. 12. num. 96.* Sylvester *v. emptio, quaestione 3.* Molina *loc. cit.* Fagundez *num. 4.* Bassaeus *num. 23.*

*SECUNDO, si venditor fuit in mora tradendae rei venditae, tunc enim ipse est in culpa, ut notat D. Bonav. in* speculo animae, cap. 2. ad finem. *Tunc igitur venditori perit, ut colligitur* ex l. illud, ff. de periculo, et commodo rei vendit. *et docent Less.* l. 2. cap. 21. dub. 12. num. 96. *Sylvester* v. emptio, quaestione 3. *Molina* loc. cit. *Fagundez* num. 4. *Bassaeus* num. 23.

5 THIRD, if it has been so agreed in the contract; this is taken expressly *from l. in venditione, ff. de per. et com. rei vend.* and they teach, Molina *loc. cit.* Fagundez *num. 6.* Bassaeus *loco cit.*

*TERTIO, si in contractu ita conventum est, expresse sumitur* ex l. in venditione, ff. de per. et com. rei vend. *et docent Molina* loc. cit. *Fagundez* num. 6. *Bassaeus* loco cit.

6 FOURTH, when the thing is confiscated on account of the crime of the seller. Thus the authorities cited above hold.

*QUARTO, quando res confiscatur ob delictum venditoris. Sic supra allegati sentiunt.*

7 FIFTH, if the seller in contracting said something whereby the buyer would believe the thing to be durable. Likewise if the seller knew the thing would not last, and did not warn the buyer, *l. si vina, ff. de pericul. et commod. rei vend.* See Molinam *loc. cit.* Fagundez *num. 8.* Bassaeum *loc. cit.*

*QUINTO si venditor in contrahendo aliquid dixit, quo emptor crederet, rem duraturam. Item si venditor sciebat non duraturam rem, nec admonuit emptorem* l. si vina, ff. de pericul. et commod. rei vend. *Vide Molinam* loc. cit. *Fagundez* num. 8. *Bassaeum* loc. cit.

8 I ASSERT second, that if the sale be made in genus, as the Jurists say, or if the thing sold be indeterminate, as the Theologians say — for instance, if from his flock ten sheep, from the herd two cows, without designating them — the flock or herd perishing, it perishes to the seller; Less. *l. 2. cap. 21. dub. 11. num. 97.* Molina *loc. cit.* Fagundez *num. 10. cap 47.* It is clear *from Leg. In ratione, §. diligenter, ff. ad l. Falcidiam, and Leg. Incendium, Cod. si certum petatur.*

*ASSERO secundo, si venditio fiat in genere, ut loquuntur Iuristae, seu si res vendita sit indeterminata, ut Theologi loquuntur, puta si ex grege suo decem oves, ex armento duas vaccas, non designando illas; pereunte grege, vel armento perit venditori, Less.* l. 2. cap. 21. dub. 11. num. 97. *Molina* loc. cit. *Fagundez* num. 10. cap 47. *Patet* ex Leg. In ratione, §. diligenter, ff. ad l. Falcidiam, et Leg. Incendium, Cod. si certum petatur.

9 The REASON is, because from such a purchase the buyer has acquired only the right that ten sheep be delivered to him, but no right in particular.

*RATIO est, quia e tali emptione emptor solum acquisivit ius, ut sibi decem oves traderentur, nullum autem ius in particulari.*

10 They commonly ADD third: when some thing to be measured is sold whole and entire, as this whole cask of wine, this whole granary of wheat, this whole cask of oil, for a certain number of regali for every measure: if they perish before they are measured, they perish to the seller; but once

measured, to the buyer; Less. *l. 2. cap. 21. dub. 12. num. 97.* Molina *loc. cit.* and others with Fagundez *num. 12.*

> *ADDUNT communiter tertio; quando venditur aliqua res mensuranda integre tota, ut totum hoc dolium vini, totum hoc horreum tritici, totum hoc dolium olei tot regalibus pro quavis mensura, si pereant, antequam mensurentur, perire venditori; mensurata vero, emptori; Less.* l. 2. cap. 21. dub. 12. num. 97. *Molina* loc. cit. *et alii apud Fagundez* num. 12.

11 However, Baldus, and Paulus de Castro *ad l. 2. C. de per. et com. rei vendit.* hold that such a sale is to the body, not to the measure, except when certain measures are sold by deceit or by the heap; and therefore it perishes to the buyer even before measurement. Others reject this, with Fagund. *num. 12.* and others there, and Bassaeo, *num. 13.* Yet Fagund. himself fights with himself, as I shall say, *quaest. 13.*

> *Attamen Baldus, et Paulus de Castro* ad l. 2. C. de per. et com. rei vendit. *existimant, talem venditionem esse ad corpus, non ad mensuram, nisi quando aliquae mensurae ex dolo, vel acervo venduntur, et ideo perire emptori, etiam ante dimensionem. Alii hoc reiiciunt cum Fagund.* num. 12. *et aliis ibi, ac Bassaeo,* num. 13. *Ipse tamen Fagund. secum pugnat, ut dicam* quaest. 13.

## Question XII: On the rescission of a sale and purchase on account of fraud, etc.

1 IT MUST BE NOTED that D. Bonaventure, in the *Mirror of the Soul, chapter 2,* teaches that hidden injustice is often committed in contracts in many ways, namely by frauds in number, weight, and measure; in value or in quantity; by silence about a defect, or by deceiving the simplicity of a buyer, by commending a false thing with perjuries, by asserting things with execrations, by duplicity of words — all of which are against charity, and also against justice, insofar as they are directed at deceiving and damaging one's neighbor; for they give a cause to contracts which buyers would not enter into if they knew such things. Similarly, sellers often disparage merchandise, spreading reports that such goods must be reduced to a very cheap price; by disseminating letters; by ships quickly landing, laden with the same merchandise, etc. These sometimes give a cause to contracts. About these we must see what we ought to hold.

> ***De rescissione venditionis, et emptionis ratione doli etc.***
>
> *NOTANDUM est D. Bonav. in* speculo animae, cap. 2. *iniustitiam occultam saepe fieri in contractibus, multis modis, fraudibus scilicet, in numero, pondere, mensura; in valore, seu in quantitate, in defectus taciturnitate, vel decipiendo mentis simplicitatem, commendando rem falsam periuriis, asseverando execrationibus, verborum duplicitate, quae omnia contra charitatem sunt, et etiam contra iustitiam, quatenus ad decipiendum proximum, et damnificandum diriguntur; dando causam contractibus, quos non inirent emptores, si talia nossent. Similiter emptores saepe merces vilipendunt, spargentes, tales merces ad viliusculum pretium redigendas; litteras disseminando; naves cito appellen-las, iisdem mercibus onustas, etc. Quae aliquando dant causas contractibus. De his videndum, quid sentire debemus.*

2 THEREFORE, FIRST, frauds and deceits concerning the substance of things, when they give a cause to the contract, render it void, as all confess. The reason is given by D. Bonaventure in *4 dist. 27, art. 2, question 2,* and elsewhere in the same *distinction*: because fraud and deceit make the contract itself involuntary; but without free consent a human act cannot stand. This is proven also by the others: Lessius *book 2, chap. 17, dub. 5, n. 27*; Fagundez *book 5, chap. 42, n. 2.*

*PRIMO igitur fraudes, et doli circa substantiam rerum, dantes causam contractui, reddunt irritum, ut omnes fatentur. Ratio est D. Bonav. in* 4. dist. 27. art. 2. quaest. 2. *et alibi eadem* dist. *quia fraus, et dolus reddunt ipsum contractum involuntarium; sine consensu autem libero, actus humanus non stat. Ita probatur etiam a caeteris Lessio* l. 2. cap. 17. dub. 5. num. 27. *Fagundez* l. 5. cap. 42. num. 2.

3 I SAY secondly, that fraud and deceit which do not cause the contract, but only an increase or diminution of the price, do not void the contract, but only oblige to reducing the price to equality. See Molina *t. 2, disp. 352*; Less. *book 2, chap. 17, dub. 5, n. 28*.

*DICO secundo, fraus, et dolus non causantes contractum, sed solum intensionem, vel remissionem pretii, non irritant contractum, sed solum obligant ad reducendum pretium ad aequalitatem. Vide Molinam* t. 2. disp. 352. *Less.* l. 2. cap. 17. dub. 5. num. 28.

4 I SAY thirdly. If deceit, error, or fraud gives a cause to a contract of sale, or to any other, such that the party suffering the deceit would not contract if he knew of the deceit, and the deceit itself proceeds from the other contracting party, or he shares in it, the other contracting party being in good faith, the contract is void in the forum of conscience and in the external forum; yet in the external forum, in favor of the deceived party and of the deceiver, by civil and canonical law there is given an action for rescinding the contract, or for reducing it to equality, as the deceived party may prefer, even if the deception does not go beyond the limits of the just price. So Molina *T. 2, disp. 259 and 352*; Couar. *ad regulam Possessor, p. 2, §. 6*; Medina *Cod. de restit., question 35*; Vallascus *de iure emphyt., question 5, n. 9*; Sylvest. *v. culpa, question 7*; Fagundez *book 5, chap. 42*; and it is evident *ex l. si dolo C. de rescind. vendit. and ex cap. cum dilecti de empt. et vendition.*

*DICO tertio. Si dolus, error, vel fraus det causam contractui venditionis, vel cuicumque alteri, ita ut dolum patiens non contraheret, si dolum sciret, et ipse dolus proveniat ex altero contrahente, aut illius particeps sit, bona fide altero contrahente, contractus est irritus in foro conscientiae, et externo; datur tamen in foro externo in favorem decepti, et decipientis, de iure civili, et canonico, actio rescissoria contractus, vel reductoria ad aequalitatem, prout deceptus maluerit, etiam si deceptio non sit extra limites pretii iusti. Ita Molina* T. 2. disp. 259. et 352. *Couar.* ad regulam Possessor, p. 2. §. 6. *Medina* Cod. de restit. quaest. 35. *Vallascus* de iure emphyt. quaest. 5. num 9. *Sylvest.* v. culpa, quaest. 7. *Fagundez* l. 5. cap. 42. *et constat* ex l. si dolo C. de rescind. vendit. et ex cap. cum dilecti de empt. et vendition.

5 *IT IS PROVED* commonly by the argument placed above of D. Bonaventure, because free consent, necessary for every contract, was lacking.

PROBATUR *communiter, argumento supra posito D Bonaventurae, quia defuit consensus liber, necessarius ad omnem contractum.*

6 I SAY fourthly. If the deceit is brought about by some third party, the contracting parties being unaware, although the contract is valid, yet the deceived party can in the forum alone have an action against that third party for damages, as is found in *cap. cum dilecti, de empt. et vendit., and Leg. eleganter, at the beginning, ff. de dolo, and ex Leg. si dolo C. de rescind. vendit.*; and this is taught commonly by Molina *t. 2, disp. 352*; Less. *cited book, chap. 17, dub. 5, n. 33*; and others as gathered by Fagundez *n. 16*.

*DICO quarto. Si dolus inductus est a tertio quodam, insciis contrahentibus, licet sit validus contractus, tamen potest deceptus in foro Soli habere actionem contra illum tertium de damno, ut habetur,* cap. cum dilecti, de empt. et vendit. et Leg. eleganter, in principio, ff. de dolo, et ex Leg. si dolo C. de rescind. vendit. *et docent communiter Molina* t. 2. disp. 352. *Less.* lib. cit. cap. 17. dub. 5. num. 33. *et alii apud Fagundez* num. 16.

7 SOME, however, say that such a contract is null in conscience, because consent, which is the substance of the whole contract, is lacking. So Medina *C. de restit., question 33*; Conrad. *in addit. sum., ad question 57, dicto 3 and 4*. For the rest see the *disput. de contractibus, question 3*. Bassaeus adds at *n. 13* that the contract cannot be patched up at the very lowest by an occult diminution of measure, unless he is compelled to go below the minimum.

> *ALIQUI tamen dicunt, talem contractum esse in conscientia nullum, quia deficit consensus, qui est substantia totius contractus. Ita Medina* C. de restit. quaest. 33. *Conrad.* in addit. sum. ad quaest. 57. dicto 3. et 4. *Reliqua vide* disput. de contractibus quaest. 3. *Bassaeus* num. 13. *addit non posse refarcire contractum ad infima diminutione mensurae occulta, nisi cogatur infra infimum ire.*

## Question XIII: Whether a sale with a pact of repurchase is lawful

1 I SAY first, that a sale with a pact of buying back is licit, even in favor of the seller alone. This is the common opinion. So Molina *t. 2, disp. 375*; Tanner. *disp. 4, question 7, n. 51*; Less. *book 1 de Iust.*, book 5, chap. 21, dub. 14, n. 113; Fagundez book 5, chap. 43; and others as gathered in these authors, and Bassaeus n. 3; provided, however, first, that there be an intention of selling. Secondly, that the price of the thing be just. Thirdly, that the fruits belong to the buyer, as I shall say.

> ***An licita sit venditio cum pacto retrovendendi.***
>
> *DICO primo, licitam esse venditionem cum pacto retrovendendi in favorem solius etiam venditoris. Est communis opinio. Ita Molina* t. 2. disp. 375. *Tanner.* disp. 4. quaest. 7. num. 51. *Less.* l. 1. de Iust. *l. 5. cap. 21. dub. 14. num. 113. Fagundez l. 5. cap. 43. et alii apud istos, ac Bassaeus n. 3. si tamen adsit vendendi intentio. Secundo ut rei pretium sit iustum. Tertio ut fructus sint emptoris, ut dicam.*

2 *It is proved*, because such a pact is nowhere found forbidden, nor is it prejudicial to anyone. Nor does *C. ad nostram* stand in the way, because there other bad conditions are brought forward.

> Probatur*, quia tale pactum nullibi invenitur vetitum, neque ulli est praeiudiciale. Neque obstat* C. ad nostram*, quia ibi aliae malae conditiones adducuntur.*

3 Also, the thing sold with such a pact is worth less than if it were sold without it, nor is it to be increased in the redemption. So the Doctors commonly, as gathered by Fagundez *n. 5*; Tanner. *n. 51*. The reason is, because it is sold with a burden. Some indeed want it to be worth a third part less; others remit this to the judgment of a prudent man.

> *Res etiam, quae tali pacto venditur, minus valet, quam si sine illo venderetur, nec in redemptione augendum. Ita communiter Doctores apud Fagundez* num. 5. *Tanner.* num. 51. *Ratio est, quia venditur cum onere. Aliqui vero volunt, tertiam partem minus valere; alii prudentis arbitrio id remittunt.*

4 *You ask first*, To whom do the fruits belong that hang during that time?

> Quaeres primo*, Cuius sint fructus, pendentes pro illo tempore.*

5 *They answer*, They belong to the buyer, provided the sale is not usurious. See Fagund. and Bassaeus.

> Respondent*, pertinere ad emptorem, dummodo venditio non sit usuraria. Vide Fagund. et Bassaeum.*

6 *You ask secondly*, When in the sale no term is set for buying back, what term is prescribed: Some say it is one of 30 years. Others say it can always be redeemed. See Fagundez *n. 19*; it is founded on *l. si*

*ita stipulatus, ff. de fid. instrum.* And *l. hac conditio, and l. 2, ff. de condition. et demonstrat.*, and Barthol. teaches *there*.

> Quaeres secundo, *quando in venditione non ponitur terminus ad retrovendendum; qui terminus praescribatur: Aliqui dicunt, esse 30. annorum. Alii dicunt, posse semper redimi. Vide Fagundez* num. 19. *fundatur in* l. si ita stipulatus, ff. de fid. instrum. *Et* l. hac conditio, et l. 2. ff. de condition. et demonstrat. *et docet Barthol.* ibi.

7 *You ask first*, In what the sale to the body differs from the sale to the measure.

> Quaeres primo, *quo pacto differat venditio ad corpus, et ad mensuram.*

8 A sale to the body takes place when the thing is sold by a designation and expression of the quantity in a confused way, as if I sell you such a farm contained within such boundaries, however many acres it may have; not designating that it has so many acres, as in Fagund. *book 5, chap. 44*.

> *Venditio ad corpus fit, cum res venditur designatione, et expressione quantitatis confusa, ut si tibi vendam tale praedium inter tales terminos contentum, quotquot iugera habeat; non designando, habere tot iugeta, apud Fagund.* l. 5. cap. 44.

9 A sale to the measure is when so many measures are designated, *e. g.* ten modia of wheat; or ten amphorae of wine, according to Fagund. *chap. 44*.

> *Venditio ad mensuram est, cum tot mensurae designantur* v. g. *decem modia tritici; vel decem anphorae vini, secundum Fagund.* cap. 44.

10 Therefore, when the form of the words of the contract begins from the measure, the sale is deemed to be to the measure. But when it begins from the body, it is said to be made to the body. See Fagundez *chap. 44*. Thus, therefore, if I sell you this whole cask of wine, however many pitchers it may contain, it will be a sale to the body. So *chap. 44, n. 3 and 4* asserts. But *chap. 47, n. 12* says it is a sale to the measure, *as I said in question 11*.

> *Itaque quando forma verborum contractus incipit a mensura, censetur venditio ad mensuram. At quando incipit a corpore, dicitur facta ad corpus. Vide Fagundez* cap. 44. *Sic igitur vendo tibi totum hoc vini dolium, quotquot hydrias contineat, erit venditio ad corpus. Ita asserit* cap. 44. num. 3. et 4. *At* cap. 47. num. 12. *ait esse venditionem ad mensuram,* ut dixi quaest. 11.

11 It helps, moreover, to know this distinction; for if the sale is made to the body, not only the risk of the thing, as well as the advantage, belongs at once to the buyer, but the whole thing also, at least by force of the contract, will be deemed sold for the price alone agreed at the beginning, whether it is found greater or smaller afterwards.

> *Iuvat autem hanc scire distinctionem; nam si ad corpus venditio fiat, non solum periculum rei, sicut et commodum ad emptorem statim pertinet, sed etiam tota res, saltem ex vi contractus, solo pretio ab initio convento vendita censebitur, sive maior, sive minor postea inveniatur.*

12 But if it was made to the measure, the whole thing is not deemed sold, but only the quantity expressed. See Fagundez *chap. 44*.

> *Si autem facta est ad mensuram, non censetur vendita tota res, sed solum quantitas expressa. Vide Fagundez* cap. 44.

13 *You ask secondly*, What is the pact of the lex commissoria?

> Quaeres secundo, *quid sit pactum legis commissoriae.*

14 *It is answered*, That it is that by which the thing is sold under the condition that, if the price is not paid within such a time, the thing shall be as if not bought. So Molina *t. 2, disp. 324 and 378*; Fagundez *chap. 45*.

> Respondetur, *esse illud, quod res venditur sub conditione, ut si pretium tali tempore non solvatur, res sit inempta. Ita Molina* t. 2. disp. 324. et 378. *Fagundez* cap. 45.

15 *You ask thirdly*: Whether the fruits of the thing sold, so long as it is not paid for, belong to the seller.

> Quaeres tertio*: An fructus rei venditae, quamdiu non solvitur, sint venditoris.*

16 *It is answered*, That the fruits which hang on the thing sold at the time of the purchase belong, as to their value which they then have, to the buyer, unless it is otherwise agreed. This is the common opinion.

> Respondetur, *fructus, qui tempore emptionis pendent in re vendita, quoad valorem, quem tunc habent, ad emptorem pertinere, nisi aliter conventum sit. Est communis sententia.*

17 I say secondly, that as soon as the buyer has given the price to the seller, all the fruits which arise after the sale has been made, and their increments, belong to the buyer.

> *Dico secundo, statim ac venditor pretium dedit venditori, ita omnes fructus, qui post factam venditionem nascuntur, horumque incrementa pertinent ad emptorem.*

18 *Note*, That from contracts, especially from sale, there very often results a certain obligation which is called eviction, which is the loss of the just title by which one possessed a thing; as if I sold you a horse as my own which was in truth Peter's, and Peter takes it from you through a judge, and so evicts it; I, the seller, am bound by this eviction; for I am obliged to make good that horse to you, nor to leave you without indemnity for that eviction; and there belongs also to you, the buyer, against me the seller, not only an action for the price at which the horse was valued at the time of the eviction, but an action for interest and the damages that followed, *l. si eum quaestio, Cod. de eviction., and leg. evicta re, ff. on the same title*; and the Doctors, as gathered by Fagund. *de contract. book 1, chap. 4, n. 19*; Bassaeus, *v. Venditio*; Bonac. *disp. 3, question 2, p. ult.*

> Nota, *e contractibus, maxime venditione, saepissime resultare obligationem quandam, quae dicitur evictio, quae est amissio iusti tituli, quo quis rem possidebat, ut si vendidi tibi, tanquam meum, equum, qui revera erat Petri; Petrus autem illum a te per iudicem aufert, sicque evincit; teneor ego venditor de hac evictione; sum enim obligatus tibi facere bonum illum equum, neque indemnem facere de illa evictione, competitque etiam tibi emptori contra me venditorem, non solum actio ad pretium, quo equus aestimabatur tempore evictionis ad interesse, et damna secuta* l. si eum quaestio, Cod. de eviction. et leg. evicta re, ff. eodem titul. *et Doctores apud Fagund.* de contract. lib. 1. cap. 4. num. 19. *Bassaeum,* v. Venditio *Bonac.* disp. 3. quaest. 2. p. ult.

19 Truly, in all onerous contracts the party transferring dominion to the other is bound on both sides for the eviction of the thing, *l. Libera, C. de sent: et interloc., and L. praedium, C. de evict.*

> *Sane in omnibus contractibus utrinque onerosis tenetur transferens dominium in alterum de evictione rei,* l. Libera, C. de sent: et interloc. et L. praedium, C. de evict.

# Disputation VI: On the Loan and Usury

1 I shall treat these two under a single title, since Usury is nothing other than the abuse of the Loan; of which the pages of both Testaments speak clearly; moreover, the Canons of Councils and the decrees of Pontiffs plainly condemn it. Yet Scholastics are not lacking who strive to purge so shameful a vice from every stain, and who rather cut up than examine the material of the most delicate consequence with empty little distinctions — men who have come to such rashness as to calumniate simple usuries as licit to laymen before Alexander III, although they were most expressly condemned in the Council of Nicaea, *can. 8*, as I shall say below.

> ***De mutuo et Usura.***
>
> *Haec duo uno titulo expediam, cum Usura nihil aliud sit, quam Mutui abusus; de quo utriusque testamenti pagina clare proloquitur; insuper Conciliorum Canones, ac Pontificum decreta plane eum damnant: Non tamen desunt Scholastici, qui ab omni labe tam turpe vitium purgare nituntur; ac materiam delicatissimae consequentiae inanibus distinctiunculis discerpunt potius quam discutiant, qui eo temeritatis deveneruut, ut simplices usuras laïcis licitas ante Alexandrum III. calumnient, cum tamen in Concilio Nicaeno* can. 8. *disertissime sint damnatae, ut infra dicam.*

## Question I: What a loan and usury are, and why usury is a sin

1 Mutuum is said from this, that what is mine becomes yours, *l. Mutuum, ff. si certum petatur.* And thus it is defined: *A loan (mutuum) is the transfer of a thing as to dominion, whereby it at once becomes the recipient's, with the obligation of returning at a future time another thing of the same kind.*

> ***Quid sit Mvtuvm, et Usvra, et cur haec sint peccatum.***
>
> *Mutuum dicitur ab eo, quod ex meo tuum fit,* l. Mutuum, ff. si certum petatur. *Et sic definitur:* Mutuum est traditio rei, quoad dominium, qua statim fiat accipientis, cum obligatione reddendae aliam futuro tempore eiusdem rationis.

2 It is gathered from D. Bonaventure *in 6 Luke* at those words: *Et si mutuum dederitis.* It is given by Caspens. *tract. 19, disp. 3*; Bassaeus *v. mutuum*; and the others *ex l. 1, 2, ff. si certum petatur.*

> *Colligitur ex D. Bonavent.* in 6. Lucae *ad ea verba:* Et si mutuum dederitis. *Eam habent Caspens.* tract. 19. disp. 3. *Bassaeus* v. mutuum, *et caeteri* ex l. 1. 2. ff. si certum petatur.

3 But it differs from the Commodatum: for in the latter only the use of the thing lent is transferred, not dominion, as is found in the *Institutes, Quibus modis re contrahitur obligatio.* Hence if the thing borrowed perishes, it perishes to the borrower; but the thing lent for use, if it perishes without the fault of the one who borrowed it, perishes to the lender.

> *Differt autem a Commodato: In hoc enim solus traditur usus rei commodatae, non dominium, ut habetur* Institut. Quibus modis re contrahitur obligatio. *Unde si res mutuata pereat, ipsi perit mutuatario: At res commodata, si pereat citra culpam commodatarii, perit commodanti.*

4 Next, in the commodatum the same thing is returned, say the same horse, etc. But in the mutuum another is returned, say other wheat, etc., of the same price, the same kind, and quality. By which means it differs from sale, exchange, and other contracts, in which there is not returned a thing of the

same quality and kind, but a thing altogether different, as money for wheat. This difference is to be noted gravely, because where there is no mutuum, Usury cannot subsist.

> *Deinde in commodo redditur eadem res, puta idem equus, etc. At in mutuo redditur alia, puta aliud triticum, etc. eiusdem pretii, eiusdem rationis, et qualitatis. Quo pacto differt a venditione, permutatione, et aliis contractibus, in quibus non redditur res eiusdem qualitatis, et rationis, sed res omnino diversa, ut pecunia pro tritico. Haec differentia est graviter notanda, quia ubi non est aliquod mutuum, Usura subsistere non potest.*

5 Usura is said from *usu aeris*, as the holy Doctor says *in speculo animae, chap. 2, §. the third of the principal fruit of injustice, etc.*; for there are certain things whose use is the consumption of the thing, and whose dominion is transferred to the recipient, as money, and grain, and wine. Whence he who sells the use of such things is called a usurer, and has the character of mortal sin against justice, because he sells to others what is not his own, the dominion having been transferred.

> *Usura dicitur ab* usu aeris*, ut ait S. Doctor* in speculo animae, cap. 2. §. tertium fructus principalis iniustitiae, etc. *sunt enim quaedam res, quarum usus est rei consumptio, et quarum dominium in accipientem transfertur, ut pecunia, et bladum, et vinum. Unde qui talium usum vendit, usurarius dicitur, et habet rationem mortalis peccati contra iustitiam, quia vendit aliis quod suum non est, cum sit translatum dominium.*

6 Thus usury is defined by the holy Doctor in the Explanation of the Terms of Theology: *It is avarice acquiring something from a loan beyond the principal.* This definition is followed commonly, as is seen in Valencia *disp. 5, question 21, puncto 1*. But this word is taken by Theologians and Jurists for the action itself which is called *the sin of Usury*.

> *Sic autem usura definitur a S. Doctore in explicatione terminorum Theologiae:* Est avaritia acquirens aliquid ex mutuo, praeter sortem. *Hanc definitionem sequuntur communiter, ut videre est in Valentia* disp. 5. quaest. 21. puncto 1. *Accipitur autem haec a Theologis, et Iuristis pro actione ipsa, quae dicitur* peccatum Usurae.

7 But the word *Usury* is also accustomed to be taken for the proper object of the usurious transaction itself, and thus usury is nothing other than that gain which one receives above the principal in the use, namely for the use of the money which he gives in loan. This gain is also called *Foenus* from foetura (bringing forth), because, as Aristotle says, *in the first Politics, chap. 7, in usury money begets money*, and in this sense usury is wont to be said to be restorable. See Valencia above; Molina *tract. 2, disput. 303*.

> *Solet vero accipi vocabulum* Usurae *etiam pro obiecto proprio ipsius mutationis usurariae, et sic usura nil aliud est, quam lucrum illud, quod quis supra sortem in usu recipit, pro usu scilicet pecuniae, quam mutuo dat. Quod lucrum vocatur etiam* Foenus *a foetura, quia, ut ait Aristoteles,* primo Politic. cap. 7. in foenore nummus nummum parit*, et hoc sensu solet dici usura restituenda. Vide Valentiam supra, Molinam* tract. 2. disput. 303.

8 Therefore Usury is gain proceeding from a contract which is called mutuum, not from elsewhere, nor under another title, but as the cause of the loan. But he who gives the loan is called the Mutuans; he who receives it, the Mutuatary; the thing given in loan is called *Sors* (principal), in which sense it is taken in *14. quaest. 3, cap. Plerique*, and often elsewhere in Canonical law; which name is derived from the contract of Partnership, in which each of the partners casts in his sors, or share, and draws it out at the time of partition, and then receives the part of the gain which beyond the sors pertains to him. The sors is also wont to be called *Capitale* or *Principale*; but the gain or access above the sors is called *Usura*, if it accrues by force of the mutuum, as Caspensis notes *tract. 19, disput. 3, sect. 1, n. 4*; Bassaeus *V. Usura*.

*Igitur Usura est lucrum proveniens ex contractu, qui dicitur mutuum, non aliunde, neque alio titulo, sed causa mutui. Dicitur autem Mutuans, qui mutuum dat; qui vero recipit, Mutuatarius: Res vero mutuo data, dicitur* Sors*, quo sensu accipitur* 14. quaest. 3. cap. Plerique*, et alibi saepe in iure Canonico; quod nomen derivatur ex contractu Societatis, in quo unusquisque sociorum sortem suam, sive partem immittit, eamque tempore partitionis extrahit, et deinde accipit partem lucri, quae ultra sortem ad ipsum attinet: Solet etiam dici Sors* Capitale*, aut* Principale*; lucrum vero seu accessus ultra sortem, dicitur* Usura*, si accedat vi mutui, ut notat Caspensis* tract. 19. disput. 3. sect. 1. num. 4. Bassaeus V. Usura.

9 But Usury is divided commonly by the Doctors after D. Bonaventure *in the cited place of the Speculum*, into Real and Mental, or Exterior and Interior (others call it conventional and non-conventional). Real or conventional usury is that in which there intervenes some pact or convention concerning gain beyond the Sors by reason of the loan. But this pact is twofold: one express; the other tacit or implicit.

*Dividitur autem Usura communiter a Doctoribus post D. Bonavent.* loco cit. speculi*, in Realem et Mentalem, seu Exteriorem, et Interiorem (appellant alii conventionalem et non conventionalem.) Usura realis, seu conventionalis est ea, in qua intercedit pactum aliquod, seu conventio de lucro ultra Sortem ratione mutui. Hoc autem pactum est duplex; aliud expressum; aliud tacitum, sive implicitum.*

10 Express, when the lender agrees with the borrower in express words to give him something beyond the sors, and on this pact lends to him.

*Expressum est, quando mutuans verbis expressis convenit cum mutuatario, ut det sibi aliquid ultra sortem, et hoc pacto illi mutuat.*

11 Tacit, however, when a convention is made not in express words, but in veiled and palliated ones, by which he hints that he wishes something beyond his sors; as if he should say: I will lend you a hundred, but you know the custom. Or: I entrust my money to you in the confidence that it will not return to me empty. Or: I know you to be a grateful man, etc.; and the borrower is silent, or hints that he consents.

*Tacitum vero, quando fit conventio, non verbis expressis, sed tectis, et palliatis, quibus innuit, se velle aliquid ultra sortem suam, ut si dicat: Ego tibi mutuabo centum, sed nosti consuetudinem. Aut: Ego confido tibi pecuniam meam non reversuram ad me vacuam. Vel novi, te virum esse gratum, etc. et mutuatarius tacet, vel innuit se consentire.*

12 Mental usury is when, no pact intervening, neither explicit nor implicit, concerning the returning of something beyond the sors, one lends with that mind and intention that he may receive gain from the loan, not from the gratitude or liberality of the borrower, but from fear lest the loan be otherwise denied him; which intention, however, he does not express, and it is said to be in hope. Of this usury the text is understood in *cap. consuluit, de usuris*, where the consultor puts the question: Whether he who, every convention ceasing, gives a loan with that mind that he may receive gain from it, is to be judged a usurer in the judgment of conscience. And he answers that in the forum of the soul he is to be judged a usurer and compelled to restitution.

*Usura mentalis est, quando nullo intercedente pacto, neque explicito, neque implicito de reddendo aliquid ultra sortem, quis ea mente, et intentione mutuat, ut lucrum recipiat ex mutuo, non ex gratitudine mutuatarii, seu liberalitate, sed timore, ne alia via ei mutuum denegetur, quam tamen intentionem non explicat, et dicitur in spe. De qua usura intelligitur textus in* cap. consuluit, de usuris*, ubi consultus ponit: An in iudicio animae censendus sit usurarius, qui*

*cessante omni conventione mutuum dat eo animo, ut inde lucrum accipiat. Et respondet, in foro animae censendum esse usurarium, et cogendum ad restitutionem.*

13 Others divide usury into open and palliated: Open, when the mutuum is formal, and gain is intended from it, whether an express or tacit pact intervenes. But when the mutuum is not formal, but only virtual, lying hidden under another species of contract, the gain intended is called palliated usury, as happens when one sells a thing dearer on account of the postponement of the payment of the price, as the holy Doctor says. These things posited:

*Alii dividunt usuram in apertam, et palliatam: Aperta est, quando mutuum est formale, et intenditur lucrum ex illo, sive intercedat pactum expressum, sive tacitum. Quando vero mutuum non est formale, sed solum virtuale latens sub alia specie contractus, lucrum intentum dicitur usura palliata, sicut evenit, cum quis vendit rem carius ex dilata solutione pretii, ut ait S. Doctor. His positis.*

14 I ASSERT first, that Usury is a sin forbidden by natural, divine, and human law. So with D. Thom. *question 78, art. 1*; S. Bonaventure *in the places to be cited*; it is the common consensus of Theologians, as Valencia relates *question 21, puncto 1*; Molina *Tract. 2, disp. 304*; Tanner. *disp. 4, question 7, n. 75, contra Molinaeum, tract. de commerc.*

*Assero primo, Usuram esse peccatum vetitum iure naturali, divino, et humano. Ita cum D. Thom.* quaest. 78. art. 1. *S. Bonavent.* locis citandis*, est communis Theologorum consensus, ut referunt Valentia* quaest. 21. puncto 1. *Molina* Tract. 2. disp. 304. *Tanner.* disp. 4. quaest. 7. num. 75. cont. Molinaeum, tract. de commerc.

15 That it is against natural law is proved by D. Bonaventure *in the cited place of the Speculum*, and in the passage adduced to 6 Luke, because it is against Commutative Justice, to which it belongs to establish an equality between what is given and what is received: But injustice is forbidden by natural law. The antecedent is proved, because it is against commutative justice in any contract whatever to exact more than is given; but he who receives gain for a loan exacts more than the thing is worth: Therefore. The assumption is proved by the holy Doctor, because money lent is not deteriorated by the accommodation: Therefore it ought not, according to commutative justice, to owe something beyond itself. Next, because that money of itself bears no fruit, but the whole reason of fructification is from the industry of the user. Why, then, is more owed? Finally, rather it devastates and consumes, without affording from itself anything that replenishes.

*Quod sit contra ius naturae, probatur a D. Bonavent.* loco cit. speculi*, et ad 6. Lucae adductum, quia est contra Iustitiam Commutativam, ad quam pertinet constituere aequale inter datum, et acceptum: Iniustitia autem vetita est iure naturae. Antecedens probatur, quia contra iustitiam commutativam est in quocumque contractu plus exigere, quam detur; sed is, qui pro mutuo accipit lucrum, plus exigit, quam res valeat: Ergo. Probatur assumptum a S. Doctore, quia mutuata pecunia propter accommodationem non deterioratur: Ergo non debet aliquid secundum iustitiam commutativam ultra se ipsam. Deinde, quia pecunia illa ex se nil fructificat, sed tota ratio fructificationis est ex industria utentis. Cur ergo amplius debetur? Tandem potius devastat, et consumit, absque eo quod praebeat ex se aliquid refarciens.*

16 Moreover, the dominion of the thing lent passes to the borrower. Therefore the lender exacts gain from a thing not his own. Finally, because the borrower bears the whole risk of the thing; but the advantage accrues to the lender; from which the holy Doctor also draws the further inference, that money is loved more than one's neighbor.

*Praeterea transit rei mutuatae dominium in mutuatarium. Igitur mutuans exigit lucrum ex re non sua. Tandem, quia mutuatarius suscipit totum rei periculum; commodum autem mutuanti cedit, ex quibus etiam deducit novam illationem S. Doctor, plus diligi nummum, quam proximum.*

17 Another argument the holy Doctor brings *in the cited place of the Speculum*, by which D. Thomas strives. By natural law it is forbidden to sell the same thing twice, or to sell what is not, or for what is not, what is one's own; to exact fruit; but he who receives gain from a loan sells the same thing twice, because he receives an equal value and further gain; or he sells what is not, if he receives gain for the use, since such use is not distinguished from dominion, nor is it given without it. Scotus also uses this argument, 4 distinct. 15, question 2. To whom Molinaeus ridiculously answers, that I can even receive for what is not mine, but another's, if it is owed to me. But how do you prove that that is owed to me with gain, O stupid head!

*Aliam rationem affert S. Doctor* loco cit. speculi, *qua nititur D. Thomas. Iure naturae vetitum est idem bis vendere, aut vendere id, quod non est, aut pro eo, quod non est, suum; exigere fructum; qui autem accipit lucrum ex mutuo, idem bis vendit, quia accipit aequale forti, et ulterius lucrum; aut vendit quod non est, si accipiat lucrum pro usu, cum talis usus non distinguatur a Dominio, neque detur sine illo. Hac ratione utitur etiam Scotus 4. distinct. 15. quaestione 2. Cui ridicule respondet Molinaeus, posse me etiam accipere pro eo, quod non est meum, sed alterius, si id mihi debeatur. At quomodo probas illud mihi deberi cum lucro, o stolidum caput!*

18 THAT Usury is forbidden by positive divine law is proved by the holy Doctor in the places alleged, from many Scriptures of the New and Old Testament.

*QUOD vero prohibita sit Usura iure positivo divino, probatur a S. Doctore locis allegatis ex multis Scripturis novi, et veteris testamenti.*

19 Psalm 14: *Domine, quis habitabit in tabernaculo tuo? aut quis requiescet in loco sancto tuo? Qui pecuniam suam non dedit ad usuram*. Weighing which passage, the Fathers of the Council of Nicaea, can. 18, relate thus: *Many clerics following shameful gains have forgotten the Divine precept, which says: Qui pecuniam suam non dedit ad usuram*; and in the same way this passage is understood in the Roman Council of Pope Martin, and is related in 14. quaest. 4, C. *si quis oblitus*. The same is forbidden in Exodus 22: *Si pecuniam mutuam dederis populo meo pauperi, qui habitat tecum, non urgebis eum, quasi exactor, nec usuris opprimes*. The same the holy Doctor proves on Psalm 71, in those words: *Ex usuris, et iniquitate redimet animas eorum.*

*Psal. 14.* Domine, quis habitabit in tabernaculo tuo? aut quis requiescet in loco sancto tuo? Qui pecuniam suam non dedit ad usuram. *Quem locum ponderantes Patres Concilii Nicaeni, can. 18. sic referunt:* Multi clerici turpia lucra sectantes obliti sunt Divini praecepti, quo dicitur: Qui pecuniam suam non dedit ad usuram, *et eodem modo intellectus est hic locus in Concilio Romano Martini Papae, et refertur 14. quaest. 4. C.* si quis oblitus. *Idem prohibetur Exodi 22.* Si pecuniam mutuam dederis populo meo pauperi, qui habitat tecum, non urgebis eum, quasi exactor, nec usuris opprimes. *Id ipsum probat S. Doctor ad Psal. 71. illis verbis:* Ex usuris, et iniquitate redimet animas eorum.

20 So Ezech. 18 pronounces the sentence of death upon the usurer, saying: *Non vivet, cum universa haec detestanda fecerit, morte morietur.*

*Sic Ezech. 18. sententiam mortis pronunciat in usurarium, dicens:* Non vivet, cum universa haec detestanda fecerit, morte morietur.

21 PROVERBS 28: *Qui coacervat divitias usuris, et foenore liberali in pauperes congregat eas, etc. oratio eius erit execrabilis.*

> *PROVERBIORUM 28.* Qui coacervat divitias usuris, et foenore liberali in pauperes congregat eas, etc. oratio eius erit execrabilis.

22 HE URGES especially that of Luke 6: *Peccatores peccatoribus foenerantur. Mutuum date, nihil inde sperantes.* By which testimony Urban III proves it in C. *Consuluit*, extra *de usuris*. And the Lateran Council under Leo X, session 10, not far from the beginning, where the supreme Pontiff, with the holy Council approving, says thus: *Dominus noster, Luca Evangelista attestante, aperto nos praecepto obstrinxit, ne ex dato mutuo quidquam ultra sortem sperare debeamus.*

> *URGET praecipue illud Lucae 6.* Peccatores peccatoribus foenerantur. Mutuum date, nihil inde sperantes. *Quo testimonio id probat Urbanus III. in C.* Consuluit, *extra* de usuris. *Et Concilium Lateranense sub Leone X. sess. 10. non longe ab initio, ubi summus Pontifex, sacro approbante Concilio, ita dicit:* Dominus noster, Luca Evangelista attestante, aperto nos praecepto obstrinxit, ne ex dato mutuo quidquam ultra sortem sperare debeamus.

23 THE SAME the holy Fathers gravely affirm from the aforesaid Scriptures.

> *ID ipsum e praefatis scripturis graviter asseverant SS. PP.*

24 BASIL, on Psalm 14, pondering that passage: *Qui pecuniam suam non dedit ad usuram*, says: *Do you not know that a greater heap of sins presses upon you than is the increase of wealth which you hunt from usuries.*

> *BASILIUS in Psalmo 14. perpendens illud:* Qui pecuniam suam non dedit ad usuram, *ait:* An ignoras quod maior tibi peccatorum urget acervus, quam sit accessus opum, quem ex usuris venaris.

25 S. GREGORY of Nyssa, homily 4 on Ecclesiastes: *He who has called usury another robbery and parricide will not have strayed far from what is fitting.*

> *S. GREGORIUS Nyssenus, homil. 4. in Ecclesiasten:* Foenus qui aliud latrocinium, et parricidium nominaverit; non procul ab eo, quod decet, aberraverit.

26 S. AUGUSTINE, on Psalm 36: *Do not be usurers, and therefore I do not will it, because God does not will it. Whence does it appear that God wills this not? Qui pecuniam suam non dedit ad usuram*, Psalm 14. *And how detestable, how odious, how execrable it is, I think even the usurers themselves know.*

> *S. AUGUST. in Psal. 36.* Nolite sitis foeneratores, et ideo nolo, quia Deus non vult. Unde apparet Deum hoc nolle? Qui pecuniam suam non dedit ad usuram, *Psalm. 14.* Et quam detestabile sit, quam odiosum, quam execrandum; puto, quia et ipsi foeneratores noverunt.

27 S. JEROME, on Psalm 54, at that passage: *Non defecit de plateis eius usura, et dolus*, says: *All things that are forbidden in the Law have grown up to a heap of sin. In the Law they are forbidden to receive usury. Usury is to receive more than one gives.*

> *S. HIERONYMUS in Psalm. 54. ad id:* Non defecit de plateis eius usura, et dolus, *ait:* Omnia, quae in lege prohibita sunt, ad augendi peccati cumulum excreverunt. In lege eius usura recipi prohibentur. Usura est plus accipere, quam dare.

28 THAT Usury is also forbidden by human law is proved by D. Bonaventure in the Confessionale, chap. 5, particula 54, from the whole title de usuris, which is evident also in 14. quaest. 4 and 47

dist., by many chapters, where usurers are forbidden under grave penalties, and lastly are deprived of Ecclesiastical burial. See Sylvestra, verb. *Usura*, 1. §. 9.

> *QUOD etiam Iure humano sit vetita Usura, probatur a D. Bonavent. in Confessionali, cap. 5. particula 54. ex toto titulo de usuris, quod patet etiam 14. quaest. 4. et 47. dist. per multa capita, ubi gravibus sub poenis prohibentur, et ultimo privantur Ecclesiastica sepultura. Vide Sylvestrum, verb.* Usura*, 1. §. 9.*

29 Usuries are forbidden also by CIVIL law; for the *Authent. de Eccles. tit.*, at the beginning, commands the decrees of the Council of Nicaea to be observed, in which usuries were forbidden by canon 18, and it is related in C. *Quoniam*, 47 distinct., and in the *Leg. cunctos populos, Cod. de Sum. Trin. et fide Catholica*, Justinian commands all subject to him to follow the faith of the Roman Church and to render obedience, by whose authority it stands established in the aforesaid decrees that usury is forbidden. The Gloss uses this argument on *Cap. Quid dicam*, question 14, 4.

> *IURE etiam civili prohibentur usurae; nam* Authent. de Eccles. tit. *in princip. iubentur servare decreta Concilii Nicaeni, in quo usurae prohibitae fuerunt canone 18. et refertur in C.* Quoniam *47. distinct. et in* Leg. cunctos populos, Cod. de Sum. Trin. *et fide Catholica, iubet Iustinianus omnes sibi subiectos sequi fidem Romanae Ecclesiae, et obedientiam praestare, cuius authoritate constat in praedictis decretis, usuram esse prohibitam. Hoc argumento utitur Glossa in* Cap. Quid dicam*, 14. quaestione 4.*

30 LET THESE THINGS be heard by those who say that usuries are not a sin; for they are condemned as heretics in the *Clementina unica, de usuris, in C. Vien. under Clement V.* Perish, therefore, the Albanenses and the Greek Schismatics, who denied this. Away with Carolus Molinaeus, who foolishly in his *Tract. de Commerciis, et usuris* admits some usuries, and erects certain silly little objections to obscure a doctrine so clear in the light of nature — a doctrine which even Aristotle, 1 *Politic.*, chaps. 6 and 7, and 4 *Eth.* chap. 1, and Cato in Cicero, book 2 *de offic.*, and others perceived by the mere twilight of nature, confessing it to be against nature; so much so that the most wise Cato called it *the killing of men*, at which Ausonius alludes, *Eydil.* 15, singing:

> *HAEC audiant, qui usuras non esse peccatum aiunt; hi enim tanquam haeretici damnantur in* Clementina unica, de usuris in C. Vien. sub Clemente V. *Pereant igitur Albanenses, et Schismatici Graeci, qui hoc negarunt. Abeat Carolus Molinaeus qui stulte in* Tract. de Commerciis, et usuris *aliquas usuras admittit, et nonnullas insulsas erigit obiectionculas ad doctrinam adeo lumine naturae claram obscurandam, quam etiam Aristoteles 1.* Politic. *cap. 6. et 7. et 4.* Eth. *cap. 1. et Cato apud Ciceronem l. 2.* de offic. *et alii solo naturae crepusculo perceperunt, eam contra naturam esse confitentes, adeo ut sapientissimus Cato eam vocaverit* hominum occisionem*, cui alludit Ausonius* Eydil. *15. canens:*

31 — *Turpia lucra Foenoris, et velox inopes usura trucidat.*

> — Turpia lucra Foenoris, et velox inopes usura trucidat.

32 YOU WILL OBJECT first, Deuter. 23: *Non foeneraberis fratri tuo, sed alieno.* Since, therefore, it concedes giving usury to foreigners, that is, to the Gentiles, it does not seem forbidden by natural law.

> *OBIICIES primo Deuter. 23.* Non foeneraberis fratri tuo, sed alieno. *Cum ergo concedat dare usuram alienis, idest, gentibus, non videtur vetita iure naturae.*

33 Conradus answers, *quaest.* 24, *de contract.*; Medina, *question 2, de usura*; Caspens., *number 11*: that it was conceded because God had already transferred dominion over the things pertaining to those

Gentiles to the Hebrews. And so, as he conceded to them to carry off the treasures of the Egyptians, so also he had transferred the foenerari — the interest and principal of the Chanaanites — to them, so that they could exact it. Conaruv. subscribes, 3 *variar. cap.* 1; and it is taken from St. Ambrose, *book de Tobia, chapter 15*.

> *RESPONDENT Conradus* quaest. *24.* de contract. *Medina* quaestione 2. de usura, *Caspens.* numero 11. *id concessum, quia iam Deus rerum spectantium ad eas gentes transtulerat dominium in Hebraeos. Itaque, sicuti concessit ipsis auferre thesauros AEgyptiorum, ita et foenerari inite, et capitale Chananaeorum in eos transtulerat, ut possent illud exigere. Subscribit Conarruv. 3.* variar. cap. *1. et sumitur ex Divo Ambrosio* lib. de Tobia, capite 15.

34 D. Bonaventure answers *in the passage adduced to 6 Luke*; D. Thom. *question 78, art.* 1; Alens. 3 p. *quaest.* 36, *membr.* 4; Sotus *book 6 de Iust., question 1, art.* 1; and Valencia: that the Jews sinned in lending thus at usury, but that it was permitted with impunity on account of their obstinacy; just as also the bill of divorce; and to wash away this guilt of theirs the Psalmist sings of the Messiah to come, Psalm 71: *Ex usuris, et iniquitate redimet animas eorum.* The Hebrew text pleases as rendered by Pagnino, where the exclusive particle (*but*) is not found: *Non foeneraberis fratri tuo usura pecuniae, usura cibi, usura omnis rei, qua foenerabitur extraneo* תַּשִּׁיךְ (*the verb by which*) *he will lend at usury*; where he seems gravely to rebuke the Jews, saying: Let it be far from you, nor let Usury be named among you, which you exercise so obstinately with the Gentiles. Therefore he permitted it that a greater evil might be avoided, as the holy Doctor says.

> *RESPONDENT D. Bonavent.* ad 6. Lucae allegatum, *D. Thom.* quaestione 78. art. *1. Alens. 3. p.* quaest. *36.* membr. *4. Sotus* lib. 6. de Iust. quaestione 1. art. *1. et Valentia, peccasse Iudaeos sic foenerando, id tamen permissum impune ob eorum pervicaciam; sicuti etiam, libellus repudii, et hanc eorum culpam eluendam a Messia venturo canit Psaltes 71.* Ex usuris, et iniquitate redimet animas eorum. *Arridet textus Hebraeus ex Pagnino, ubi seclusiva particula (*sed*) non reperitur:* Non foeneraberis fratri tuo usura pecuniae, usura cibi, usura omnis rei, qua foenerabitur extraneo תַּשִּׁיךְ (Verbi quod) foenerabitur*; ubi graviter videtur carpere Iudaeos, dicendo: Absit a te, nec nominetur in vobis Usura, quam adeo pervicaciter cum gentibus exercetis. Eam igitur permisit ad maius malum vitandum, ut ait Sanctus Doctor.*

35 YOU WILL OBJECT secondly, that of Luke 6: *Mutuum date, nihil inde sperantes.* But this is a mere counsel, as is gathered from those preceding words: *Si benefeceritis his, qui vobis benefaciunt, quae vobis est gratia?* The same is gathered from the following words: *Et erit merces vestra multa.* So Sotus *book 6 de Iustitia, quaest. 1, art.* 1.

> *OBIICIES secundo illud Lucae 6.* Mutuum date, nihil inde sperantes. *Hoc autem est merum consilium, ut colligitur ex illis verbis praeeuntibus:* Si benefeceritis his, qui vobis benefaciunt, quae vobis est gratia? *Idem colligitur ex verbis sequentibus:* Et erit merces vestra multa. *Ita Sotus* lib. 6. de Iustitia, quaest. 1. art. *1.*

36 The holy Doctor answers, whom Couar. follows, *book 3, var. cap. 1, num.* 5; Nauar. in the *Manuale, chap.* 17, *num.* 107; and Valencia; nay, Urban III in *C. consuluit, extra de Usuris*; Leo X in the *Concil. Later., sess.* 10: that it was defined there, as Medina notes, *quaest.* 2, *de Usura*, that there is a precept forbidding usury; otherwise Alexander III would not assert with sufficient certainty in the Lateran Council — which is related in *cap. Quia, extra, de usuris* — that Usury forbidden in the pages of both Testaments, nor would he say solidly in *cap. super eo*, of the same title: *Usuram utrumque Testamentum detestari*. For there is hardly any other passage in the New Testament reproving usuries. Add also the Roman Penitential, far more ancient than Alexander III, where it is read: *If anyone receives usuries, he commits robbery; and therefore whoever exacts it shall do penance for 3 years, one year on bread, namely, and water.*

*RESPONDET S. Doct. quem sequuntur Couar.* l. 3. var. cap. 1. num. *5. Nauar. in* Manuali, cap. *17.* num. *107. et Valentia, Imo Urbanus III. in* C. consuluit, extra de Usuris. *Leo X. in* Concil. Later. sess. *10. id definitum, ut notat Medina* quaest. 2. de Usura*, ibi esse praeceptum prohibens usuram; alioqui Usuram utriusque paginae testamento prohibitam non satis certo asseveraret Alexander III. in Concilio Later. quod refertur* cap. Quia extra, de usuris*, neque solide diceret* cap. super eo*, eodem titulo:* Usuram utrumque Testamentum detestari. *Nullus enim fere alius est locus in novo testamento usuras carpens. Adde et Poenitentiale Romanum longe Alexand. III. antiquius, ubi legitur.* Si quis usuras accipit, rapinam facit, ideoque quicumque illam exegerit, poenitentiam aget annis 3. uno in pane, scilicet et aqua.

37 NOR does Sotus satisfy when he says that both Testaments forbid usuries only insofar as they forbid theft. For the contrary is the case; for the alleged Pontiffs prove from that text that usury is specially forbidden. The same is interpreted by the Fathers adduced, and by Beda *on chap. 6 of Luke*.

*NEQUE satisfacit Sotus dicens, eatenus utrumque Testamentum usuras prohibere, quatenus prohibet furtum. Contra enim est; nam allegati Pontifices probant ex eo textu specialiter vetitam usuram. Idem interpretantur Patres allati, et Beda* ad cap. 6. Lucae.

38 The holy Doctor proves this OPTIMELY, and Valencia after him; for he had premised the natural precepts in general: *Prout vultis faciant vobis homines, et vos facite illis similiter;* but soon adds the singular natural precepts of doing good in necessity, not only to friends, but also to strangers and enemies, and he also sets down the precept forbidding usury, which is against the natural precept of not doing to another what you do not wish done to yourself. Besides, the declaration of the Church is enough for me, and more than enough, which is the column and firmament of truth. If the condemned Molinaeus does not receive it, good Catholics at least receive it. But this declaration, beyond the places assigned, is found clearly in the Fourth Council of Carthage, *can.* 67; the Council of Calchitensis in England, *cap.* 17; the Council of Paris in the *year* 819; that of Meaux in the year 845, *can.* 55; the Capitulary of Aix-la-Chapelle, *cap.* 5; the Council of Crolseiano in the *year* 909, etc.

*OPTIME autem hoc probat S. Doctor, et post eum Valentia; nam praemiserat praecepta naturalia in genere:* Prout vultis faciant vobis homines, et vos facite illis similiter; *mox vero subdit praecepta singularia naturalia benefaciendi in necessitate, non solum amicis, sed alienis etiam, et inimicis, et apponit etiam praeceptum prohibens usuram, quae est contra naturale praeceptum, non faciendi alteri, quod tibi non vis fieri. Praeterea satis mihi, superque est Ecclesiae declaratio, quae est columna, et firmamentum veritatis. Quam si non recipit damnatus Molinaeus, recipiunt saltem boni Catholici. Haec autem declaratio, ultra loca assignata, liquido habetur in Concilio Carthag. IV.* can. *67. Concilio Calchitensi in Anglia* cap. *17. Concilio Parisiensi* anno *819. Meldensi anno 845.* can. *55. capitulari Aquisgranensi* cap. *5. Concilio Crolseiano* anno *909. etc.*

## Question II: Whether it is usury to lend so that, when I have need, you lend back to me, or buy from me at a just price

1 The QUESTION is: whether a lender can lawfully insert into the agreement that obligation of the natural law by which, from honesty, we are bound to do good to our benefactors, and indeed without any inconvenience to the borrower.

An sit USURA mutuare, ut mihi, cum opus habuero, remutues, aut iusto pretio a me emas.

*QUAESTIO est: an mutuatur licite possit deducere in pactum eam iuris naturalis obligationem, qua ex honestate tenemur benefacere nostris benefactoribus, et sane absque incommodo mutuatarii.*

[2] NOTE that four conditions of usury are commonly assigned. The first is a loan that is commonly of things consumable by use. The second is profit beyond the principal, or the capital sum given. The third is that the profit be a thing estimable by price. The fourth, that this profit arise precisely from the force of the loan itself, not from elsewhere, for instance from lucrum cessans. So Bassaeus *num. 1.* Molina *disp. 303. tom. 2.* Sylvester *V. usura 1. quaestio 2.*

> *NOTA, quatuor conditiones usurae communiter assignari. Prima est, mutuum, quod sit communiter de rebus, usu consumptibilibus, Secunda est lucrum ultra sortem, seu summam capitalem datam. Tertia est, ut lucrum sit res pretio aestimabilis. Quarta ut hoc lucrum obveniat ex vi praecise mutui, non aliunde, puta lucri cessantis. Sic Bassaeus* num. *1. Molina* disp. 303. tom. 2. *Sylvester* V. usura 1. quaestio 2.

[3] The FIRST opinion holds that such loans are licit even with a civilly binding agreement. So D. Ant. *part. 2. tit. 1. cap. 7. §. 15.* Adrianus *in 4. de restit. quaest. de usura*, and others cited by Bassaeus.

> *PRIMA opinio censet haec mutua licere etiam pacto civiliter ligante. Sic D. Ant.* part. 2. tit. 1. cap. 7. §. 15. *Adrianus* in 4. de restit. quaest. de usura*, et alii apud Bassaeum.*

[4] The SECOND opinion is that it is licit if only an obligation of a grateful mind is introduced into the agreement. Thus Azor *part. 3. lib. 5. cap. 7.* Rodriquez *tract. 2. cap. 197.* Lessius *lib. 2. cap. 20. dub. 8.* Filliucius *tract. 34. 2. part. num. 38.* Sà *V. mutuum, num. 3.* Salas *de usur. dub. 9. 10. 11. 16. et 21.* saying that such obligations are fulfilled without inconvenience, from Vega *tract. 2. cap. 131. casu 76.* Diana *p. 1. Tract. de contr. resol. 59. et 60.* Bassaeus, *V. usura 2. num. 5.* Malder. *2. 2. tract. 5. cap. 3. disp. 4.*

> *SECUNDA opinio est licere, si inducatur sola obligatio grati animi in pactum. Ita Azor* part. 3. lib. 5. cap. 7. *Rodriquez* tract. 2. cap. 197. *Lessius* lib. 2. cap. 20. dub. 8. *Filliucius* tract. 34. 2. part. num. 38. *Sà* V. mutuum, num. 3. *Salas* de usur. dub. 9. 10. 11. 16. et 21. *dicens, tales obligationes sine incommodo impleri, ex Vega* tract. 2. cap. 131. casu 76. *Diana* p. 1. Tract. de contr. resol. 59. et 60. *Bassaeus,* V. usura 2. num. 5. *Malder.* 2. 2. tract. 5. cap. 3. disp. 4.

[5] The BEST opinion, however, is that of D. Bonavent. in his *commentary on Luke 6*, where he indeed grants lending for the hope of a like service, for instance a return loan, etc.; yet he rejects every agreement, both civil, and even that of a grateful mind.

> *OPTIMA tamen sententia est D. Bonavent. in* comment. ad 6. Lucae*, ubi concedit quidem mutuare ob spem similis obsequii, puta remutui, etc. attamen omne pactum refellit, tum civile; tum etiam grati animi.*

[6] This is the common opinion. So D. Thom. *q. 78. art. 2. ad 2. et 4.* and there Caietanus, Salonius, Aragonius, Bannes and Petrus a Navarra *lib. 3. de restit. cap. 2. disp. 4. num. 249.* Molina *tract. 2. disp. 308. et 309.* Covar. *lib. 3. var. cap. 1.* Sylvester *V. usura 1. quaestio 2.* Medina *in sum. lib. 1. cap. 14. §. 23. num. 43.* Lessius *lib. 2. cap. 20. dub. 8. num. 58.* Megala *2. 2. lib. 2. cap. 15. quaest. 2. num. 29.* Molfesius *part. 2. tract. 12. cap. 23. num. 45.* and Caspensis *tract. 19. sect. 3. et 4.*

> *Haec est communis sententia. Sic D. Thom.* q. 78. art. 2. ad 2. et 4. *et ibi Caietanus, Salonius, Aragonius, Bannes et Petrus a Navarra* lib. 3. de restit. cap. 2. disp. 4. num. 249. *Molina* tract. 2. disp. 308. et 309. *Covar.* lib. 3. var. cap. 1. *Sylvester* V. usura 1. quaestio 2. *Medina* in sum. lib. 1. cap. 14. §. 23. num. 43. *Lessius* lib. 2. cap. 20. dub. 8. num. 58. *Megala* 2. 2. lib. 2. cap. 15. quaest. 2. num. 29. *Molfesius* part. 2. tract. 12. cap. 23. num. 45. *et Caspensis* tract. 19. sect. 3. et 4.

[7] I ASSERT, with this opinion, that every such agreement is illicit, as being usurious.

> *ASSERO cum hac sententia, omne simile pactum illicitum esse, utpote usurarium.*

8 It is PROVED by this argument of D. Bonavent., which Diana proclaims most valid; for the civil obligation, or that arising from the insistence upon such acts, is estimable by price, and consequently money, as is evident from Aristotle *lib. 4. Eth. cap. 1.* and D. Bonavent. *ad cap. 4. Regulae nostrae*, but to exact money for a loan beyond the principal is usurious: Therefore.

> *PROBATUR hac ratione D. Bonavent. quam validissimam acclamat Diana; nam obligatio civilis, seu ex instantia ad tales actus, est pretio aestimabilis, et consequenter pecunia, ut constat ex Aristotele* lib. 4. Eth. cap. 1. *et D. Bonavent.* ad cap. 4. Regulae nostrae*, sed exigere pecuniam pro mutuo ultra sortem, est usurarium: Ergo.*

9 NOR do the adversaries solve it sufficiently; for one cannot submit without inconvenience to being compelled to lend back in return, always having to visit that man's workshop, frequent that mill, etc.

> *NEQUE satis adversarii solvunt; etenim non potest absque incommodo subiri, ut cogaris remutuare, eius officinam semper adire, molendinum frequentare, etc.*

10 NOR let them say that there is no price for the loan, because the borrower has in that mill what he would have elsewhere; for he is compelled, and deprived of liberty.

> *NEQUE dicant, nullum esse pretium mutui, quia mutuatarius in molendino illo habet id, quod haberet alibi; nam cogitur, et libertate privatur.*

11 But OBSERVE that Diana and Bassaeus do not rightly assert that the authors of our opinion exclude only the civil obligation, but not an agreement under the title of gratitude; for S. Thom. *ad 2.* excludes the civil obligation, and *ad 4.* excludes any agreement whatsoever, even if he should admit that an obligation exists on the side of the recipient of the loan, under the title of a grateful mind; but it differs greatly to add an agreement, and in this way other authors also think, as is evident, and Valencia notes *punct. 2. §. 7. rtio quaero*, and I shall say *quaest. 4.* where I shall also report the words of S. Bonaventure.

> *OBSERVA vero, non recte Dianam, et Bassaeum asserere, authores nostrae sententiae solum excludere obligationem civilem; non autem pactum titulo gratitudinis; nam S. Thom.* ad 2. *excludit obligationem civilem, et* ad 4. *excludit pactum quodcumque, esto admittat obligationem adesse ex parte recipientis mutuum, titulo grati animi; sed valde distat addere pactum, et hoc modo sentiunt etiam alii, ut videre est, et notat Valentia* punct. 2. §. 7. rtio quaero*, et dicam* quaest. 4. *ubi etiam referam verba S. Bonaventurae.*

12 HENCE also you will deduce what Diana asks subsequently, *resol. 50.* Whether the lender may insert into the agreement that the borrower immediately sell, buy, lend back, and perform similar services.

> *HINC etiam deduces id, quod quaerit consequenter Diana* resol. 50. *An mutuanti liceat in pactum deducere, ut mutuatarius statim emat, vendat, remutet, et similia praestet.*

13 Indeed Diana ASSERTS, with Reginaldo *tract. 2. lib. 25. cap. 11. num. 198.* that it is licit; so also Bannes *quaest 78. art. 2.* asserts it probable, and Pet. Nauar. *lib. 3. de restit. cap. 2. num. 235. et 242.* Layman *lib. 3. sect. 5. tract. 4. cap. 16.* teach it absolutely.

> *ASSERIT quidem Diana cum Reginaldo* tract. 2. lib. 25. cap. 11. num. 198. *licitum esse, sic et Bannes* quaest 78. art. 2. *eam probabilem asserit, eamque absolute docent Pet. Nauar.* lib. 3. de restit. cap. 2. num. 235. et 242. *Layman* lib. 3. sect. 5. tract. 4. cap. 16.

14 Yet Lopez, Sotus, Aragon. and Graffius teach that this is a usurious contract, cited by Sala *de usuris, dub. 10.* Rebell. *part. 2. lib. 8. quaest. 4. num. 10.* and it is the opinion of D. Bonavent. *locis allegatis*, for he himself detests every obligation entered into by agreement.

> *HUNC tamen esse contractum usurarium docent Lopez, Sotus, Aragon. et Graffius, citati a Sala* de usuris, dub. 10. *Rebell.* part. 2. lib. 8. quaest. 4. num. 10. *estque sententia D. Bonavent.* locis allegatis, *nam ipse omnem obligationem detestatur, pacto initam.*

## Question III: Whether it is lawful to lend on the pact that the borrower confer an office or an ecclesiastical benefice

1 D. Bonaventure TEACHES that this is usury *in speculo animae, cap. 2. §. Item, ut dictum est.* Aragon follows him *quaest. 78. art. 2. disp. 2.* Medina *sum. lib. 1. cap. 14. §. 23.* Lopez *part. 1. cap. 56.* Medina, Complut. *quaest. 4. de usuris*, Reginaldus *tract. 2. lib. 25. cap. 11. num. 202.* Rebell. *part. 2. lib. 2. quaest. 14. num. 23.* who proclaim it a simoniacal usury. For it is usury insofar as he intends utility from the loan; but simony hands over a spiritual thing. So also Tanner. *num. 89.* Nauar. *super caput si foeneratoris, 14. quaest. 15.* Bensseldius *quaest. 4. in cap. Consuluit.*

> An liceat mutuare cum pacto, ut qui recipit mutuum, conferat officium, vel beneficium Ecclesiasticum.
>
> *HANC esse usuram docet D. Bonaventura* in speculo animae, cap. 2. §. Item, ut dictum est. *Sequuntur Aragon* quaest. 78. art. 2. disp. 2. *Medina* sum. lib. 1. cap. 14. §. 23. *Lopez* part. 1. cap. 56. *Medina, Complut.* quaest. 4. de usuris, *Reginaldus* tract. 2. lib. 25. cap. 11. num. 202. *Rebell.* part. 2. lib. 2. quaest. 14. num. 23. *qui eam simoniacam usuram conclamant. Est enim usura pro ut ex mutuo utilitatem intendit; simonia vero vel rem spiritualem tradit. Sic etiam Tanner.* num. 89. *Nauar.* super caput si foeneratoris, 14. quaest. 15. *Bensseldius* quaest. 4. in cap. Consuluit.

2 DIANA p. p. *Tract. 8. resol. 61.* admonishes, with Peter Navarro, that an agreement introducing the (immediate) conferral of a benefice would not be usury, because an obligation to do an act, lasting only a short time, is not estimable by price: Therefore, to lend with an agreement that the borrower immediately confer a benefice is not usury. The same is said by Malder. *2. 2. tract. 5. cap. 3. dub. 6.* who says that, if anyone gives a loan, not as the price of an Ecclesiastical benefice, but to provoke in this way the friendship of the dearer man, or to bestow a grace which he does not wish to bestow unless the other immediately gratifies him by conferring a benefice, it is probable that it is neither simony nor usury.

> *DIANA p. p.* Tract. 8. resol. 61. *admonet cum Petro Nauarro, quod deducte in pactum collationem faciendam (statim) beneficii, non esset usura, quia obligatio ad factum, cum modico tempore duret, non est pretio aestimabilis: Ergo mutuare cum pacto, ut statim mutuatarius conferat beneficium, non est usura. Idem ait Malder.* 2. 2. tract. 5. cap. 3. dub. 6. *qui ait, quod, si quis mutuum datet, non ut pretium beneficii Ecclesiastici, sed ut hac ratione provocet amicitiam collaroris, aut ut gratiam praestet, quam non vult praestare, nisi alter statim gratificetur conferendo beneficium, probabile est, non esse simoniam, vel usuram.*

3 AND Lessius *lib. 2. cap. 20. dub. 9. num. 64.* asserts: If you lend to another with an agreement that he confer an Ecclesiastical benefice, it is partly usury, partly Simony; provided that agreement be of justice, otherwise if it be of friendship. But Bassaeus, under the word *Usura, primo, num. 7. et 2. num. 3.* seems to wish that it be Simony, not usury, if the agreement was not entered into from justice.

*ET Lessius* lib. 2. cap. 20. dub. 9. num. 64. *asserit. Si mutues alteri cum pacto, ut conferat beneficium Ecclesiasticum, partim est usura, partim Simonia; modo istud pactum sit iustitiae, secus si sit amicitiae. At vero Bassaeus, verbo* Usura, primo, num. 7. et 2. num. 3. *videtur velle, esse Simoniam, non usuram, si pactum non ex iustitia sit initum.*

## Question IV: Whether it is usury to receive beyond the principal any other emolument whatever besides money

1 I SUPPOSE first, that usury is to receive from the force of a loan, beyond the principal, some profit even estimable in money; for, as the Philosopher says *lib. 4. Eth. cap. 1. et* D. Bonavent. *ad cap. 4. Regulae nostrae*, we call money all those things whose valuation the coin measures; but to receive from the force of a loan money beyond the principal is usury, as we saw *quaest. 1.*; therefore also to receive something estimable in money and price. So D. Bonavent. *in speculo animae, cap. 2.* D. Thom. *art. 2.* and it is the opinion of D. Augusti in *Psalm. 36.* Valencia proves it *quaest. 21. puncto 2.* with D. Bonavent. on those words, Ioan. 2. *Eiecit nummularios*, and 18. Ezech. *Usuram, et superabundantiam non accipias.*

***An sit USURA accipere ultra sortem qualecumque etiam aliud emolumentum praeter pecuniam.***

*SUPPONO primo, usuram esse ex vi mutui accipere ultra sortem emolumentum etiam aliquod pecunia aestimabile, nam ut inquit Philosophus* lib. 4. Eth. cap. 1. et *D. Bonavent.* ad cap. 4. Regulae nostrae. *Pecunia ea omnia dicimus, quorum aestimationem nummus metitur, sed accipere ex vi mutui pecuniam ultra sortem, est usura, ut vidimus* quaest. 1. *ergo etiam accipere aliquid pecunia, et pretio aestimabile. Ita D. Bonavent.* in speculo animae, cap. 2. *D. Thom.* art. 2. *et est sententia D. Augusti in* Psalm. 36. *Id probat Valentia* quaest. 21. puncto 2. *cum D. Bonavent. ad ea verba, Ioan. 2.* Eiecit nummularios, *et 18. Ezech.* Usuram, et superabundantiam non accipias.

2 I SUPPOSE second, that it is not usury if someone receives something estimable in money beyond the principal, not as exacting it by the force of the loan, but as a gratuitous gift. The reason is, because if such a man did not lend, he could receive that gift; but he is not made worse off by lending. So the Doctors commonly, and the Holy Doctor supposes everywhere, with the others, in Valencia *puncto 2.* see what I have said on this matter, *tom. 4. disp. 17. quaest. 10. ad proposit. 42.* according to the decree of Alexander VII.

*SUPPONO secundo, non esse usuram, si quis aliquid, pecunia aestimabile, ultra sortem accipiat, non velut vi mutui exigens, sed ut donum gratuitum. Ratio est, quia si talis non mutuaret, posset recipere illud donum; At non efficitur peioris conditionis mutuando. Ita communiter Doctores, et supponit ubique S. Doctor cum caeteris, apud Valentiam* puncto 2. *vide quae hac de re dixerim,* tom. 4. disp. 17. quaest. 10. ad proposit. 42. *iuxta decretum Alexandri VII.*

3 The QUESTION is: Whether one who excites the borrower to a remuneration is usurious.

*QUAESTIO est: An excitans mutuatarium ad remunerationem, sit usurarius.*

4 There WERE some, as Ioannes Maior *4. dist. 15. quaest. 29. et* Couar. *lib. 1. var. cap. 20. num. 4.* bringing forward others, who said that an agreement could be entered into without danger of usury with the borrower concerning some gift to be given back, under the title of a grateful mind, yet not under the title of the loan. The same is taught by the authors cited *quaest. 2. secundo loco.*

*FVERE nonnulli, ut Ioannes Maior* 4. dist. 15. quaest. 29. et *Couar.* lib. 1. var. cap. 20. num. 4. *alios adducens dicentes, posse absque periculo usurae iniri pactum cum mutuatario de aliquo dono reddendo, titulo grati animi, non tamen titulo mutui. Idem docent authores* quaest. 2. secundo loco, *allati.*

5 COMMONLY, however, with D. Thom. all here deny that it is licit to introduce into the agreement any remuneration of a gratuitous thing, and therefore Valencia *quaest. 21. puncto 2.* gravely concludes that the opinion of Maior is not to be brought into practice. The same think Lessius *cap. 20. num. 58.* Tanner. *disp. 4. quaest. 7. num. 90.* unless perhaps under the aspect of friendship (they say), when the thing is of such a kind that it is usually bestowed from gratuitous motive. So also those cited for the 3rd opinion *quaestione 2.*

> *COMMUNITER tamen cum D. Thom. hic omnes negant, licere in pactum deducere aliquam remunerationem rerum gratuitam, et ideo Valentia* quaest. 21. puncto 2. *graviter concludit, opinionem Maioris ad praxim deducendam non esse. Idem sentiunt Lessius* cap. 20. num. 58. *Tanner.* disp. 4. quaest. 7. num. 90. *nisi forte sub amicitiae ratione (aiunt) cum res talis est, ut soleat ex mote gratuito praestari. Sic et relati pro 3. sententia* quaestione 2.

6 The greater CONTROVERSY is: Whether it be licit to excite at least the borrower to some remuneration.

> *CONTROVERSIA maior est: An liceat excitare saltem mutuarium ad aliquam remunerationem.*

7 They ASSERT Valencia *loco cit.* Caietanus *hic* Molina *tract. 2. disp. 305.* Rebell. *part. 2. lib. 8. quaest. 4. n. 8.* Bonacina *de contract. disp. 3. quaest. 3. punct. 2. n. 10.* Salon. *hic ad art. D. Thom. controu. 2.* Diana *p. p. Tract. 8. resol. 62.* where he adds that it is licit to lend who would not lend, until the borrower, excited by the lender, says that he will give some gift, yet not from justice, but from fidelity. The same holds Salas *Tract. de usuris, disp. 7. num. 6.* who also adds that it is not usury to receive an inducement from him whom I know will not give, except out of fear lest a loan be again denied him, or lest he seem or be called ungrateful. This, however, Caietanus *ad 4.* Petrus Nauar. *lib. 3. cap. 2. num. 211.* Nauar. *cap. 17. num. 219. et alii.* deny.

> *ASSERUNT Valentia* loco cit. *Caietanus* hic *Molina* tract. 2. disp. 305. *Rebell.* part. 2. lib. 8. quaest. 4. n. 8. *Bonacina* de contract. disp. 3. quaest. 3. punct. 2. n. 10. *Salon.* hic ad art. D. Thom. controu. 2. *Diana* p. p. Tract. 8. resol. 62. *ubi addit, licere mutuati non mutuate, donec mutuatarius excitatus a mutuante dicat, se daturum aliquod donum, non tamen ex iustitia, sed ex fidelitate. Idem habet Salas* Tract. de usuris, disp. 7. num. 6. *qui etiam addit, non esse usuram recipere auctitium ab illo, quem scio, non daturum, nisi timore, ne iterum negetur ei mutuum, aut ne videatur, vel vocetur ingratus. Hoc tamen negant Caietanus* ad 4. *Petrus Nauar.* lib. 3. cap. 2. num. 211. *Nauar.* cap. 17. num. 219. et alii.

8 MOREOVER, that it is not licit to insinuate this, teach Richardus *in 4. dist. 15. art. 5. quaest. 5.* Scotus *quaest. 2.* Angles *quaest. de contract. mutui, art. 2. defin. 5. concl. 1. et alii.*

> *CAETERUM neque licitum esse hoc insinuare, docent Richardus* in 4. dist. 15. art. 5. quaest. 5. *Scotus* quaest. 2. *Angles* quaest. de contract. mutui, art. 2. defin. 5. concl. 1. et alii.

9 The Holy Doctor SETS FORTH his opinion *ad 6. Lucae* in these words: *mutuum date, nihil inde sperantes,* in these words: *mutuum date, nihil inde sperantes, scilicet recompensationis, Deutet. 23. Fratri autem tuo absque usura id, quo indiget, commodabis, ut benedicat tibi Dominus Deus tuus in omni opere tuo, in terra, ad quam ingredieris possidendam: idest, non quaeras retributionem de hoc ab homine, sicut usutarii, qui propter spem usurae perdunt spem vitae aeternae.* Against whom the Apostle says, *prima Corinth. 15. Si in hac vita tantum in Christo sperantes sumus, miserabiliores sumus omnibus hominibus.* Such are the rich, who hope in riches, etc. Note that hope in a loan can be, either for a like service, or for profit: in the first way it is licit: in the second way it can be twofold, either expressed by agreement, and this is simply prohibited; because it makes one usurious. Or it is tacit, and in the heart, and in this way twofold: either as

principally moving to the loan, and this likewise is prohibited, because it makes one usurious. Or it is tacit, and in the heart; and in this way twofold; either as principally moving to the loan; and this likewise is prohibited, because it is against the divine commandment: Or it is not principally moving, but as it were annexed, because, although he does not act principally for profit, such as gain, he nevertheless believes the recipient will not be ungrateful to him, and for that reason lends the more willingly. Here, however, there is not such a hope of gain as is against the divine commandment. Such is the Holy Doctor, who openly denies every agreement and inducement in the manner in which Salas says; yet, since he grants that some gift can be hoped for and desired out of gratitude, he will consequently grant also some gentle insinuation, in charming words, which nevertheless impart neither fear nor any force, but only express his own frame of mind, for instance by saying: I give to you willingly, and I give without interest, and the more willingly as I hope that you will not be ungrateful, through your kindness. This manner surely is safe.

> *SENTENTIAM suam promit S. Doctor* ad 6. Lucae *in ea verba:* mutuum date, nihil inde sperantes, *his verbis:* mutuum date, nihil inde sperantes, scilicet recompensationis, Deutet. 23. Fratri autem tuo absque usura id, quo indiget, commodabis, ut benedicat tibi Dominus Deus tuus in omni opere tuo, in terra, ad quam ingredieris possidendam: idest, non quaeras retributionem de hoc ab homine, sicut usutarii, qui propter spem usurae perdunt spem vitae aeternae. *Contra quos Apostolus ait,* prima Corinth. 15. Si in hac vita tantum in Christo sperantes sumus, miserabiliores sumus omnibus hominibus. *Tales sunt divites, qui in divitiis sperant, etc. Nota quod spes in mutuo potest esse, vel ad consimile obsequium, vel ad lucrum: Primo modo licet: Secundo modo potest esse dupliciter, vel expressa per pactum, et haec simpliciter est prohibita; quia facit usurarium. Vel est tacita, et in corde, et hoc modo dupliciter: vel ut principaliter mouens ad mutuum, et haec similiter est prohibita, quia facit usurarium. Vel est tacita, et in corde; et hoc modo dupliciter; vel ut principaliter mouens ad mutuum; et haec similiter est prohibita, quia est contra mandatum diuinum: Vel est non principaliter mouens, sed quasi adnexa, quia, licet non faciat propter commodum principaliter ut lucrum, credit tamen accipientem non fore sibi ingratum, et eo facit libentius. Hic vero non est talis spes commodi, quae est contra diuinum mandatum. Haec S. Doctor, qui aperte negat omnem pactionem, et inductionem eo modo, quo ait Salas; sed tamen cum concedat, posse sperari, et desiderari ex gratitudine aliquod donum, consequenter concedet etiam aliquam suauem insinuationem, verbis lepidis, quae tamen nec timorem, nec vim aliquam ingerant, sed solum exprimant conceptum animi sui, puta dicendo: Do libenter vobis, et do absque interesse, et eo libentius, quo spero, vos non fore ingratos vestra benignitate. Hic modus sane est tutus.*

10 I ASSERT therefore first, that it is not licit to make any agreement in this matter.

> *ASSERO igitur primo, non licere hac de re aliquod pactum.*

11 It is PROVED, because thus it compels, and takes away liberty from a free loan; and although, metaphysically abstracted, it might have value; yet in its modality, and in practice, it is not good. Indeed it is against the divine precept *Lucae 6.* by which certainty of gain from a loan is forbidden, as the Holy Doctor argues, and with him Valencia.

> *PROBATUR, quia sic cogit, et libertatem aufert libero mutuo, et ita licet metaphysice abstractae valeret; tamen motalitet, et in praxi non est bonum. Imo contra diuinum praeceptum* Lucae 6. *quo inhibetur certitudo habendi ex mutuo, ut arguit S. Doctor, et cum eo Valentia.*

12 From which it follows that it is not licit to make an agreement that the borrower be bound to come to your mill and your workshop, even to buy at a just price. So very many, in Tanner *disput. 4. quaest. 7. dub. 3. num. 88. iuxta cap. Naviganti, de usuris.* The reason is, because this too is an obligation estimable by price.

*Ex quo sequitur, non licere pactum, ut mutuatarius ad tuum molendinum, et tuam officinam teneatur venire, licet iusto pretio emendum. Ita plurimi apud Tannerum* disput. 4. quaest. 7. dub. 3. num. 88. iuxta cap. Naviganti, de usuris. *Ratio est, quia et haec est obligatio aestimabilis pretio.*

13 I assert second, that this can be insinuated charmingly, in the manner said, with D. Bonaventure.

*Assero secundo, posse hoc insinuari lepide, modo dicto cum D. Bonaventura.*

14 *It is proved* from the Holy Doctor. The interior and exterior act are of the same account, goodness, and malice: but the interior act from the note of a grateful mind is licit: Therefore also the exterior insinuation. *It is confirmed* by D. Bonavenr. *in speculo animae, cap. 2. loco cit. et hic ad 6. Lucae*, for the formal object of usury is profit from the force of the loan, whether explicit or implicit, desired, or in hope; but that act of insinuation has not the formal object of Usury, nor anything like it impelling and exacting: Therefore. So also Diana, and others.

Probatur *ex S. Doctore. Actus interior, et exterior sunt eiusdem rationis, bonitatis, et malitiae: sed actus interior ex grati animi nota est licitus: Ergo et insinuatio exterior.* Confirmatur *a D. Bonavenr.* in speculo animae, cap. 2. loco cit. et hic ad 6. Lucae*, nam obiectum formale usurae est lucrum ex vi mutui, vel explicitum, vel implicitum, appetitum, vel in spe; sed actus ille insinuationis non habet obiectum formale Usurae, nec aliquid simile impellens, et exigens: Ergo. Ita etiam Diana, et alii.*

15 Therefore the Holy Doctor concludes that one who lends does not commit mental usury from the hope of gain, provided he does not hope for gain as the price of the loan, but from the gratitude, or friendship, of the borrower; wherefore it can stand that the lender would not have lent if the hope of gain ceased, and that he does not commit mental usury; provided he intends gain from a grateful and benevolent mind, as Caspensis says *sectione 1. in fine.*

*Itaque concludit S. Doctor, mutuantem spe lucri non committere usuram mentalem, dummodo non speret lucrum, tanquam pretium mutui, sed ex gratitudine, vel amicitia mutuatarii; quare potest stare, quod mutuans non esset mutuaturus cessante spe lucri, et quod non committat usuram mentalem; si tamen intendat lucrum ex grato, et benevolo animo, ut ait Caspensis* sectione 1. in fine.

## Question V: Whether the lender can receive anything on account of risk and ceasing profit, and what

1 Difficulty is raised by *cap. Naviganti, de usuris*: where it is thus said: *Naviganti, et ad nundinas eunti, certam mutuans pecuniae quantitatem, pro eo quod suscipit in se periculum recepturus aliquid ultra sortem, usurarius est censendus.*

An, et quid accipere queat mutuans ratione periculi, et lucri cessantis.

*Difficultatem facit* cap. Naviganti, de usuris: ubi sic dicitur: Naviganti, et ad nundinas eunti, certam mutuans pecuniae quantitatem, pro eo quod suscipit in se periculum recepturus aliquid ultra sortem, usurarius est censendus.

2 Yet it seems to me that that danger undertaken is estimable by price; and accordingly one can receive some remuneration, as Caspensis says *disput. 3. sect 7.* Likewise that, from lucrum cessans, one who has been asked for a loan can demand something for true lucrum cessans; as Caspensis notes *sect. 10.*

*Attamen videtur mihi periculum illud susceptum esse pretio aestimabile; atque adeo aliquam accipere possit remunerationem, ut ait Caspensis* disput. 3. sect 7. *Similiter et ex lucro cessante posse interpellatum de mutuo dando aliquid exigere pro vero lucro cessante; ut notat Caspensis* sect. 10.

3 But it must be noted that whole gains are not to be introduced into the agreement, but with the expenses of the danger of loss extracted, etc. The reason is, because a gain in hope, the more uncertainty it has, the less it ought to be. So Rodriquez *in summa, cap. 111. num. 9.* Palatius *de contract. lib. 4. cap. 4.* Sylvester, *verb. usura, 1. quaest. 19.* Angel. *quaest. 16.* Armilla *num. 3.* Molina *tract. 2. disp. 316.* Gabriel. *in 4. dist. 5. quaest. 11.* Graff. *part. 1. lib. 2. cap. 115. num. 20.* Rebell. *part. 1. lib. 8. quaest. 6.* and others, as Sotus *lib. 6. de Iustitia, quaest. 1. art. 3.* Salon. *tract. 2. quaest. 88. art. 2. controv. 9.* Bassaeus, *V. Usura 3.* with others cited.

*Oportet autem advertere, ne deducantur in pactum lucra integra, sed extractis expensis periculo deteriorandi, etc. Ratio est, quia lucrum in spe quantum habet incertitudinis, tanto debet esse minus. Ita Rodriquez* in summa, cap. 111. num. 9. *Palatius* de contract. lib. 4. cap. 4. *Sylvester,* verb. usura, 1. quaest. 19. *Angel.* quaest. 16. *Armilla* num. 3. *Molina* tract. 2. disp. 316. *Gabriel.* in 4. dist. 5. quaest. 11. *Graff.* part. 1. lib. 2. cap. 115. num. 20. *Rebell.* part. 1. lib. 8. quaest. 6. *et alii, ut Sotus* lib. 6. de Iustitia, quaest. 1. art. 3. *Salon.* tract. 2. quaest. 88. art. 2. controv. 9. *Bassaeus,* V. Usura 3. *aliis adductis.*

4 But because the said opinion leaves the assessment of the said gain to the judgment of a good man, scruples must be bid farewell, and a morally certain manner given.

*Sed quia dicta opinio relinquit taxationem dicti lucri arbitrio boni viri, oportet scrupulis valedicere, et modum moraliter certum dare.*

5 Therefore Diana *p. p. Tract. 8. resol. 64.* with Lessio *lib. 2. cap. 20. dub. 11. num. 96.* Bonacina *de contract. disp. 3. quaest. 3. puncto 4.* Reginaldus *tract. 2. lib. 23. cap. 8. num. 87.* [hold that] there is to be remitted of lucrum cessans just as much as he himself would give to another on account of a contract of insurance, that is, as much as he would give to him who would make him secure of the whole hoped-for gain, taking upon himself the whole danger.

*Igitur Diana* p. p. Tract. 8. resol. 64. *cum Lessio* lib. 2. cap. 20. dub. 11. num. 96. *Bonacina* de contract. disp. 3. quaest. 3. puncto 4. *Reginaldus* tract. 2. lib. 23. cap. 8. num. 87. *Tantum esse de lucro cessante remittendum, quantum ipse daret alteri ob contractum assecurationis, idest, quantum daret illi, qui securum redderet de toto lucro sperato, in seipsam suscipiens totum periculum.*

6 It is better defined from D. Bonavent. *in speculo animae, cap. 2. §. secundus fructus principalis*, that the burdens, dangers, etc. of both be computed, and all things reduced to a common stock, so that lender and borrower participate equally in both, and it stand with good and bad alike, and this will easily be computed. But the bonification of such lucrum cessans must be fitted to the certainty of the quantity, and to the time, so that it be made not immediately, but at the time when the cessation will occur.

*Melius definitur ex D. Bonavent.* in speculo animae, cap. 2. §. secundus fructus principalis, *ut utriusque gravamen, pericula, etc. computentur, et omnia redacantur in commune, ita ut aequaliter mutuans, et mutuatarius participent de utroque stetque bono, et malo, et hoc facile computabitur. Talis vero lucri cessantis bonificatio debet esse aptata quantitatis certitudini, ac tempori, ita ut non statim, sed tempore, quo erit cessatio, fiat.*

## Question VI: Whether it is lawful to lend wheat, or something else, with the pact that it be restored in the same measure, even if the price has risen at the time of restitution

1 I say first: if it is doubtful whether the thing will be worth more or less, one may lend wheat for that time, for instance the month of September, so that it be returned in the month of February. See Molina *disp. 311.* and Caspensis *sect. 6.*

> An liceat mutuare triticum, vel aliquid aliud cum pacto, ut restituatur in eadem mensura, etiamsi pretium tempore restitutionis creverit.
>
> *Dico primo: si dubium est: An res sit valitura plus, vel minus; potest pro eo tempore, puta mensis Septembris, mutuare triticum, ut reddatur in mense Februario. Vide Molinam* disp. 311. *et Caspensem* sect. 6.

2 Truly, if it be morally certain that the wheat, wine, etc. will be worth more at the time of payment, and the lender was not keeping wheat until that time, he cannot lend without usury wheat which is now worth less by condition, so that just so much be returned at the time when it will be worth more. So expressly D. Bonavent. *in speculo animae, cap. 2. supra citato, quaest. 5.* whom they follow commonly, in Caspensis *sect. 6.* The Holy Doctor infers the same of one who lends an old thing so as to receive a new one of greater price. The reason is, because gain is received from the loan without any foundation.

> *Enim vero, si moraliter sit certum, tempore solutionis plus valiturum triticum, vinum, etc. et non erat mutuatus servaturus triticum ad illud tempus, non potest citra usuram mutuare triticum, quod modo minus valet ex conditione, ut reddatur tantumdem, tempore, quo plus valitutum est. Ita expresse D. Bonavent.* in speculo animae, cap. 2. supra citato, quaest. 5. *quem sequuntur communiter apud Caspensem* sect. 6. *Idem infert S. Doctor de eo, qui rem antiquam mutuat, ut novam accipiat maioris pretii. Ratio est, quia accipitur lucrum ex mutuo absque aliquo fundamento.*

3 Hence you have what is to be thought: Whether it be licit for one who knows that coin is to be raised in value to give a loan, so that the coin be returned at part of the value at the time of restitution of the loan.

> *Hinc habes quid sentiendum: An liceat scienti, monetas esse extollendas, dare mutuum, ut monetas reddat ad partem tempore restitutionis mutui.*

4 For it is answered negatively, with Rebellio *part. 2. lib. 9. quaest. 6. num. 7.* Azorio *part. 3. lib. 5. cap. 7. quaestio 9.* against Reginaldum *Tom. 2. lib. 5. cap. 23. num. 345.* Bonacinam *de contract. disput. 3. quaest. 2. puncto 5. num. 17.* and others cited by him, with whom Diana is pleased *p. p. Tract. 8. resol. 25.* who proposes the opposite title, which is the same thing: Whether, if he knows the money is to be diminished, he can bind to the present value.

> *Respondetur enim negative cum Rebellio* part. 2. lib. 9. quaest. 6. num. 7. *Azorio* part. 3. lib. 5. cap. 7. quaestio 9. *contra Reginaldum* Tom. 2. lib. 5. cap. 23. num. 345. *Bonacinam* de contract. disput. 3. quaest. 2. puncto 5. num. 17. *et alios apud eum, quibus arridet Diana* p. p. Tract. 8. resol. 25. *qui oppositum titulum proponit, quod idem est: An, si sciat pecunias minuendas, possit obligare ad valorem praesentem.*

5 The reason is, because he receives from the loan a gain which is forbidden.

> *Ratio est, quia accipit e mutuo lucrum, quod est vetitum.*

6 But Caspensis observes *sect. 5.* that if in the contract of loan they do not agree that the same matter be returned, for instance gold; or the same quantity, for instance so many Ungari; the borrower

cannot pretend anything besides the value.

> *Observat autem Caspensis* sect. 5. *quod si in contractu mutui non conveniunt, ut redderetur eadem materia, puta aurum; vel eadem quantitas, puta tot Ungari; non potest mutuatarius praetendere aliud, praeter valorem.*

7 But if it is agreed that the same matter be returned, for instance of gold, he cannot exact the increment.

> *Quod si convenit, ut redderetur eadem materia, puta auri, non potest exigere incrementum.*

8 But if it is agreed that the same coins be returned, even as to value, if they have increased, he says, one can bind the borrower to restore also the accretion, for instance those Ungari which would have grown of themselves with him: because the gain of the accretion ceases if he would have kept the money with himself, for instance those ungaros which would have grown of themselves with him: Therefore by reason of lucrum cessans he can bind the borrower; yet if they should decrease, the borrower will not be bound to restore the same value which it had at the time of the loan; but it suffices that he restore the same money in number, weight, and measure. And thus the agreement ought to be understood in every event.

> *At si convenit, ut reddantur monetae eaedem, etiam quo ad valorem, si creverint, ait, posse obligare mutuatarium ad reddendum etiam accrementum, puta Ungaros illos, qui apud se crescerent: quia cessat lucrum accrementi, si pecunias apud se retineret, puta ungaros illos, qui apud se crescerent: Ergo ratione lucri cessantis potest obligare mutuatarium; si tamen decrescant, non tenebitur mutuatarius reddere eundem valorem, quem habebat tempore mutui; sed sufficit quod reddat easdem pecunias numero, pondere, et mensura. Et ita debet intelligi pactum in omni eventu.*

9 Finally, he concludes badly with Diana, that if he knows the value of money is to be depressed, he can bind the borrower to restore the coin at the value current at the time of the contract. The reason is, because this gain does not come from the loan, but from an extrinsic cause; for thus also, according to D. Thom. *quaest. 77. art. 3. ad 4.* merchandise can be sold at a high price current, if you know the price is soon to be diminished.

> *Tandem male concludit cum Diana, quod si sciat, valorem pecuniae deprimendum, potest obligare mutuatarium ad reddendam monetam in valore currente tempore contractus. Ratio est, quia hoc lucrum non venit ex mutuo, sed ex causa extrinseca; sic enim etiam secundum D. Thom.* quaest. 77. art. 3. ad 4. *possunt vendi merces alto pretio currente; si scias, brevi pretium diminuendum.*

10 But this comparison does not please; for in a loan the contract is made for the time of restitution, the value being changed, and accordingly for gain; nor is it excused by the fact that this happens from the extrinsic command of the Prince, for the law of the Prince is intrinsic to the coin, because it runs and has value insofar as it is coin only so far as is decreed by the Prince, and accordingly a loan is made for the time of the intrinsic accretion, which is usury, as S. Bonavent says: but a contract of sale is made only for the present; and therefore parity is denied.

> *Sed haec comparatio non placet; nam in mutuo fit contractus pro tempore redditionis, mutato valore, atque adeo pro lucro; neque excusatur, eo quod ex mandato extrinseco Principis id eveniat, nam lex Principis est monetae intrinseca, quia currit, et valet, quatenus moneta est solum, quantum a Principe decernitur, atque adeo fit mutuum pro tempore intrinseci accrementi, quod est usura, ut ait S. Bonavent: at contractus venditionis fit solum pro nunc; et ideo negatur paritas.*

## Question VII: Whether, and how, gain acquired from usury is to be restored

1 Twofold gain can come from usury. One is that inducement of the loan which is exacted; the other is that which is begotten from this inducement.

> *Duplex lucrum potest ex usura venire. Alterum est auctitium illud mutui, quod exigitur; alterum est illud, quod ex hoc auctitio gignitur.*

2 Concerning the first, all Catholics agree that it is to be restored; but there is controversy as to for what cause.

> *Circa primum, omnes Catholici conveniunt, esse restituendum; sed controversia est qua de causa.*

3 The first opinion is that of Adrianus *quaest. de usura,* Scoti *in 4. dist. 15. quaest. 3. art. 3.* and Paludani ibidem, after the Gloss *in cap. si quis usuram, 14. quaest. 4.* who say the reason is, not because the usurer has not acquired dominion, but because he inflicted loss on the borrower by inducing him, without reasonable title, to give the accretion; Therefore he ought to repair the loss by restoring.

> *Prima opinio est Adriani* quaest. de usura*, Scoti* in 4. dist. 15. quaest. 3. art. 3. *et Paludani ibidem, post Glossam* in cap. si quis usuram, 14. quaest. 4. *dicentium, rationem esse, non quia usurarius non acquisierit dominium, sed quia damnum intulit mutuatario inducendo illum sine titulo rationabili ad donandum auctarium; Propterea debere damnum resarcire restituendo.*

4 The true opinion, however, is that the foundation of restitution is, because the dominion of that accretion has not been transferred to the usurer. So D. Thom. *quaest. 78. art. 3.* Alens. *3. part. quaest. 36. memb. 4. art. 2.* Altisiodor. *3. part. tract. 21. quaest. 1.* Henricus *quodlibet. 4. quaest. 27.* Richardus *in 4. dist. 15. art. 5. quaest. 5.* Sylvester *verb. Usura, 6.* Caietanus *tract. de usura, quaest. 1.* Sotus *lib. 6. de iust. quaest. 1. art. 4.* Medina *quaest. 4. de usura.* Valentia *disp. 5. quaest. 21. puncto 3.* and almost all others.

> *Vera tamen sententia est, fundamentum restitutionis esse, quia non est translatum illius auctitii dominium in usurarium. Ita D. Thom.* quaest. 78. art. 3. *Alens.* 3. part. quaest. 36. memb. 4. art. 2. *Altisiodor.* 3. part. tract. 21. quaest. 1. *Henricus* quodlibet. 4. quaest. 27. *Richardus* in 4. dist. 15. art. 5. quaest. 5. *Sylvester* verb. Usura, 6. *Caietanus* tract. de usura, quaest. 1. *Sotus* lib. 6. de iust. quaest. 1. art. 4. *Medina* quaest. 4. de usura. *Valentia* disp. 5. quaest. 21. puncto 3. *et fere omnes alii.*

5 This is the opinion of D. Bonavent. *in 4. dist. 15. part. 2. art. 2. quaest. 1. ad 4. et in speculo animae, cap. 2. §. tertius fructus, etc.*

> *Haec est sententia D. Bonavent.* in 4. dist. 15. part. 2. art. 2. quaest. 1. ad 4. et in speculo animae, cap. 2. §. tertius fructus, etc.

6 *It is proved* from D. Bonavent. *ibi*: it stands in the same way with one who gives involuntarily to a robber out of fear, and with one who gives out of the necessity of coercion to the usurer; but the robber does not acquire dominion over the thing which he extorts on the way from the merchant: Therefore, since he does not receive dominion from the borrower, he has it not, unless he obtained it from the Prince; but by law he does not acquire it: Therefore. The minor is proved first from the laws cited *quaest. 1.* And although by civil law it is permitted him with impunity *Tit. de usuris, ff. et Cod.* because the borrower seems to be compelled to pay the usuries, as is evident from *leg. prima, Cod. de Usuris,* nevertheless now this has been taken from them in Canonical Law, especially *in Clementina unica de usuris,* where judges are commanded under excommunication to pass sentence against

Usuries. So Valencia *puncto 1.* Sotus *lib. 6. quaest. 1. art. 1.* after D. Bonavent. as I showed *Tract. de legibus, Disput. de Iure Canonico.*

> Probatur *ex D. Bonavent.* ibi, *eodem modo se habet dans involuntarie ex timore latroni, et ex necessitate coactionis usurario; sed latro non acquirit dominium rei, quam in via extorquet a mercatore: Ergo cum non accipiat a mutuatario dominium, non habet illud, nisi a Principe obtineret; at ex lege illud non acquirit: Ergo. Minor probatur primo ex legibus allegatis* quaest. 1. *Et quamvis lege civili permittatur impune* Tit. de usuris, ff. et Cod. *quia cogi videtur mutuatarius ad solvendas usuras, ut patet ex* leg. prima, Cod. de Usuris, *tamen nunc detractum est eis Iure Canonico, maxime* in Clementina unica de usuris, *ubi sub excommunicatione iubentur iudices ferre sententiam contra Usuras. Ita Valentia* puncto 1. *Sotus* lib. 6. quaest. 1. art. 1. *post D. Bonavent. ut ostendi* Tract. de legibus, Disput. de Iure Canonico.

7 *It is proved* second, because if dominion had been transferred, the usurer would not be held by justice to restitution.

> Probatur *secundo, quia si translatum esset dominium, non teneretur usurarius ex iustitia ad restitutionem.*

8 Nor is it enough that the usurer ought to give back, because a reasonable title of receiving is lacking. For a reasonable title is not necessary for a donation to be valid, as is evident, when someone out of levity donates something to a Scurra; for that Scurra is not held to restore it, just as neither a stage-player, as Valencia teaches *puncto 3.* with S. Bonavent. *loco citato.*

> *Nec satis est, usurarium debere reddere, quia deficit rationabilis titulus accipiendi. Non enim necessarius est rationabilis titulus, ut donatio valeat, ut patet; cum quis ex levitate donat aliquid Scurrae; neque enim tenetur id Scurra restituere, sicuti neque histrio, ut docet Valentia* puncto 3. *cum S. Bonavent.* loco citato.

9 I add, that not only the real, or exterior, usurer, but also the mental one, is held to restore what he received beyond the principal; if he thinks, or ought to think, that the borrower gave it by the force of the loan. So it was defined in *cap. Consuluit, extra de Usuris*, and it is the common doctrine.

> *Addo, non solum usurarium realem, seu exteriorem, sed etiam mentalem, teneri id restituere, quod ultra sortem accepit; si putat, vel putare debet, mutuatarium ex vi mutui id dedisse. Ita definitum est in* cap. Consuluit, extra de Usuris, *estque doctrina communis.*

10 The arguments for the opinion of Scotus only prove that the borrower indeed wishes to give that gain, but compelled by necessity. Therefore that external giving does not suffice for transferring dominion, as is held in *leg. Nunquam, ff. de acquirendo rerum dominio*, and Valencia noted it with D. Bonavent. above.

> *Argumenta pro opinione Scoti solum probant, mutuatarium quidem velle dare illud lucrum sed necessitate coactum. Itaque illa datio externa non sufficit ad transferendum dominium, ut habetur* leg. Nunquam, ff. de acquirendo rerum dominio, *et adnotavit Valentia eum D. Bonavent. supra.*

11 As to the gain emerging from the accretion.

> *Quoad lucrum emergens ex auctitio.*

12 D. Thom. DISTINGUISHES that if that thing is fruitful, certainly the fruit is to be restored; but if the gain was made from a thing usurious, not fruitful, but consumable by use, as money, it is not to be restored, because it is not the fruit of the usury, but of industry: It is the common opinion, as Valencia says, except for very few, in Medina *quaest. de restitutione Usurarum.*

*Distingvit D. Thom. quod si res illa est fructifera, certe fructus est restituendus; si autem lucrum factum est re usuraria, non fructifera, sed usu consumptibili, ut pecunia, non esse restituendum, quia non est fructus usurae, sed industriae: Est communis sententia, ut ait Valentia, excipe perpaucos apud Medinam* quaest. de restitutione Usurarum.

13 This opinion is defended by more of the Thomists. Valencia solves the arguments to the contrary.

*Haec sententia pluribus defenditur a Thomistis. Argumenta in contrarium solvit Valentia.*

## Question VIII: Whether it is lawful to seek a loan from a usurer

1 This question supposes what I said *Tract. de Charitate, disp. 18. et quae de scandalo, quaest. 4.* That it is licit, in necessity, to ask from someone with right intention that which he himself will culpably do, not asking of him that he commit a sin, but only that which I am owed, as a supper from him who serves only meat on a day of fasting.

*Haec quaestio supponit ea, quae dixi* Tract. de Charitate, disp. 18. et quae de scandalo, quaest. 4. *Licere in necessitate petere ab aliquo recta intentione id, quod ipse culpabiliter operabitur, non petendo ab eo, ut peccatum committat, sed solum id, quod debeo, ut coenam ab eo, qui solam carnem die ieiunii apponat.*

2 I assert first, that it is not licit to ask a money loan from a usurer under usury. So D. Thom. *quaest. 78. art. 4.* Nauar. *cap. 17. num. 262.* Couar. *part. 1. §. 1.* Valentia *disp. 5. quaest. 21. puncto 4.* for it is to cooperate in sin, indeed to induce to the act.

*Assero primo, non licere petere ab usurario pecuniam mutuam sub usura. Ita D. Thom.* quaest. 78. art. 4. *Nauar.* cap. 17. num. 262. *Couar.* part. 1. §. 1. *Valentia* disp. 5. quaest. 21. puncto 4. *est enim cooperari peccato, imo inducere ad actum.*

3 I assert second, that it is not licit to ask a loan from a usurer without necessity. So Valencia, citing Sylvestrum *verb. usura 7. quaest. 1.* Richardus *4. dist. 15. art. 5. quaest. 5. ad 2.* Gabriel. *ibi, quaest. 11. art. 3. dub. 14.* and others, who all confess it to be a mortal sin. D. Thom. seems to think the same; nevertheless they do not admit that it is licit to ask even out of necessity under usury; against Molinam *disp. 335.* Sanchez *lib. 3. decal. c. 8. n. 27.* Caspensem *disp. 5. sect. 13.* who, in necessity, grant that a loan at usury can be requested.

*Assero secundo, non licere absque necessitate petere mutuum ab usurario. Ita Valentia, allegans Sylvestrum* verb. usura 7. quaest. 1. *Richardus* 4. dist. 15. art. 5. quaest. 5. ad 2. *Gabriel.* ibi, quaest. 11. art. 3. dub. 14. *et alios, qui omnes confitentur, id esse peccatum mortale. Idem videtur D. Thom. attamen non admittunt, licere etiam ob necessitatem petere sub usura; contra Molinam* disp. 335. *Sanchez* lib. 3. decal. c. 8. n. 27. *Caspensem* disp. 5. sect. 13. *qui in necessitate concedunt, posse postulari mutuum ad usuram.*

4 *It is proved* indeed that one can ask for a loan in grave necessity, for instance from the decency of one's state, because thus he uses his own right, nor does he act formally toward fault.

Probatur *vero quod possit petere mutuum in necessitate gravi, puta ex decentia status, quia sic utitur iure suo, nec agit ad culpam formaliter.*

5 But in extreme necessity it is licit to ask even under usury, if he cannot otherwise, renouncing his own Right; nor is he inviting to sin, but only exposing to the usurer himself, so that he may choose to make usury rather than homicide, allowing him to perish, as Valencia says; and in this way Nauar. *cap. 17. num. 263.* Sylvester *verb. usura, 7. quaest. 1.* are understood; for it is licit to propose the lesser evil, as I said *Tract. de Charitate, Disputatione 18. quae est de scandalo, quaestione 4.*

*In extrema vero necessitate licet petere etiam sub usura, si aliter non potest, renunciando suum Ius; neque invitando ad peccatum, sed solum exponendo ipsi usurario, ut malit usuram facere, quam homicidium, sinendo perire, ut ait Valentia, et hoc modo intelliguntur Nauar.* cap. 17. num. 263. *Sylvester* verb. usura, 7. quaest. 1. *licet enim proponere minus malum, ut dixi* Tract. de Charitate, Disputatione 18. quae est de scandalo, quaestione 4.

# Disputation VII: On Census Contracts (Annuities)

1 The wealthier and nobler are accustomed to lease their estates or goods to others, who contract from it a certain obligation: and this especially stands in the payment of the census, which admits several conditions both by the law of nature and by positive law: but chiefly it is considered as to the time, which is the term of the sale; and as to the thing which is sold by the census, of which below.

> *Solent ditiores, et nobiliores sua praedia vel res aliis locare, qui certam inde obligationem contrahunt: haec vero in solutione census praecipue stat, quae tam iure naturae, quam lege positiva plures patitur conditiones: in primis autem consideratur quo ad tempus, quod est venditionis terminus; et quoad rem, quae censu venditur, de quibus infra.*

## Question I: What a census is, and of how many kinds

1 They commonly define the Census: *Census est ius percipiendi annuam pensionem ex re, vel persona alterius*. By way of example, someone binds himself to another to confer on him each year a certain part of the fruits of his own vine; the right which the latter has of receiving those fruits is called a Census: and he who binds himself to pay the pension is usually called the Censuarius; just as he who has the right of receiving is called the Censualista.

> Quid sit Census, et quotuplex.
>
> *Definiunt communiter Censum:* Census est ius percipiendi annuam pensionem ex re, vel persona alterius. *Exempli gratia, obligat quis se alteri ad conferendam ei certam partem fructuum propriae vineae singulis annis; ius, quod iste habet eos fructus percipiendi, dicitur Census: et ille, qui se obligat ad pensionem solvendam, dici solet Censuarius; sicut qui ius habet percipiendi, dicitur Censualista.*

2 The Census is divided into Reservativum, and Consignativum. It is called Reservativus, when someone transfers his thing to another as to direct and useful dominion, keeping for himself an annual pension over the same thing, as Joseph did *Genes. 47.* over all the lands of the Egyptians, when he restored them, bought and subjected to the dominion of Pharaoh, to the Egyptians, a census having been established in them. And therefore this census is called Reservativus, because from the very thing which is conferred he reserves, granting to himself, or to another, that census, receiving nothing in compensation for that which he grants from that thing. Whence also this contract takes place in spirituals without the vice of Simony, and it differs from Emphyteusis, because by the Emphyteutic contract only the useful dominion is transferred; but the direct remains with the granter; by this census contract, however, even the direct dominion is transferred. Then, that in Emphyteusis, if the pension is not paid by the Emphyteuta for two or three years, he incurs the Forfeiture, that is, he loses the useful dominion to the proprietor; but in this census contract he does not incur it, but is only held to pay the pensions. Finally they differ, because the Emphyteuta cannot sell the Emphyteutic thing without the lord being asked; otherwise he will fall into the Forfeiture, and moreover from the price he is held to pay the Laudemium to the proprietor: but the debtor of this census can sell the census thing without the Lord, to whom the thing is owed, being asked, nor is he held from the price to pay him the Laudemium. See Caspensem *Tract. 19. disp. 5. sect. 1.* Bassaeum *V. Census*, Bonacinam *disp. 3. quaest. 4.* Lessium *lib. 2. cap. 22.* Filliucium *tract. 35. 2. part. cap. 1.* Sylvest. et Becan. *2. 2. quaest. 78. art. 4.*

*Dividitur Census in Reservativum, et Consignativum. Reservativus dicitur, quando quis transfert rem suam in alterum quo ad dominium directum, et utile, servata sibi pensione annua super eadem re, ut fecit Ioseph* Genes. 47. *in omnibus terris AEgyptiorum, cum eas emptas, et subiectas dominio Pharaonis, AEgyptiis restituit, constituto in eis censu. Et ideo hic census dicitur Reservativus, quia ex re ipsa, quae confertur, reservat, concedens sibi, vel alteri eum censum, nihil accipiendo in recompensationem eius, quod ex ea re concedit. Unde etiam hic contractus locum habet in spiritualibus absque vitio Simoniae, et differt ab Emphyteusi, quia per contractum Emphyteuticum transfertur solum utile dominium; directum vero manet apud concedentem; Per hunc vero censualem, etiam directum dominium transfertur. Deinde quod in Emphyteusi, si pensio ab Emphyteuta biennio, aut triennio non solvatur, incidit in Commissum, idest, amittit utile dominium proprietario; in hoc vero censuali non incidit, sed solum tenetur solvere pensiones. Denique differunt, quia Emphyteuta non potest vendere rem Emphyteuticam irrequisito domino; alias cadet in Commissum, et praeterea ex pretio tenetur solvere proprietario Laudemium: at debitor huius census potest vendere rem censualem irrequisito Domino, cui res debetur, neque ex pretio tenetur ei Laudemium solvere. Vide Caspensem* Tract. 19. disp. 5. sect. 1. *Bassaeum* V. Census, *Bonacinam* disp. 3. quaest. 4. *Lessium* lib. 2. cap. 22. *Filliucium* tract. 35. 2. part. cap. 1. *Sylvest. et Becan.* 2. 2. quaest. 78. art. 4.

3 The Consignativum Census, however, of which I treat at present, is, when someone over his goods, whose dominion, or even over his own person, consigns to another the right of an annual pension, as, when Peter sells to Paul the right of receiving over his thing one hundred solidi yearly, one hundred scudi being given for the price, and he consigns the house, or estate, or the very person, from which the pension, or fruits, are to be collected.

*Census vero Consignativus, de quo in praesenti dissero, est, quando quis super bonis suis, quorum dominium, vel etiam super persona sua alteri ius pensionis annuae consignat, ut, quando Petrus vendit Paulo ius percipiendi super re sua centum solidos annuos, datis pro pretio centum scutis, et consignat domum, vel praedium, aut ipsam personam, ex qua pensio, vel fructus sunt colligendi.*

4 This census is first divided, on the side of the thing in which it is placed, into Real, and Personal. The Real is that which is founded in a thing, as a house, farm, estate, etc. so that the pension is to be paid from the fruits of these, until it be redeemed. The Personal, however, is that which is founded upon a person, who sells an annual census to be paid from the fruits of his own industry. The Mixed, however, is that which is established upon a thing, and a person immediately, so that if the thing perish, the person is still bound.

*Hic census primo dividitur ex parte rei, in qua collocatur in Realem, et Personalem. Realis est, qui fundatur in re, ut domo, fundo, praedio, etc. ita ut pensio ex fructibus horum solvenda sit, donec redimatur. Personalis vero est, qui fundatur super persona, quae vendit annuum censum solvendum ex fructibus propriae industriae. Mixtus vero, qui constituitur super re, et persona immediate, ita ut si res pereat, adhuc persona sit obligata.*

5 Secondly, on the side of the thing to be paid, it is divided into Fructuarium, and Pecuniarium: For if it is paid in money, it is called Pecuniarius; but if in fruits, Fructuarius.

*Secundo ex parte rei solvendae dividitur in Fructuarium, et Pecuniarium: Si enim solvitur in pecunia, dicitur Pecuniarius; si vero in fructibus, Fructuarius.*

6 Thirdly it is divided into Certain, and Uncertain. The Certain is that which determines the quantity of money, or of fruits: the Uncertain is that which establishes it indeterminately, for instance the second, or third part of the fruits.

*Tertio dividitur in Certum, et Incertum. Certus est, qui determinat quantitatem pecuniae, vel fructuum: Incertus est, qui indeterminate statuit, puta secundam, vel tertiam partem fructuum.*

7 Fourthly, on the side of time, it is divided into Temporal, and Perpetual. The Temporal is subdivided into that which lasts a certain number of years, for instance of ten years, and into that which lasts an uncertain number of years, as for the whole of life, and it is called Vitalitius. The Perpetual is cut into Redimibilem, which is made with an agreement of selling back; and into Irredimibilem. See Caspensem cited, Tannerum *disp. 4. quaest. 7. dubio 4.* and Bassaeum.

*Quarto ex parte temporis dividitur in Temporalem, et Perpetuum. Temporalis subdividitur in eum, qui certum numerum annorum durat, puta decem annorum, et in eum qui durat numerum annorum incertum, ut per totam vitam, et dicitur Vitalitius. Perpetuus secatur in Redimibilem, qui fit cum pacto de retrovendendo; et in Irredimibilem. Vide Caspensem allegatum, Tannerum* disp. 4. quaest. 7. dubio 4. *et Bassaeum.*

## Question II: Whether a census can lawfully be sold

1 I assert that it is licit to sell and buy it, unless injustice arises from some other quarter. Thus it is laid down in both *Extravagants of Martin V. and Calixtus III. tit. de empt. et vendit.* and repeatedly in both Laws, and it is the common opinion of the Doctors at Tanner *disput. 4. quaest. 7. num. 116.*

An Census possit licite vendi.

*Assero, licere vendi, et emi, nisi aliunde accidat iniustitia. Ita habetur in utroque* Extravaganti Martini V. et Calixti III. tit. de empt. et vendit. *et passim in utroque Iure, estque communis sententia Doctorum apud Tannerum* disput. 4. quaest. 7. num. 116.

2 It is proved, because a right which one has to receive utility from some thing is estimable by a price, just as also the right which one has to the whole thing, of which he is lord: Therefore that right can be transferred by sale.

*Probatur, quia ius, quod quis habet ad percipiendam utilitatem ex re aliqua est pretio aestimabile, sicut etiam ius, quod habet ad rem totam, cuius est dominus: Ergo potest id ius transferri per venditionem.*

3 Wherefore Medina *quaest. 12. de Usuris*, Soto *lib. 5. quaest. 5. art. 1.* Covarru. *lib. 3. variar. cap. 7.* and the rest refute Henry *quodlib. 1. quaest. 39. and quodlib. 8. quaest. 24.* and Innocent *super cap. in civitate, extra. de usuris*, and John Andreas there, and Salicetus *in Authent. Ad haec, Cod. de usuris*, who deny that a census newly to be instituted can be bought and sold, though they concede that one already instituted can be sold and bought.

*Quare Medina* quaest. 12. de Usuris, *Soto* lib. 5. quaest. 5. art. 1. *Covarru.* lib. 3. variar. cap. 7. *et caeteri refellunt Henricum* quodlib. 1. quaest. 39. et quodlib. 8. quaest. 24. *et Innocentium* super cap. in civitate, extra. de usuris, *et Ioannem Andreaeam ibi, et Salicetum* in Authent. Ad haec, Cod. de usuris, *negantes, posse emi, et vendi censum de novo instituendum, licet concedant vendi, et emi posse iam institutum.*

4 It is proved secondly by Casas, because one can bequeath the usufruct of one's own thing, as the text proves *in leg. Omnium praediorum, ff. de usufructu*, and *leg. si quis in 20. of the same title:* Therefore he can licitly sell such a usufruct: Therefore also another can licitly buy it.

*Probatur secundo a Caspensi, quia potest quis legare usumfructum rei propriae, ut probat textus* in leg. Omnium praediorum, ff. de usufructu, *et* leg. si quis in 20. eodem titulo: *Ergo potest talem usumfructum licite vendere: Ergo et potest alius licite emere.*

## Question III: From what things a census can be sold by natural law

[1] By this natural law it can be made even from movable things, for instance a flock or a herd, as Medina says *quaest. 11. de Usura*, Valencia *puncto 2.* He adds also from money, provided it be exposed to profit, from Soto *lib. 6. quaest. 5. art. 1.* It is rarer, because from this thing too, like other consumables existing in such a fruit-bearing state, one has the right to receive utility.

> Ex quibus rebus iure naturae CENSUS vendi queat.
>
> *Hoc iure naturae ex rebus etiam mobilibus, puta grege, vel armento fieri potest, ut aiunt Medina* quaest. 11. de Usura*, Valentia* puncto 2. *Addit etiam ex pecunia, dummodo sit exposita ad lucrum, ex Soto* lib. 6. quaest. 5. art. 1. *Rario est, quia ex hac etiam aliis rebus consumptibilibus existentibus in tali statu fructificandi, habet ius accipiendi utilitatem.*

[2] A census CAN likewise be sold from other censuses, as Medina and Valencia note. Add that a census is counted among immovable goods by Clement V. *Clementina prima.*

> *POTEST vendi census itidem ex aliis censibus, ut notant Medina, et Valentia. Adde census inter bona immobilia numerari a Clemente V.* Clementina prima.

[3] It CAN be sold also from all the goods of someone, determining none certain one, as many Doctors note at Valencia.

> *POTEST vendi etiam ex rebus omnibus alicuius, nullam certam determinando, ut multi Doctores adnorant apud Valentiam.*

[4] BESIDES, a Census can also be sold from a person, when the person is lucrative, and it is a personal census, as I said *quaest. 1. See Casas sect. 3.*

> *PRAETEREA etiam ex persona potest vendi Census, quando persona est lucratina, estque census personalis, ut dixi* quaest. 1. Vide Caspensem sect. 3.

[5] NOTE, however, that a census cannot be sold from a thing which yields at the least not so much fruit as the payment to be paid is; for if the thing is not such, the lord does not have the right to receive from it so much utility. But the opposite is admitted without cause by Soto *lib. 9.* Covarruvias *lib. 3. var. cap. 7.* Conradus *de contract. quaest. 88. concl. 12.* at Diana *p. p. Tract. 8. resol. 44.*

> *ADVERTE tamen, non posse vendi censum ex re, quae ad minimum non fructificet tantum, quanta est pensio solvenda; si enim res non est talis, dominus non habet ius accipiendi ex ea tantam utilitatem. Oppositum vero sine causa admittunt Sotus* lib. 9. Covar. lib. 3. var. cap. 7. *Conradus* de contract. quaest. 88. concl. 12. *apud Dianam* p. p. Tract. 8. resol. 44.

[6] LET THESE things be said by natural law; for by positive law, *Extravagant of Pius V. of the year 1568. 14. of the Calends of February* it is prescribed that a census not be sold unless from an immovable thing, fruit-bearing by its nature, certain, and assigned with determinate boundaries. Yet this Bull is in force where it flourishes in green observance. Although Navarrus *in Comment. de Usuris, numero 106.* and Valencia say that the Extravagant, since it proceeds from a presumption of usurious intention in those who do not observe all the conditions required there in the buying of censuses, does not bind in the forum of conscience private individuals who without iniquity before God would buy censuses without those conditions required there, beyond certain necessary conditions, which are of natural law. For there is no place for a presumption in the forum of conscience where the truth is contrary to

the presumption, as is had in *cap. Tua de sponsal. and cap. Humanae aures, 22. quaest. 5.* Yet it binds Judges not to admit in judgment purchases of censuses celebrated otherwise than is prescribed there.

> *HAEC iure naturae dicta sint; nam iure positivo,* Extravagant. Pii V. anno 1568. 14. Calend. Februarii *praescribitur ne census vendatur, nisi ex re immobili, natura sua fructifera, certa, et determinatis finibus assignata. Ubi tamen Bulla haec viget in viridi observantia. Etsi Navarrus* in Comment. de Usuris, numero 106. *et Valentia dicant, Extravagantem, cum procedat ex praesumptione usurariae intentionis in iis, qui conditiones omnes ibi requisitas in emptione censuum non servent, non obligare in foro conscientiae particulares, qui sine iniquitate usurae coram Deo ement census sine iis conditionibus ibi requisitis, ultra necessarias aliquas conditiones, quae sunt iuris naturae. Nam praesumptioni in foro conscientiae non est locus, ubi veritas est praesumptioni contraria, ut habetur* cap. Tua de sponsal. et cap. Humanae aures, 22. quaest. 5. *Obligat tamen Iudices, ne admittant in iudicio emptione, censuum aliter, quam ibi praescribitur, celebratas.*

7 WHICH things being so, Diana *p. p. Tract. 8. resol. 44.* holds that a census can be constituted from money previously owed, or by handing over some merchandise as the price of the census, and he adduces Maldonado *2. 2. tract. 5. cap. 5. dub. 6.* Joan. de la Cruz *in direct. part. 1. praecepto 7. quaest. 6. dub. 3.* Lessius *lib. 2. cap. 22. num. 80.* Navarrus *in comment. de usuris, num. 88. and 121.* Boninsegna *de cens. cap 5.* Bartholomew of St. Foust *in speculo, disp. 18. quaest. 29.* who cites Valencia, Salonus, and Palatium. The erudite Megalaeus subscribes *2. 2. lib. 2. cap. 7. quaest. 2. num. 57.* on account of the reason of Navarrus brought forward. Sà taught the same *verb. Census.*

> *QUAE cum ita sint, Diana* p. p. Tract. 8. resol. 44. *tenet, posse de pecunia antea debita censum constitui, vel tradendo aliquas merces in pretium census, et adducit Malderum* 2. 2. tract. 5. cap. 5. dub. 6. *Ioan. de la Cruz* in direct. part. 1. praecepto 7. quaest. 6. dub. 3. *Lessium* lib. 2. cap. 22. num. 80. *Navarrum* in comment. de usuris, num. 88. et 121. *Boninsignum* de cens. cap 5. *Bartholomaeum a S. Fausto* in speculo, disp. 18. quaest. 29. *qui citat Valentiam, Salonium, et Palatium. Subscribit Megala eruditus* 2. 2. lib. 2. cap. 7. quaest. 2. num. 57. *ob rationem Navarri allatam. Idem docuit Sà* verb. Census.

8 THEREFORE if without fraud in the census contract you find those things which are due by natural law, they conclude it to be licit.

> *ITAQUE si absque fraude in contractu censuali invenias ea, quae sunt iure naturae debita, concludunt, esse licitum.*

9 THESE things, however, are from Lessius *lib. 2. cap. 22. dub. 12. num. 74.* Equality according to estimation between the census and the price. But if any burdens are imposed here and there, beyond the nature of the contract, by accessory pacts; they must be duly compensated at the judgment of the prudent.

> *HAEC autem sunt ex Lessio* lib. 2. cap. 22. dub. 12. num. 74. *AEqualitas secundum aestimationem inter censum et pretium. Quod si aliqua gravamina hinc inde, praeter naturam contractus per pacta accessoria imponantur; ea prudentis arbitrio debite compensentur.*

10 NOTE that Soto *de Iustitia, lib. 6. quaest. 5. art. 1.* asserts that a census can be constituted even from money lent, but Lopez de comtrov. *lib. 3. cap. 59.* and Bartholomew of St. Foust in spec. disp. 18. quaest. 32. num. 2. deny it, he thinks more probably. Finally Diana admits the opinion of Soto only where the Bull is not in force.

> *ADVERTE, Sotum* de Iustitia, lib. 6. quaest. 5. art. 1. *asserere, etiam ex pecunia credita posse constitui censum, sed negant Lopez de comtrov.* lib. 3. cap. 59. et Bartholomaeus a S. Fausto in spec. disp. 18. quaest. 32. num. 2. *probabilius putat. Tandem Diana opinionem Soti admittit solum, ubi Bulla non est in vigore.*

## Question IV: For how long a time a census can be sold

[1] I ASSERT with Valencia *puncto 4.* that a census can be sold both temporal and perpetual, provided a foundation exist, so that it can render the payment. And so the thing perishing, the census also perishes. Whence it comes about that it cannot be perpetual over a person or thing that will perish, but is made according to the state of the thing founding it.

> Ad quantum Tempus CENSUS vendi queat.
>
> *ASSERO cum Valentia* puncto 4. *posse vendi censum etiam temporalem, et perpetuum, dummodo existat fundamentum, ut pensionem reddere possit. Itaque pereunte re, perit etiam census. Quo fit, ut perpetuus esse nequeat super persona, vel re peritura, sed pro rei statu fundantis fiat.*

[2] Casas ADDS *sect 4.* that the purchase of a perpetual, irredeemable census can be made at a lesser price than the payments hoped for, and says this is common among the Doctors. The reason is, because a right is bought which is less than the payment.

> *ADDIT Caspensis* sect 4. *posse fieri emptionem census perpetui, irredimibilis minori pretio, quam sint pensiones speratae, et ait esse Doctorum communem. Ratio est, quia emitur ius, quod pensione minus est.*

[3] On the SAME foundation he concludes *sect. 5.* that a census even for a time is licit at a lesser price than the quantity of the payments which are to be paid from it.

> *EODEM fundamento concludit* sect. 5. *censum etiam ad tempus esse licitum minori pretio, quam sit quantitas pensionum, quae ex eo sunt solvendae.*

## Question V: What conditions are required for a census

[1] The CONDITIONS of natural law indicated above are those, which are multiplied by others. Tanner *disp. 4. quaest. 3. num. 116.* lays down four conditions as necessary by natural law.

> Quae conditiones ad CENSUM requirantur.
>
> *CONDITIONES iure naturae supra indicatae sunt, quae ab aliis multiplicantur. Tannerus* disp. 4. quaest. 3. num. 116. *quatuor conditiones iure naturae statuit necessarias.*

[2] The FIRST is that the census be founded on a fruit-bearing thing, which in due time renders its proportionate payment, either immediately or mediately, as Medina also teaches *quaest. 21. de Usuris.* Valencia *quaest. 22. puncto 2.* who adds with Soto *lib. 6. quaest. 5. art. 2. from* the common opinion that all the goods of the censualist, and also his very person, are bound to pay such a payment.

> *PRIMA est ut census fundetur in re fructifera, quae in debito tempore suam pensionem proportionatam reddat, sive immediate, sive mediate, ut docent etiam Medina* quaest. 21. de Usuris. *Valentia* quaest. 22. puncto 2. *qui addit cum Soto* lib. 6. quaest. 5. art. 2. ex *communi huiusmodi pensionem solvendam omnia bona censuarii, et ipsius quoque personam obligari.*

[3] The SECOND is, that the census be bought at a just price. That is deemed just which by law, or by the judgment of prudent men, has been so much, considering the present condition of things.

> *SECUNDA est, ut census ematur iusto pretio. Censetur autem iustum, quod vel lege, vel iudicio prudentum tantum fuerit, spectata rerum praesenti conditione.*

4 AND indeed in the Empire, for a perpetual Census, or redeemable on the seller's side only, the legal price is five per hundred. But this law set aside, where it is not to be observed, the just price is seven per hundred, as Valencia notes *quaest. 25. quaest. 1. puncto 2.*

> *ET quidem in Imperio, pro Censu perpetuo, sive ex parte solum venditoris redimibili, legale pretium est quinque pro centum. Seclusa vero hac lege, ubi observanda non est, iustum est pretium septem pro centum, ut notat Valentia* quaest. 25. quaest. 1. puncto 2.

5 The THIRD condition is, that if the census-bearing thing perish or become sterile, no longer apt to bear so much fruit (without fault of the censualist), it perishes for the censualista, who receives the payment, a special pact of assurance being set aside, as Valencia teaches from the common opinion *quaest. 23. puncto 2.* Molina *Tom. 1. disp. 390. and* it is gathered from the Bull of Pius V. *de Censibus.* The reason is, because the thing perishes to its Lord. Since therefore the censualista is the Lord of the right to the payment, it ought to perish for him. Yet if the census-bearing thing is unfit for fruit for one or another year, the censualist is not freed from paying the payment, provided in the remaining years it bears so much as is necessary to pay the payment. Thus Sà V. census, and Valencia loc. cit.

> *TERTIA conditio est, ut si res censualis pereat, vel sterilescat, non amplius apta tanto fructui ferendo (citra censuarii culpam) censualistae pereat, qui percipit pensionem, secluso speciali pacto assecurationis, ut ex communi docet Valentia* quaest. 23. puncto 2. *Molina* Tom. 1. disp. 390. et *colligitur ex Bulla Pii V.* de Censibus. *Ratio est, quia res Domino perit. Cum ergo censualista sit Dominus iuris ad pensionem, debet ei perire. Si tamen res censualis uno, vel altero anno sit inepta fructui, non liberatur censuarius a solvenda pensione, modo reliquis annis tantum ferat, quantum necesse est ad solvendam pensionem. Ita Sà V. census, et Valentia loco cit.*

6 The FOURTH condition is, that the census-bearing thing not be transferred to another against the will of the censualist, from whom the payment to be paid would be obtained with difficulty and less securely, as Scotus lib. 6. quaest. 5. art. 5. Valencia quaest. 22. puncto 7. Tanner. num. 122. teach. The reason is, because since the Censualista has a right to the census-bearing thing, that right ought not to be made worse by such a sale: They add, that burdens not be imposed beyond the nature of the contract; and if perchance they have been laid down, they must be duly defined by the judgment of the prudent.

> *QUARTA conditio est, ut res censualis invito censualista non transferatur in alium, a quo solvenda pensio aegre, minusque secure obtineatur, ut docent Scotus lib. 6. quaest. 5. art. 5. Valentia quaest. 22. puncto 7. Tanner. num. 122. Ratio est, quia cum Censualista ius habeat ad rem censualem, non debet illud tali venditione reddi deterius : Addunt, ut non imponantur gravamina, praeter naturam contractus; et si forte posita sint, iudicio prudentis debite definiantur.*

7 FILLIUCIUS tract. 35. part. 2. cap. 1. numero 268. adds, the consent of the Censualista is necessary, and that the right which is sold be founded in a vendible thing. Bassaeus adds num. 3. that it be in the dominion of the censualista, and that if some burden is imposed on the seller, to which he is not bound by the nature of the contract, he be compensated with due payment.

> *FILLIUCIUS tract. 35. part. 2. cap. 1. numero 268. addit, consensum Censualistae necessarium, et ut ius, quod venditur, sit fundatum in re vendibili. Addit Bassaeus num. 3. ut sit in dominio censualistae, et ut si onus aliquod imponatur venditori, ad quod non tenetur ex natura contractus, debita mercede compensetur.*

8 BONACINA disput. 3. quaest. 4. puncto unic. and others lay down three conditions. First, that the one constituting the census have the free faculty of disposing of it. Second, that the census be

founded on a fruit-bearing thing. Third, that, if the thing perish without fault of the censualist, the census cease pro rata; for the thing perishes to its lord.

> *BONACINA disput. 3. quaest. 4. puncto unic. et alii, tres conditiones ponunt. Prima, ut constituens censum, liberam habeat illius disponendi facultatem. Secunda, ut census fundetur in re fructifera. Tertia, ut, si res pereat sine culpa censuarii, cesset census ad ratam; nam res domino suo perit.*

9 But the JUST price is to be taxed by common estimation and the custom of the place; yet from the nature of the thing in an Irredeemable census, the price ought to be greater than in a Redeemable one, and in a Perpetual one than in a Temporal one, and in a Life one than in one constituted for a certain and determinate time.

> *PRETIUM vero iustum communi aestimatione, et consuetudine loci taxetur; ex natura tamen rei in censu Irredimibili, pretium debet esse maius, quam in Redimibili, et in Perpetuo, quam in Temporali, et in Vitalitio, quam in eo, qui ad certum, et determinatum tempus constituitur.*

10 AS TO the conditions designated by the most holy Pontiff Pius V.

> *QUOAD conditiones a sanctissimo Pontifice Pio V. designatas.*

11 The FIRST is, that a census not be founded except on an immovable thing. Whence censuses, even personal ones, are prohibited. And so it must be only in an immovable, fruit-bearing, and certain thing.

> *PRIMA est, ut non fundetur census, nisi super re immobili. Quare prohibentur census, etiam personales. Itaque debet esse solum in re immobili, fructifera, et certa.*

12 SECOND, that the payment of counted money be made before Witnesses present, and a Notary, and in the act of the celebration of the instrument, but not before the integral and just price has been received.

> *SECUNDA, ut pecunia numerata praesentibus Testibus, ac Notario fiat, et in actu celebrationis instrumenti, non autem prius recepto integro, iustoque pretio.*

13 THIRD he prohibits anticipated payments.

> *TERTIA solutiones anticipatas prohibet.*

14 FOURTH he prohibits all obligatory pacts for fortuitous cases.

> *QUARTA prohibet omnia pacta obligatoria ad casus fortuitos.*

15 FIFTH he prohibits the pact that the seller cannot freely alienate the thing subject to the census, or the paying of a Laudemium for obtaining the faculty of alienating.

> *QUINTA prohibet pactum, ut venditor non possit libere alienare rem, censui subiectam, aut solvendi Laudemiam pro facultate alienandi obtinenda.*

16 SIXTH he prohibits that a pact be made that the Censuarius being in delay of paying be held to interest of lucrum cessans, or to some penalty, or to losing the thing subjected to the census, or to making the expenses of the censualista, an oath intervening.

> *SEXTA prohibet, ne fiat pactum, ut Censuarius existens in mora solvendi, teneatur ad interesse lucri cessantis, aut ad aliquam poenam, aut amittendam rem, censui suppositam, aut ad expensas censualistae faciendas, mediante iuramento.*

17 SEVENTH, that no condition be appended, that he who does not owe some burden pay it, or that a census be instituted over some thing so that it be never augmented.

> *SEPTIMA, ut non apponatur conditio, ut solvat aliquod onus is, qui illud non debet, seu ne census instituatur super aliqua re, unquam augeatur.*

18 The EIGHTH is thus: *censuses to be created in the future, lest they perish in whole or in part, or be made fruitless in whole or in part, we will that they perish pro rata.*

> *OCTAVA sic habet:* census in futurum creandos, ne in totum, vel pro parte perempta; aut infructuosa in totum, vel pro parte effecta, volumus ad ratam perire.

19 NINTH he rejects irredeemable censuses.

> *NONA reiicit census irredimibiles.*

20 TENTH he commands, that when a census is to be extinguished, it be denounced to him to whom the price is to be given two months before, and after the denunciation, that the price can also be demanded within a year against his will, and where the price is demanded, if he neither willing within two months pays, nor is it exacted against his will within a year.

> *DECIMA praecipit, ut quando census sit extinguendus, denuncietur per bimestre ante ei, cui pretium dandum est, et post denunciam, etiam intra annum ab invito pretium repeti posse, et ubi pretium petitur, neque volens intra bimestre solvat, neque ab invito intra annum exigatur.*

21 ELEVENTH, that a census cannot be constituted with a pact of re-selling in favor of the buyer, so that the seller remain bound to redeem the census whenever it pleases the buyer, and moreover, that no other penalty can be imposed on him, in case he should not pay the payment, or for another cause. This condition seems to some to be of natural law; others deny it. See Tanner. disp. 4. quaest. 7. num. 128.

> *UNDECIMA, ut non possit constitui census cum pacto retrovendendi in favorem emptoris, ita ut venditor maneat obligatus censum redimere, quoties placuerit emptori, et insuper, ut non possit ei imponi aliqua alia poena, casu quod pensionem non solverit, vel ob aliam causam. Haec conditio videtur nonnullis iuris naturae; alii id negant. Vide Tanner. disp. 4. quaest. 7. num. 128.*

22 NOTE, that some assert it probable that by natural law a pact of reemption at the will of the censualista is licit, the same price being given back, or the price at which the census will afterwards be worth, as they agree among themselves, provided the burden resulting thence to the seller be compensated elsewhere. Thus with many authorities cited Valencia puncto 6. adding that this was concluded at Rome by the Congregation of Theologians; and Bassaeus says n. 14. that in Germany it is reduced to practice. They prove it, because the contract of sale and purchase is kept intact, and if it is conceded in favor of the seller; why not also of the buyer? Yet this reason is weak, because the burdens of each are unequal. Moreover Pius V. declares him to act usuriously against his decree, and wills it observed in constituting a new census.

> *NOTA, quosdam astruere probabile ex iure naturae licitum esse pactum retroemptionis ad libitum censualistae, reddito eodem pretio, vel pretio, quod postea valebit census, pro ut inter se convenerint, dummodo gravamen, hinc venditori resultans, aliunde compensetur. Sic multis allegatis Valentia puncto 6. addens id Romae a Theologorum Congregatione conclusum; et Bassaeus ait n. 14. in Germania ad praxim deduci. Id probant, quia servatur integer venditionis, et emptionis contractus, et si conceditur in favorem venditoris; cur non etiam emptoris? Haec tamen ratio est tenuis, quia*

*inaequalia sunt utriusque gravamina. Caeterum Pius V. usurarium declarat contra decretum suum agere, et in novo censu constituendo vult observari.*

23 FINALLY he decrees that the price once constituted for a census must never be changed. But Casas with Diana p. p. tract. 8. resol. 36. will that it can be bought at a lesser price, if the seller asks it, because ultroneous merchandise depreciates by a third part.

*DENIQUE statuit pretium censui semel constitutum, nunquam immutandum. Sed Caspensis cum Diana p. p. tract. 8. resol. 36. volunt, id posse emi minori pretio, si roget venditor, quia merces ultroneae vilescunt pro tertia parte.*

24 Casas ADDS sect. 7. with Valencia puncto 7. that a census subject to litigation, or difficult, can be bought for less according to the estimation of the danger or difficulties. Bassaeus adds, that it cannot be bought for less where the price has been taxed by the Prince; because it is taxed in favor of the sellers. Thus num. 18. he says that in Belgium they punish those who buy censuses for a lesser price than 16. in each, when they are first created.

*ADDIT Caspensis sect. 7. cum Valentia puncto 7. censum liti obnoxium, vel difficilem, posse minoris emi iuxta periculi, vel difficultatum aestimationem. Addit Bassaeus, non posse minoris emi, ubi a Principe taxatum est pretium; quia taxatur in gratiam venditorum. Sic num. 18. dicit puniri in Belgio, qui minori pretio, quam 16. in singula emunt census, dum primo creantur.*

25 He ADDS that it is licit sometimes to buy a census with a pact, that the seller, if he should wish to redeem it, be held to redeem it with the same coin, provided however there be no fraud in the future mutation of the coin, because it would be known to him that at such a time it was to be changed to the loss of the other. But if the buyer knew it was to be augmented at that time, and wished to reserve it to be spent on that; the pact will be licit. See also Bonacina disp. 3. quaest. 4. num. 36. Salas disp. 24.

*ADDIT licere aliquando emere censum cum pacto, ut venditor, si voluerit redimere, teneatur eadem moneta redimere, si tamen in mutatione futura monetae non sit fraus, quia esset ei notum tali tempore mutandam in damnum alterius. At si emptor sciebat augenda eo tempore, et in illud volebat reservare expendendam; licebit pactum. Vide etiam Bonacinam disp. 3. quaest. 4. num. 36. Salam disp. 24.*

26 THAT it is LICIT also to buy a census for a certain time, so that within it it cannot be redeemed, Medina teaches de usur. quaest. 15. disp. 1. Covar. lib. 3. var. cap. 8. Bassaeus num. 21. and 22.

*LICERE etiam emere censum ad certum tempus, ita ut intra illud redimi nequeat, docent Medina de usur. quaest. 15. disp. 1. Covar. lib. 3. var. cap. 8. Bassaeus num. 21. et 22.*

27 THAT it is LICIT also to make the pact, that the census cannot be redeemed in parts, Toletus teaches lib. 5. cap. 45. Azor 3. part. lib. 10. cap. 13. quaestio 6. Lessius lib. 2. dub. 11. num. 68. Bassaeus num. 24. and indeed not irrationally.

*LICERE etiam pactum, ut census non possit redimi per partes, docent Toletus lib. 5. cap. 45. Azor 3. part. lib. 10. cap. 13. quaestio 6. Lessius lib. 2. dub. 11. num. 68. Bassaeus num. 24. et sane irrationabiliter.*

28 IN a Reservative census they add it is possible, that if the payment has not been paid for two or three years, the thing subjected to the census fall into commision, and in punishment of negligence become the property of the lord of the census. In the Consignative contract, however, they assert the

allegati, that this pact is not licit, unless it be compensated equitably by the price of the census being augmented; at the judgment of the prudent.

> *IN censu Reservativo addunt posse, ut si pensio per biennium, vel triennium soluta non fuerit, res censui subiecta cadat in commissum, et in poenam negligentiae efficiatur domini census. In contractu vero Consignativo hoc pactum non licere, nisi ex aequo compensetur aucto pretio census; arbitrio prudentis, asserunt allegati.*

# Disputation VIII: On Exchange

1 CAMBIRE means the same as to change; yet not every change of some thing is called Cambium; as if you were to change a horse for clothes, you would not be said to cambire except broadly: But this contract is most usual among Merchants, and Changers, inhabitants of different cities; and is most apt for carrying money hence and thence: yet its bond binds principally the Campsor and Campsarius, of whom below. It differs indeed from sale, because the latter claims money for a thing of another species; it differs also from a loan, because that is made in things of diverse nature, as in wheat, wine, and the like; but Cambium demands money for money, as will appear from its definition below.

> *CAMBIRE idem sonat ac mutare; non tamen omnis rei alicuius mutatio Cambium dicitur; ut si equum pro vestibus mutares, non nisi late cambires: Hic autem contractus usitatissimus est inter Mercatores, et Campores, diversarum civitatum incolas; et divehendis hinc inde nummis aptissimus: huius tamen vinculum ligat praecipue Campsorem, et Campsarium, de quibus infra. Differt quidem a venditione, quia haec pro re alterius speciei pecuniam sibi vindicat; differt etiam a mutuo, quia hoc fit in rebus diversae naturae, ut in tritico, vino, et similibus; Cambium vero pecuniam pro pecunia postulat, ut ex eius definitione infra patebit.*

## Question I: What exchange is, and of how many kinds

1 *Cambium IS DEFINED: It is an exchange of different moneys: Or an exchange of money for money.*

> Quid sit CAMBIUM, et quotuplex.
>
> DEFINITUR Cambium: Est permutatio diversarum pecuniarum: Vel permutatio pecuniae pro pecunia.

2 CAMBIUM is twofold, one Real, one Dry. The Real, which is called true Cambium, is a legitimate exchange of money for money: But the Dry is that which is not true Cambium, but covered with the cloak of a loan, and true usury, because merely on account of the delay of time, or an expected payment, or when it is feigned that the payment is to be made elsewhere, and it is made in the same place, something is received beyond the principal, and therefore it is called Dry, and sterile for producing legitimate profit; for the distance of place, required in it for true Cambium, is converted into an expectation of payment, because the money is truly to be paid in that place in which it is received.

> *CAMBIUM est duplex, aliud Reale, aliud Siccum. Reale, quod verum Cambium dicitur, est permutatio legitima pecuniae pro pecunia: Siccum vero est, quod non est verum Cambium, sed mutui pallio opertum, et vera usura, quia tantum ob dilationem temporis, aut expectatam solutionem, aut quando fingitur alibi solutio facienda, et fit in eodem loco, aliquid accipitur ultra sortem, et ideo dicitur Siccum, et sterile ad pariendum legitimum lucrum; nam distantia loci, in eo requisita ad verum Cambium, convertitur in expectationem solutionis, quia pecunia vere solvenda est in eo loco, in quo accipitur.*

3 The real CAMBIUM is divided into Minute, and Locale: Minute is, when one gives greater moneys for lesser, or the contrary; or old coin is exchanged with new; native with foreign; golden with silver; or silver with copper.

> *CAMBIUM reale dividitur in Minutum, et Locale: Minutum est, cum quis dat pecunias maiores pro minoribus, vel e contra; vel permutatur vetus cum nova; patria cum extera; aurea cum argentea; vel argentea cum aerea.*

4 THIS Cambium is also wont to be called Manuale, because the money being counted from hand to hand is wont to be completed at the same time and place. Locale Cambium is when present money is exchanged with absent, which is also wont to be called Cambium per litteras, because letters are wont to be sent to the place where the money is to be received or paid.

> *SOLET etiam hoc Cambium vocari Manuale, quia de manu ad manum numerata pecunia eodem tempore, et loco perfici solet. Locale Cambium est cum mutatur pecunia praesens cum absente, quod etiam vocari solet Cambium per litteras, quia mitti solent litterae ad locum, ubi pecunia accipienda, vel solvenda est.*

## Question II: Whether in petty exchange it is lawful to take something above the value of the coin fixed by law

1 This Cambium is very USEFUL to the Republic, and because men often need lesser moneys for contracts, or need to transfer moneys to remote places, and indeed to exchange lesser and inferior ones restored into greater.

> An in CAMBIO minuto liceat accipere aliquid supra valorem nummi, lege definitum.
>
> *UTILE admodum est hoc Cambium Reipublicae, et quia saepe egent homines minutioribus pecuniis ad contractus, vel egent transferre pecunias ad loca remota, atque adeo minutas, et inferiores in maiores magis restitutas commutare.*

2 But there are MANY causes for which in this Cambium it is licit to receive profit.

> *MULTAE autem causae sunt, ob quas in hoc Cambio licet lucrum accipere.*

3 The FIRST is by reason of the office of Changing, on which the burden lies of gathering moneys from different Principalities, that he may distribute them; to hire the shop; to count at the customs-house, etc. Which is understood not only in a public, but also in a private Campsor, as Molina teaches *disput. 399.* Bassaeus V. *Cambium, num. 4.* and others at his side.

> *PRIMA est ratione officii Cambiendi, cui onus incumbit congregandi pecunias diversis e Principatibus, ut eas distribuat; officinam conducere; ad telonium numerare, etc. Quod non modo in publico, sed etiam in privato Campsore intelligitur, ut docet Molina* disput. 399. *Bassaeus V.* Cambium, num. 4. *et alii apud eum.*

4 The SECOND is lucrum cessans, which the Campsor would otherwise have received. See Bassaeus *num. 5.*

> *SECUNDA est lucrum cessans, quod Campsor alias recepisset. Vide Bassaeum* num. 5.

5 The THIRD by reason of the purity of the material, as one changing coins of gold of Ophir, with copper ones.

> *TERTIA ratione puritatis materiae, ut mutans monetas auri Ophir, cum aereis.*

6 The FOURTH by reason of the commodity for transporting, as double crowns, or Zechini, which are valued more than little coins.

> *QUARTA ratione commodi ad transportandum, ut aurei duplices, vel Zechini, quae magis aestimantur quam monetulae.*

7 *YOU WILL SAY.* The Prince in these coins, having regard also to the metal, etc. set the tax *e. g.* that Zechini be worth two ounces of silver coin, and as much as 200. dipondii. Therefore it is not licit to receive anything beyond these.

DICES. *Princeps in his monetis habita ratione etiam metalli, etc. posuit taxam* v. g. *ut Zechini valeant duas uncias argenteae monetae, et quantum valent 200. dipondii. Ergo non licet accipere aliud supra haec.*

8 *IT IS ANSWERED,* this was taxed by the Prince as he is the measure of vendible things, but not according to the conditions and circumstances adduced above. See elsewhere in Casas *disp. 6. sect. 1.* For these are to be estimated by the Campsor, as D. Bonavent. notes *quaest. 4.* to be allegatus. But the profit ought to be moderate, and less in a private Campsor, as Bassaeus says. Bassaeus notes *num. 8.* that it is to be estimated by the judgment of the upright, warning that falsities in the coin, in the value, etc. be warded off.

RESPONDETUR, *hoc taxatum esse a Principe, ut est mensura rerum venalium, non autem secundum supra allatas conditiones, et circumstantias. Vide alias in Caspensi* disp. 6. sect. 1. *Hae enim a Campsore sunt aestimandae, ut notat D. Bonavent.* quaest. 4. *allegandus. Moderatum vero esse debet lucrum, et minus in Campsore privato, ut ait Bassaeus. Id proborum iudicio aestimandum notat Bassaeus* num. 8. *monens arcendas falsitates in moneta, in valore, etc.*

## Question III: Whether in local exchange, that is, by letters, when the banker receives first in order to repay elsewhere, he may make some gain

1 IT MUST BE ASSERTED, with the common opinion, that such a Campsor can receive something.

An in CAMBIO locali, sive per litteras, quando Campsor prior accipit, ut alibi restituat, possit aliquid lucrari.

*ASSERENDUM, cum communi sententia posse talem Campsorem aliquid recipere.*

2 *IT IS PROVED,* because there two legitimate titles to profit intervene. One is virtual, or equivalent; as the translation of money to the place where he has correspondents. The second is assurance, because he takes upon himself the peril.

PROBATUR, *quia ibi duo tituli legitimi ad lucrum interveniunt. Alter est virtualis, seu aequivalens; ut translatio pecuniae in locum, ubi habet correspondentes. Secundus est assecuratio, quia suscipit in se periculum.*

3 *NOTE first,* that the distance of places and the greater perils make it possible to receive greater profit. Similarly that a real translation is to be valued at more than a virtual one. Thus the DD. at Bonacina *disput. 3. quaest. 5.* and Bassaeus *num. 10.*

NOTA primo, *locorum distantiam, periculaque maiora facere, ut maius lucrum accipi queat. Similiter realem translationem esse pluris aestimandam quam virtualem. Ita DD. apud Bonacinam* disput. 3. quaest. 5. *et Bassaeum* num. 10.

4 *NOTE,* that in a Cambium by letters, the first Campsor giving, that he may receive elsewhere, can gain something, either from the virtual transportation of money, or from a greater estimation of the money. See Casas *sectione 4.*

ADVERTE, *quod in Cambio per litteras, prior Campsor dans, ut alibi recipiat, potest aliquid lucrari, sive ex virtuali transportatione pecuniae, sive ex maiori pecuniae aestimatione. Vide Caspensem* sectione 4.

## Question IV: Whether exchange is lawful when the banker's agent answers for the banker with the banker's own money

1 UNDERSTAND that in Exchange by letter, four parties intervene, that the Exchange may be perfect. The first is the Banker: the second the Banker's correspondent: the third the Banker's Respondent: the fourth the Respondent of the correspondent. The Banker therefore gives money to the correspondent, and from him in turn receives a promise that it be paid elsewhere. He assigns this obligation to his Respondent, so that he may receive the money there; and likewise the correspondent writes to his respondent, that he pay it; the payment having been made, the Exchange is perfect; and about this there is no controversy, whether it be licit; for there is a true permutation, transfer, and payment of money. But often the correspondent has no respondent in the place of payment, and so he has recourse to a merchant, who writes to his agent dwelling in that city, say Rome, that he pay such money to the agent, or respondent, of the Banker who has advanced it in this city, say Brescia. This too is licit, provided three other conditions intervene. The same must be said if the payment there is made through a servant out of the moneys of that same servant.

> An CAMBIUM sit licitum, cum pro Campsario respondet Procurator Campsoris cum pecuniis ipsius Campsoris.
>
> *INTELLIGE in Cambio per litteras, quatuor personas intervenite, ut Cambium perfectum sit. Prima est Campsor: Secunda Campsarius: Tertia Respondens Campsoris: Quarta Respondens Campsarii. Campsor ergo dat pecuniam Campsario, et ab eo vicissim accipit promissum de ea alibi solvenda. Quam obligationem remittit ad suum Respondentem, ut ibi pecuniam recipiat, et similiter Campsarius scribit ad suum respondentem, ut eam solvat; facta vero solutione perfectum est Cambium; et de hoc non est controversia, licitum ne sit; ibi enim sit vera permutatio, translatio, et solutio pecuniae. Saepe vero Campsarius non habet in loco solutionis respondentem, ideo recurrit ad mercatorem, qui suo agenti in ea civitate, puta Romae degenti, scribat, ut pecuniam talem solvat agenti, vel respondenti Campsoris, qui in hac civitate, puta Brixiae, sibi erogaverit. Et hoc etiam licitum est, cum interveniant tres aliae conditiones. Idem dicendum, si per famulum fiat ibi solutio ex pecuniis eiusdem famuli.*

2 THE CONTROVERSY is in the case in which the Banker has no respondent in that place, but a servant, and the Banker writes to him, that out of the Banker's own proper moneys he pay to himself on behalf of the correspondent that money which he received in another province.

> *CONTROVERSIA est in casu, quo Campsor non habet respondentem in loco illo, sed famulum, et Campsor scribit ad illum, ut de pecuniis ipsius Campsoris propriis solvat sibi ipsi pro Campsario pecuniam illam, quam in alia provincia recepit.*

3 THIS Exchange they proclaim to be usurarious: Sotus de Iust. lib. 6. quaest. 10. art. 1. and quaest. 13. art. 1. Comitol. lib. 3. quaest. 15. and 16. Molina tract. 2. disp. 404. Mercatus de contract. lib. 4. cap. 7. Tanner. 2. 2. disp. 4. quaest. 7. dub. 5. num. 149. and 150. Roderic. lib. 3. de annuis redditibus, quaest. 5. num. 27. Romoaldus Coli Tract. de Cambiis, cap. 22. Palacius lib. 3. de contract. cap. 3. Rebell. 2. lib. 11. quaest. 6 concl. 3. Iustinianus in tract. de Cambiis, Lupus in cap. ult. Naviganti, §. 2. sub num. 29. Tom. 7. Cavata tract. de Cambiis, tit. de Usura, V. quaero Campsores. fol. 242. and very many others, among whom Faber de restit. in 4. disp. 47. cap. 9. num. 292.

> *HOC Cambium usurarium conclamant Sotus de Iust. lib. 6. quaest. 10. art. 1. et quaest. 13. art. 1. Comitol. lib. 3. quaest 15. et 16. Molina tract. 2. disp. 404. Mercatus de contract. lib. 4. cap. 7. Tanner. 2. 2. disp. 4. quaest. 7. dub. 5. num. 149. et 150. Roderic. lib. 3. de annuis redditibus, quaest. 5. num. 27. Romoaldus Coli Tract. de Cambiis, cap. 22. Palacius lib. 3. de contract. cap. 3. Rebell. 2. lib. 11. quaest. 6 concl. 3. Iustinianus in tract. de Cambiis, Lupus in cap.*

*ult. Naviganti, §. 2. sub num. 29. Tom. 7. Cavata tract. de Cambiis, tit. de Usura, V. quaero Campsores. fol. 242. et alii permulti, inter quos Faber de restit. in 4. disp. 47. cap. 9. num. 292.*

4 YET the opposite opinion he judges probable: Azor part. 3. lib. 10. cap. 9. quaestio 2. Megala 1. 2. lib. 2. cap. 16. quaest. 3. Naldus verb. Cambium, Author consil. 31. among the consilia, Navar. tract. 2. lib. 5. tit. de usuris, Salas Tract. de Cambiis, disp. 17. Lessius de iustitia, lib. 2. cap. 23. dub. 7. num. 71. Sà verb. Cambium, Homobonus de exam. part. 2. Tract. 9. cap. 17. quaest. 56. Salvatorius de Cambiis, part. 3. num. 5. Filliucius Tom. 2. tract. 35. part. 2. cap. 8. num. 436. Batthol. a S. Fausto in speculo, disp. 16. quaest. 22. num. 2. Tanner. disp. 4. quaest. 8. dub. 5. Salon de iustitia, Tom. 2. quaest. 4. de Cambiis, art. 2. controv. 12. Thomas Boninsignus cap. 7. de Cambiis, num. 7. and 9. Scortia in constit. Pontif. epitome 107. Theorem. 291. and an anonymous Theologian in a tract de Cambiis, published at Milan, apud Bidellum in the year 1623. where he cites Marinus Fornarius, and Cosmas Stella of the Society of Jesus. Diana p. p. Tract. 8. resol. 2. who asserts that very many of his own Religion, and of the Society of Jesus, hold this; Caspensis tract. 19. sect. 5. who says it does not seem damnable, since it is practiced by all the Merchants in Spain, France, Italy, and the Low Countries, with the supreme Pontiffs knowing, or at least the Ordinaries of the places, who would not permit it if the contract were usurarious.

*OPPOSITAM tamen sententiam probabilem censet Azor part. 3. lib. 10. cap. 9. quaestio 2. Megala 1. 2. lib. 2. cap. 16. quaest. 3. Naldus verb. Cambium, Author consil. 31. inter consilia, Navar. tract. 2. lib. 5. tit. de usuris, Salas Tract. de Cambiis, disp. 17. Lessius de iustitia, lib. 2. cap. 23. dub. 7. num. 71. Sà verb. Cambium, Homobonus de exam. part. 2. Tract. 9. cap. 17. quaest. 56. Salvatorius de Cambiis, part. 3. num. 5. Filliucius Tom. 2. tract. 35. part. 2. cap. 8. num. 436. Batthol. a S. Fausto in speculo, disp. 16. quaest. 22. num. 2. Tanner. disp. 4. quaest. 8. dub. 5. Salon de iustitia, Tom. 2. quaest. 4. de Cambiis, art. 2. controv. 12. Thomas Boninsignus cap. 7. de Cambiis, num. 7. et 9. Scortia in constit. Pontif. epitome 107. Theorem. 291. et Theologus innominatus tract. de Cambiis, edito Mediolani, apud Bidellum anno 1623. ubi citat Marinum Fornarium, et Cosmam Stellam Societatis Iesu. Diana p. p. Tract. 8. resol. 2. qui asserit hoc sentire plurimos suae Religionis, et Societatis Iesu, Caspensis tract. 19. sect. 5. qui ait, non videri damnandum, cum ab omnibus Mercatoribus in Hispania, Gallia, Italia, et Belgio exerceatur, scientibus summis Pontificibus, vel saltem locorum Ordinariis, quod non permitterent, si contractus esset usurarii.*

5 IN St. Bonaventure I find nothing, except sermon 4. on several holy martyrs; where he says the office of money-changers is to test gold, or silver, or whatever metal struck into denarii.

*IN D. Bonavent. nihil invenio, nisi sermone 4. de pluribus sanctis martyribus; ubi dicit Campsorum officium esse probare aurum, aut argentum, aut quodcumque metallum in denarios excusum.*

6 THEREFORE this Exchange is proved licit by them first from the letter of Pius V. to the Bolognese, where he speaks thus: *Che ogni persona possa dar danari a Cambio, e che le lettere syno recapitate sopra essi datari, e cosi tener li suoi Cambii sino che saranno imborsati da chi havera preso i danari.* There the Pontiff speaks absolutely, without distinction of a proper or another correspondent; of one's own, or another's money.

*PROBATUR ergo ab illis hoc Cambium licitum esse primo ex epistola Pii V. ad Bononienses, ubi sic loquitur:* Che ogni persona possa dar danari a Cambio, e che le lettere syno recapitate sopra essi datari, e cosi tener li suoi Cambii sino che saranno imborsati da chi havera preso i danari. *Ibi Pontifex loquitur absolute absque distinctione proprii, vel alterius correspondentis; propriae, vel alterius pecuniae.*

7 THIS same was thus declared by the Sacred Congregation of the Most Eminent Cardinals to the Archbishop of Palermo, in the year 1574. the matter having been referred to the Most Holy Gregory XIII.

> *HOC idem ita declaratum est a S. Congregatione Eminentissimorum Cardinalium, Archiepiscopo Panormitano, anno 1574. re cum sanctissimo Gregorio XIII. collata.*

8 THEY also strive to prove this Exchange by reasons, because it suffices for a real Exchange that in the place where the exchange is made the correspondent have money in very truth, actually or in credit: but the correspondent, in this second manner, there has money, because there the Banker lends it: Therefore. It is confirmed, for if the servant were to lend his credit, which he has with the Banker, he could pay him, and so forth.

> *PROBARE, etiam rationibus nituntur hoc Cambium, quia ad Cambium reale sufficit, ut in loco, ubi Cambitur, habeat Campsarius pecuniam veram re ipsa, vel in credito: sed Campsarius, hoc secundo modo, ibi habet pecuniam, quia ibi Campsarius eam commodat: Ergo. Confirmatur, nam si famulus commodaret suum creditum, quod habet cum Campsore, posset ei solvere, ita, etc.*

9 I CONFESS that these, or other reasons, do not move me; for in that place the correspondent has not real money, but fictitious money from the Banker. For what credit does he have with the Banker? Nay rather it seems express simulation; for an Exchange requires a diversity of moneys, a diversity of persons; but here there is one true person, that is, the Banker, who feigns that he is also the correspondent, and pays to himself. It is also one money, the Banker's. It is confirmed: Contracts of permutation require real permutations; but permutation is of several, and of one with another, that it may be proved whether commutative equality be present; and therefore the holy Doctor says that the money-changer, by his office, if he be a true money-changer, is to test the variety, and diversity of money, and to examine whether a true permutation intervene in the price, etc.; otherwise what comparison of the same with itself?

> *FATEOR has, vel alias rationes me non movere; nam Campsarius in loco illo non habet pecuniam veram, sed fictam a Campsore. Quod enim creditum habet apud Campsorem? Imo potius videtur expressa simulatio; nam ad Cambium requiritur diversitas pecuniae, diversitas personarum; at vero hic una est persona vera, idest Campsor, qui fingit se etiam Campsarium, et sibi ipsi solvit. Est etiam una pecunia Campsoris. Confirmatur: Contractus commutationum requirit reales commutationes; commutatio autem est plurium, et unius cum alio, ut probetur, an aequalitas commutativa adsit, et ideo ait S. Doctor, Campsorem ex officio suo, si sit verus Campsor, probare varietatem, et diversitatem pecuniae, et experiri, an vera commutatio interveniat in pretio, etc. alioqui quae comparatio eiusdem ad se?*

10 NOR let them say, with Diana loco cit. Caspensis num. 28. Lessius num. 63. Scauia de commerciis, et Cambio, §. 6. that the Banker's servant represents two persons, namely the Banker's and the correspondent's; such Metaphysical subtleties often vanish in moral matters; for Persons are multiplied insofar as they contract, and are dealers in moneys; not, however, as they run about, as they are men; for in this they are too much materially constituted. Thus formally they are several, inasmuch as they are contracting; but there is no commutative contract, unless there is a real permutation. Let them tell me, where indeed is the permutation of the Banker's money with the Banker's money? Granted that it were carried even by many beasts of burden, promised by a herd of menservants and maidservants, etc.

*NEQUE dicant Diana loco cit. Caspensis num. 28. Lessius num. 63. Scauia de commerciis, et Cambio, §. 6. famulum Campsoris duas personas repraesentare, Campsoris scilicet, et Campsarii, haec Metaphysicalia in moralibus saepenumero evanescunt; nam Personae in tantum multiplicantur, in quantum contrahunt, et pecuniae sunt tractatores; non autem, ut discurrunt, ut homines sunt; nimis enim in hoc materialiter se habent. Itaque formaliter sunt plures, quatenus sunt contrahentes; at non est contractus commutativus, nisi ubi est realis commutatio. Dicant mihi, ubinam est commutatio pecuniae Campsoris cum pecunia Campsoris? Esto ferretur etiam a multis iumentis, promitteretur a grege famulorum, famularumque, etc.*

11 I REVERE the decree of the supreme Pontiff, if it existed; but this which they adduce does not concede this manner of Exchange, but only a real Exchange, *che possano dar danari a Cambio*, but where indeed is the exchange of denarii in this case? See Iustinianus.

*REVEREOR decretum summi Pontificis, si extaret; sed hoc, quod afferunt non concedit hunc modum Cambii, sed solum Cambium reale,* che possano dar danari a Cambio*, sed ubinam est Cambium denariorum in hoc casu? Vide Iustinianum.*

12 AS TO the Sacred Congregation, I say that it declared only that this Exchange is not contained in the things forbidden by Pius V. in the Extravagant, in which three kinds of Exchange are condemned. The first, in which the letters are not sent. The second, in which they are sent, but return empty. The third, when payments are made in the same place: whether it be licit is not declared by the Sacred Congregation.

*QUOAD S. Congregationem dico, eam solum declarasse, non contineri hoc Cambium in vetitis a Pio V. in Extravaganti, in qua tria Cambia damnantur. Primum, in quo litterae non mittuntur. Secundum, in quo mittuntur, sed redeunt inanes. Tertium, quando in eodem loco fiunt solutiones: An vero sit licitum, non declaratur a S. Congregatione.*

13 THIS opinion therefore I judge dangerous, as even Diana confesses, and therefore this Exchange is not to be praised, or recommended, whether by counsel, or by persuasion. The same confess Filliucius num. 438. Caspensis num. 29. and others with Tanner num. 147.

*HANC sententiam igitur periculosam arbitror, ut fatetur etiam Diana, et ideo non esse hoc Cambium laudandum, vel consilio, vel suasione. Idem fatentur Filliucius num. 438. Caspensis num. 29. et alii cum Tannero num. 147.*

14 I urge this, however, by the argument of St. Bonaventure in the *speculum animae, cap. 2. §. tertius principalis fructus iniustitiae.*

*Hoc autem urgeo argumento D. Bonavent. in* speculo animae, cap. 2. §. tertius principalis fructus iniustitiae.

15 LET US DEAL, my money-changers, sincerely, and in friendship, and let us doff the cloak, and search the naked exchange down to the Anatomy. You surely do not pursue this most frequent contract out of CHARITY, but for gain: Therefore you give most frequently, and of set purpose, for gain, so that it be restored in the same place, and thus you intend to take gain from the delayed payment. This you seriously intend; the rest are childish rattles, and comic, as when a servant plays the parts of the correspondent and the Banker too, distinct by merely Scotist formalities. I exhort you therefore earnestly that you come to your senses, and seriously weigh the salvation of your souls; for God cannot be deceived.

*AGAMUS, Campsores mei, sincere, et amice, et pallium exuamus, nudumque cambium usque ad Anatomen perlustremus. Vos sane hunc contractum frequentissimum non agitis ex Charitate, sed ob lucrum: Datis igitur ad lucrum frequentissime, et ex proposito, ut in eodem loco restituatur, et sic accipere intenditis lucrum ex dilata solutione. Ita hoc*

*serio intenditis; caetera vero puerilia crepundia sunt, et comica, ut famulus personas induat Campsarii, simul et Campsoris, solis Scoticis formalitatibus diversas. Hortor igitur serius ut resipiscatis, et serio animae salutem pertractetis; non enim Deus decipi potest.*

16 This then is that Exchange called *cum La Ricorsa*, which almost coincides with the Exchange of continuation, in which the re-exchange is multiplied; it smells ill.

*Hoc igitur Cambium dictum,* cum La Ricorsa*, quod fere convenit cum Cambio continuationis, in quo recambium multiplicatur, male olet.*

## Question V: Whether so-called re-exchanges are lawful only on account of ceasing profit or emerging loss

1 THEY ASSERT: Lessius *lib. 2. cap. 23. dub. 9. numero 82.* Salas *de Cambiis disp. 22.* Fillicius *tomo 2. tract. 35. part. 2. cap 10. num. 471.*

An dicta Recambia solum liceat ratione lucri cessantis, vel damni emergentis.

*ASSERUNT Lessius* lib. 2. cap. 23. dub. 9. numero 82. *Salas* de Cambiis disp. 22. *Fillicius* tomo 2. tract. 35. part. 2. cap 10. num. 471.

2 YET Diana *resol. 5.* with Scortia *in Bulla Pontif. epist. 107. Theor. 189.* teaches that these recambes are licit, not only by reason of lucrum cessans, and damnum emergentis, but also licit by the nature of Exchange itself, because they are new exchanges, and repeated purchases, and sales.

*ATTAMEN Diana* resol. 5. *cum Scortia* in Bulla Pontif. epist. 107. Theor. 189. *docet licita esse haec recambia, non solum ratione lucri cessantis, et damni emergentis, sed etiam ex natura Cambii esse licita, quia sunt nova cambia, et iteratae emptiones, ac venditiones.*

3 IT SEEMS to me that the holy Doctor, *ad cap. 2. Ioannis*, stands for the first opinion; for, explaining those words: *Eiecit nummularios*, namely those lending money under caution; for it was forbidden to give at usury, and that for this very reason: because even if they were not certain that so much gain would accrue to them from the delay, yet they exacted those gains under caution; which the second opinion admits, and the first denies; as is seen in Fillucius, and Caspensis.

*VIDETUR mihi S. Doctor* ad cap. 2. Ioannis*, stare pro prima sententia explicans enim ea verba:* Eiecit nummularios*, scilicet accommodantes pecuniam sub cautione; nam prohibitum erat dare ad usuram, ea sane de causa, quia etiamsi non essent certi, tantumdem lucri sibi cessaturum ex mora, tamen exigebant ad cautionem lucra illa; quod secunda sententia admittit, et prima negat; ut videre est in Fillucio, et Caspensi.*

## Question VI: Whether the payments and commissions that bankers receive are lawful

1 BY the name of provisions I understand, with Lessius *dub. 8.* and Caspensis *sect. 8.* the fee, and gain, which money-changers, and bankers deduct from money to be counted, by reason of the work they render in writing, counting deposited money, keeping it, obliging themselves for another; and managing the business of another.

An solutiones, et provisiones, quas Campsores accipiunt sint licitae.

*NOMINE provisionum intelligo cum Lessio* dub. 8. *et Caspensi* sect. 8. *mercedem, et lucrum, quod Campsores, et Bancharii detrahunt pecuniae numerandae, ratione operae, quam praestant scribendo, numerando pecuniam depositam, custodiendo, pro alio se obligando; et alterius negotia custodiendo.*

2 By immemorial custom in the provision of Exchanges there is due to money-changers a third part of a scudo for every hundred scudi, according to the money on which the exchange is paid, or the assignment made. So Molina *disp. 408.* Caspensis *sect. 8.* Boninsignus *de Cambiis, cap. 7.* Romoald. *Cod. de Cambiis, cap. 21.* Scaccia *de commerc. §. 3. Gloss. 3. num. 12.* Scortia *in Bullas Pontific. Epitome 107. Theor. 291.* Fillincius *tom. 2. tract. 33. part. 2. cap. 10. num. 475.* and others with those whom Diana reports *resol. 6.*

> *Ex immemorabili consuetudine in Cambii provisione debetur Campsoribus tertia pars scuti pro singulis centenis scutorum, secundum pecuniam, de qua solvitur cambium, seu efficitur assignatio. Ita Molina* disp. 408. *Caspensis* sect. 8. *Boninsignus* de Cambiis, cap. 7. *Romoald.* Cod. de Cambiis, cap. 21. *Scaccia* de commerc. §. 3. Gloss. 3. num. 12. *Scortia* in Bullas Pontific. Epitome 107. Theor. 291. *Fillincius* tom. 2. tract. 33. part. 2. cap. 10. num. 475. *et alii penes illos, quos refert Diana* resol. 6.

3 THEREFORE a money-changer, or money-broker may take a just fee for the custody of money, and the obligation of returning it. For these things are estimable in price. But if in the name of the depositor he disburses, and counts to another, let him still receive a fee from him in whose name he pays, and whom he serves. So Nauar. *cap. 17. numero 293.* Caspensis *loco cit.*

> *IGITUR potest Campsor, vel Nummularius accipere iustam mercedem pro custodia pecuniae, et obligatione eam reddendi. Haec enim sunt pretio aestimabilia. Quod si nomine deponentis eroget, et numeret alteri, accipiat adhuc mercedem ab eo, cuius nomine solvit, et cui servit. Ita Nauar.* cap. 17. numero 293. *Caspensis* loco cit.

4 IT IS PROVED by Valentia *puncto 3.* because the whole is for the benefit of him by whose order the payment is made. Advert, however, that this exaction is licit if it has been stipulated, or if custom obtains. Say the same of the respondents of the money-changer, and of the correspondent, for the same reason.

> *PROBATUR a Valentia* puncto 3. *quia totum est in gratiam illius, cuius ordine fit solutio. Aduerte tamen exactionem hanc esse licitam, si stipulata fuerit, vel si adsit consuetudo. Idem dic de respondentibus Campsoris, et Campsarii, ob eamdem rationem.*

5 THERE is a great controversy: Whether this third part of a scudo per hundred is just also in the provisions which are taken in recambes, and continuations.

> *MAGNA contentio est: An haec tertia pars scuti pro centenario sit iusta etiam in provisionibus, quae sumuntur in recambiis, et continuationibus.*

6 SOME allege it, because it is taken in all the fairs of the world. So Boninsignus, *tract. de Camb. cap. 7. num. 23.* and others with Diana *resol. 7.*

> *ALIQUI afferunt, quia in omnibus mundi nundinis accipitur. Ita Boninsignus,* tract. de Camb. cap. 7. num. 23. *et alii apud Dianam* resol. 7.

7 FOR Justice, or injustice of the provisions, one must stand by the judgment of merchants.

> *PRO Iustitia autem, vel iniustitia provisionum standum est iudicio mercatorum.*

8 BUT others deny it to be licit. So Coli *de Camb. cap. 21.* Malder. *2. 2. tract. 5. c. 4. disp. 7.* and thus Diana counseled the Merchants.

> *SED alii id licere negant. Ita Coli* de Camb. cap. 21. *Malder.* 2. 2. tract. 5. c. 4. disp. 7. *et ita consuluit Diana Mercatoribus.*

9 THE REASON is, because provisions are due for labor: but the labor in recambes, and continuations is not the same as in real Exchanges: Therefore.

> *RATIO est, quia provisiones debentur pro labore: at non est idem labor in recambiis, et continuationibus, qui est in Cambiis realibus: Ergo.*

10 SOME answer that the money-changers ought not on that account to desist, because they would labor in other new Exchanges, if the correspondents paid.

> *RESPONDENT aliqui, quod Campsores non ob id debent omittere, quia laborarent in aliis Cambiis novis, si Campsarii solverent.*

11 OTHERS answer, that gain is due also by reason of the peril of losing the principal; and it can happen that the perils are greater in the continuation, because with the passage of time the correspondent can become worse off, and at last go bankrupt. Therefore the provisions ought to be unequal.

> *RESPONDENT alii, deberi lucrum etiam ratione periculi amittendi sortem; potest autem esse, ut maiora sint pericula in continuatione, quia successu temporis potest Campsuarius fieri deterior, et tandem decoquere. Igitur debent inaequales esse provisiones.*

12 NOR does Scortia satisfy, saying that an equal provision can be taken for unequal perils, because the perils are uncertain.

> *NEQUE satisfacit Scortia dicens, posse ob pericula inaequalia accipi aequalem provisionem, quia pericula sunt incerta.*

13 But I suppose that uncertainty must be computed; but uncertainties are unequal. Moreover there are some perils that are certain; and therefore I add too, that a greater quantity makes a greater peril, and so one to be paid for.

> *At suppono, computandam esse incertitudinem; at incertitudines sunt inaequales. Praeterea sunt aliqua pericula certa, et ideo etiam addo, maiorem quantitatem facere maius periculum, atque adeo esse solvendum.*

14 IT SEEMS that the holy Doctor, *ad cap. 2. Ioan. in ea verba: Invenit in Templo nummularios, etc.* reprobates these receipts, which he proves from that *Ezech. 22. Usuram, et superabundantiam non accipies.* The reasons indeed adduced prove so to me.

> *VIDETUR S. Doctor* ad cap. 2. Ioan. in ea verba: Invenit in Templo nummularios, etc. *has receptiones reprobare, quod probat ex illo* Ezech. 22. Usuram, et superabundantiam non accipies. *Rationes quidem allatae mihi probantur.*

15 BUT Romoaldus Coli warns gravely *in tract. de Cambiis, cap. 21.* that two provisions must not be received, one in the place where the Exchange is made; another at the fairs, for the agent himself.

> *GRAVITER vero admonet Romoaldus Coli* in tract. de Cambiis, cap. 21. *non esse duas provisiones recipiendas, unam in loco, ubi efficitur Cambium; alteram in nundinis, pro ipso agente.*

16 YOU WILL ASK first. Whether one provision is due for an Exchange great, and small. Diana resolves this *resol. 10.* Caspensis *num. 40.* wishing a greater to be given for a greater Exchange.

> *QUAERES primo. An debeatur una provisio pro Cambio magno, et paruo. Hanc resolvit Diana* resol. 10. *Caspensis* num. 40. *volentes dari maiorem pro maiori Cambio.*

17 I WONDER that this is debated, given those things taught before, namely that by immemorial custom it is observed that a third part of one per hundred be given. Therefore Scortia says *epit. 107. Theor. 291.* that if the sum of the Exchange be one million, the gain of the provisions will be 3333. This pleases Coli *tract. de Camb. cap. 21.* Scavia *de commer. §. 3. Gloss. 3. num. 471.*

> *MIROR, haec agitari suppositis his, quae ante docuere, nempe consuetudine immemorabili servari, ut detur tertia pars unius de centenis. Ideo ait Scortia* epit. 107. Theor. 291. *quod si summa Cambii sit unius millionis, lucrum provisionum erit 3333. Arridet Coli* tract. de Camb. cap. 21. *Scavia* de commer. §. 3. Gloss. 3. num. 471.

18 YET Diana urges against it, because Notaries too, in drawing up a deed of the same labor for a great sum, receive a greater stipend. Some add that it is due by reason of the peril, which is greater in a greater sum of money exhibited.

> *URGET tamen contra Diana, quia Notarii quoque conficiendo scripturam eiusdem laboris pro magna summa recipiunt maius stipendium. Addunt aliqui, deberi ratione periculi, quod maius est in maiori pecunia exhibita.*

19 YOU WILL ASK secondly: Whether the custom of the money-changers of not accepting payment of the principal, unless at the same time the damages of the Exchanges be paid, be licit.

> *QUAERES secundo: An consuetudo Campsorum de non acceptanda solutione sortis, nisi simul solvantur detrimenta Cambiorum, sit licita.*

20 Diana answers *resol. 12. asserens,* adducing Lessius *lib. 2. cap. 23. dub. 10. num. 87.* Salas tract. de Camb. disp. 65. Filliucius tom. 2. tract. 35. part. 2. cap. 10. num. 472. Malderum 2. 2. tract. 5. cap. 4. dub. 10. Therefore a money-changer, to whom by chance ten are due as principal, but three for interest, and provisions; when in the computation he receives three, may take them in satisfaction for the interest, and provisions, and is not bound to deduct the three from the principal.

> *RESPONDET Diana* resol. 12. asserens, *adducens Lessium* lib. 2. cap. 23. dub. 10. num. 87. *Salas tract. de Camb. disp. 65. Filliucius tom. 2. tract. 35. part. 2. cap. 10. num. 472. Malderum 2. 2. tract. 5. cap. 4. dub. 10. Itaque potest Campsor, cui pro sorte debentur decem, pro interesse autem, et provisionibus tria; quando ad computum recipit tria, ea accipere in solutum pro interesse, et provisionibus, et non tenetur tria minuere de sorte.*

21 *You will ask thirdly:* Whether a money-changer, who in good faith gave Peter money to be paid by exchange at Rome, thinking him to have money in such a place, and afterwards discovers that he had it not; can exact as much gain as he would have received, if the correspondent had paid at Rome.

> Quaeres tertio: *An Campsor, qui bona fide dedit Petro pecuniam ad Cambium solvendum Romae, existimans, illum habere pecuniam in tali loco, et postea comperiat, eum non habere; possit tantum exigere, quantum lucri percepisset, si Campsarius Romae solvisset.*

22 *I suppose*, that if he did this in bad faith, it would be usurarious, because with no title except the delay would he exact a premium.

> Suppono*, si mala fide id faceret, esse usurarium, quia nullo titulo, praeterquam dilationis, exigeret praemium.*

23 *To the question Lessius answers affirmatively dub. 7. num. 69.* Molina *disp. 404.* and Diana *resol. 14.* and Caspensis judges it probable *sect. 8. num. 41.*

> Ad quaestionem respondet affirmative Lessius dub. 7. num. 69. *Molina* disp. 404. *et Diana* resol. 14. *eamque probabilem censet Caspensis* sect. 8. num. 41.

24 *You will ask fourthly:* Whether a money-changer can stipulate from the beginning with the correspondent a certain, and determined interest, even in the case of non-payment.

> Quaeres quarto: *An Campsor possit cum Campsario a principio pacisci certum, et determinatum interesse, etiam in casu non solutionis.*

25 Filliucius *tom. 2. tract. 35. part. 2. cap. 7. num. 424.* Homob. *de exam. part. 2. tract. 9. cap. 15. quaest. 4.* and others deny it, Pius V. forbidding it.

> Negant *Filliucius* tom. 2. tract. 35. part. 2. cap. 7. num. 424. *Homob.* de exam. part. 2. tract. 9. cap. 15. quaest. 4. *et alii ex Pio V. id prohibente.*

26 *But indeed*, since the Bull is founded on the presumption of usurarious fraud, it will avail in the forum of conscience, if it be morally certain that that interest is morally just. So Lessius *lib. 2. cap. 33. dub. 11. num. 90.* Reginald. *tract. 2. lib. 25. cap. 34. num. 467.* and others.

> Enim vero, *cum Bulla fundetur in praesumptione fraudis usurariae, in foro Poli valebit, si moraliter constet, illud interesse moraliter esse iustum. Ita Lessius* lib. 2. cap. 33. dub. 11. num. 90. *Reginald.* tract. 2. lib. 25. cap. 34. num. 467. *et alii.*

27 *But whether in such a case the money-changer sins mortally.* Salas *disp. 13.* Rebell. *part. 2. lib. 11. quaest. 13. num. 5.* affirm it; but Diana *resp. 14.* Granado *part. 2. contr. 7. tract. 3. puncto 15. sect. 2.* Sà *verbo Cambium.* deny it. The Authors of the first opinion are founded on the decree of Pius V. which does not cease to bind, the fraud ceasing, because it was enacted to remove occasions of sinning, which indeed remain, if liberty be given not to observe it. But others say it does not bind, because when the reason of the law ceases in the particular, the law ceases to bind in that particular.

> An vero in tali casu peccet mortaliter Campsor. Affirmant *Salas* disp. 13. *Rebell.* part. 2. lib. 11. quaest. 13. num. 5. *sed negant Diana* resp. 14. *Granado* part. 2. contr. 7. tract. 3. puncto 15. sect. 2. *Sà* verbo Cambium. *Fundantur Authores prioris sententiae in decreto Pii V. quod non cessat obligare, cessante fraude, quia statutum est ad removendas peccandi occasiones, quae sane remanent, si detur libertas illud non servandi. Alii vero dicunt, non obligare, quia cum cessat ratio legis in particulari, cessat lex pro illo particulari obligare.*

28 *I will relate the conditions required by Pius V. for* an exchange to be licit: First indeed he condemns all dry exchanges, such as those in which, by the intention of the contracting parties, payment is made in the same place; because the one has not money elsewhere. Then in a real exchange he requires these conditions.

> Referam conditiones requisitas a Pio V. ad *cambium licitum: Primo quidem damnat omnia cambia sicca, qualia sunt ea, in quibus ex intentione contrahentium fit solutio in eodem loco; eo quod alter alibi pecuniam non habeat. Deinde in cambio reales has requirit conditiones.*

29 *The first*, that the money-changer stipulate for no gain by reason of the delay. And that this be usury the Doctors assert with St. Bonaventure in the *speculo animae, cap. 2. §. tertius fructus principalis.*

> Prima, *ne Campsor ratione dilationis paciscatur de aliquo lucro. Et hanc esse usuram asserunt etiam DD. cum D. Bonavent. in* speculo animae, cap. 2. §. tertius fructus principalis.

30 *The second is*, that from the beginning, or afterwards, no certain interest be stipulated, even in the case in which payment would not be made at the due time.

> Secunda est, *ne ab initio, vel postea pacifcatur de certo interesse, etiam in casu, quo non fieret solutio debito tempore.*

31 *The third condition is*, that real exchanges not be made by letters otherwise than for the next fair, or, if the fair be not held; the next terms, according to the usage of places; otherwise they will be usurarious. Hence exchanges to the second fair with greater gain are forbidden, not with an equal one, or to the second one by force of the first Exchange. So the Doctors with Bassaeum *num. 17.*

> Tertia conditio est, *ne realia cambia per litteras fiant aliter, quam ad proximas nundinas, vel si nundinae non agantur; proximis terminis, iuxta usum locorum, alioqui erunt usuraria. Hinc prohibentur cambia ad secundas nundinas cum maiori lucro, non cum pari, vel ad secundas, vi primi Cambii. Ita Doctores apud Bassaeum* num. 17.

32 *The fourth condition is*, that in establishing the terms of payments regard be had to the distance, and nearness of the places to which payment is destined, that longer terms not be appointed than the distance requires. This Pius V. in the year 1571. with Navar. *cap. 17. num. 299.*

> Quarta conditio est, *ut in terminis solutionum constituendis habeatur ratio longinquitatis, et vicinitatis locorum, in quibus solutio destinatur, ne longiores statuantur, quam postulet distantia. Haec Pius V. anno 1571. apud Navar.* cap. 17. num. 299.

33 *Lessius adds, however*, that in a few places, or perhaps nowhere, at least as to some conditions, does this Decree bind.

> Addit tamen Lessius, *paucis locis, vel forte nusquam, saltem quoad aliquas conditiones hoc Decretum obligare.*

34 *You will ask fifthly:* Whether the Exchange of custody be licit, by which a money-broker takes upon himself the care of keeping moneys deposited with him, and keeps an account of datum and acceptum, and is ready to restore to those asking it.

> Quaeres quinto: *An licitum sit Cambium custodiae, quo Nummularius suscipit curam custodiendi pecunias, apud se depositas, et habeat rationem dati, et accepti, et paratus sit reddere eum petentibus.*

35 *It is answered*, with Valentia *puncto 3.* that some stipend can be received for it.

> Respondetur *cum Valentia* puncto 3. *posse aliquod stipendium inde recipere.*

36 From what has been said you have the titles by which money-changers can rightly take gain in real, local exchanges.

> *Ex dictis habes titulos, quibus Campsores in cambiis realibus localibus rite possunt recipere lucrum.*

37 *First when the money-changer first receives the moneys*, to restore them elsewhere, he can gain by the title of the translation of money, even if it be only virtual, since even there he has respondents. For this is useful to the correspondent, and estimable in price; although for this virtual one less is due to him. So Graff. *p. p. lib. 2. cap. 110.* Sylvius *2. 2. quaest. 78. art. 4. quaest. 3.* Molina *tract. 2. disp 403.* Bonacina *disp. 3. quaest. 5. part. unic.* Reginaldus *lib. 25. num. 454. et 461.* Filliucius *tract. 35. part. 2. num. 380.* Layman *lib. 3. tract. 4. cap. 19. num. 7.* Malder. *2. 2. tract. 5. cap. 5. de Camb. dub. 3.*

> Primo quando Campsor prior accipit pecunias, *ut alibi restituat, lucrari potest titulo translationis pecuniae, etiamsi virtualis tantum sit, quippe et ibi habet respondentes. Haec enim utilis est Campsario, et pretio aestimabilis; etsi pro hac virtuali minus ei debeatur. Ita Graff.* p. p. lib. 2. cap. 110. *Sylvius* 2. 2. quaest. 78. art. 4. quaest. 3. *Molina* tract. 2. disp 403. *Bonacina* disp. 3. quaest. 5. part. unic. *Reginaldus* lib. 25. num. 454. et 461. *Filliucius* tract. 35. part. 2. num. 380. *Layman* lib. 3. tract. 4. cap. 19. num. 7. *Malder.* 2. 2. tract. 5. cap. 5. de Camb. dub. 3.

38 *The second title is* the assurance of the correspondent's money, and the peril of his own, if he has it not in that place to which it is to be transferred; but if he has it, it is a matter of his industry, or fortune, which is to be esteemed at a price. So the Doctors alleged, with whom Bassaeus subscribes *num. 11.*

> Secundus titulus est *assecuratio pecuniae Campsarii, et periculum propriae, si in eo loco non habet, quo est transferenda; quod si habeat, eius industria, vel fortunae est, quae pretio est aestimanda. Ita DD. allegati, quibus subscribit Bassaeus* num. 11.

39 *Then, because money present, as lent, is* to be esteemed at more than money absent, and the further off it is, the less to be esteemed: Navar. *in manuali, cap. 17. num. 289.* Azor *3. part. lib. 10. cap. 6. quaest. 4.* Filliucius *cit. num. 595.* Bonacina *cit. num. 6.* Reginaldus *n. 416.* Toletus *lib. 5. cap. 53.* Valentia *disput. 5. quaest. 23. puncto 4.* Bassaeus *num. 12.*

> Deinde quia pecunia praesens praestita, est *pluris aestimanda, quam absens, et quo longius abest, eo minus aestimanda: Navar.* in manuali, cap. 17. num. 289. *Azor* 3. part. lib. 10. cap. 6. quaest. 4. *Filliucius* cit. num. 595. *Bonacina* cit. num. 6. *Reginaldus* n. 416. *Toletus* lib. 5. cap. 53. *Valentia* disput. 5. quaest. 23. puncto 4. *Bassaeus* num. 12.

40 *Add that the estimation of money is greater in* the place where it is given; Syluester *V. Usura 4. quaest. 8.* Filliucius *num. 380.* Lessius *dub. 4. num. 34.* Reginaldus *num. 461.* Malder. *disp. 3.* Layman *cap. 19. num. 8.* Filliucius *num. 404.* Lessius *dub. 6. num. 55.* Malder. *disp. 4.* add another title: the lack of money, and the peril lest it not be restored. Truly merchants esteem lacking their money six months at more than three, because meanwhile they lack the faculty of gaining by it.

> Adde maiorem esse pecuniae aestimationem in *loco, ubi datur; Syluester* V. Usura 4. quaest. 8. *Filliucius* num. 380. *Lessius* dub. 4. num. 34. *Reginaldus* num. 461. *Malder.* disp. 3. *Layman* cap. 19. num. 8. *Alium titulum addunt Filliucius* num. 404. *Lessius* dub. 6. num. 55. *Malder.* disp. 4. *carentiam pecuniae, et periculum ne restituatur. Sane mercatores pluris aestimant carere sua pecunia sex mensibus, quam tribus, quia interim carent facultate lucrandi illa.*

41 *Advert that Monopoly of raising the price is* unjust, and obliges to restitution of the excess above the just; Toletus *lib. 5. cap. 53.* Filliucius *cap. 7. n. 415.* Navar. *de usur. num. 59.* Sotus *de iust. lib. 6. quaest. 12. art. 3.* Bonacina *cit. num. 36.* Salon. *de Camb. quaest. 4. art. 2. contr. 23.* The abettors also of a monopoly are bound to restitution in solidum, if the principals do not pay, against Molina *disp. 345.* Lessius *lib. 2. c. 21. dub. 20. num. 151.* Salon. *dub. 38.*

> Adverte Monopolium augendi pretium esse *iniustum, et cogit ad restitutionem excessus supra iustum; Toletus* lib. 5. cap. 53. *Filliucius* cap. 7. n. 415. *Navar.* de usur. num. 59. *Sotus* de iust. lib. 6. quaest. 12. art. 3. *Bonacina* cit. num. 36. *Salon.* de Camb. quaest. 4. art. 2. contr. 23. *Cooperatores quoque monopolii ad restituendum obligant in solidum, si principales non solvant, contra Molinam* disp. 345. *Lessius* lib. 2. c. 21. dub. 20. num. 151. *Salon.* dub. 38.

42 *A money-changer, giving moneys to one whom he does not trust,* can require security, and a pledge, Azor *3. part. lib. 10. cap. 11. quaest. 11.* Lessius *dub. 8. num. 77.* Tolet. *cap. 52.* Salas *disp. 21.*

> Campsor, dans pecunias ei, cui non fidit, *potest securitatem exigere, ac pignus, Azor* 3. part. lib. 10. cap. 11. quaest. 11. *Lessius* dub. 8. num. 77. *Tolet.* cap. 52. *Salas* disp. 21.

43 *A money-changer, to whom the correspondent after many ex-*changes, and recambes has handed over a part of the debt, is not bound to compute that part toward the extinction of the principal, but can compute it for interest, and gains. The reason is, because when from some principal debt other debts are born as from a root, as fruits; then if payment be made first, it is held to be made for those fruits: then if anything is left over, it is computed into the principal, as is plain from the practice in the payment of rents, and the payment of the debts of a Society. So Filliucius *num. 471.* Bonacina *de contract. disput. 3. quaest. 5. puncto unic.* Lessius *dub. 10.* Salas *de Camb. num. 25.* Bassaeus *loco cit. num. 12.* Which is to be attentively observed.

> **Campsor, cui Campsarius post multa cam-*bia, et recambia tradidit partem debiti, non tenetur eam partem computare pro extinctione capitalis, sed potest ea computare pro interesse, et lucris. Ratio est, quia quando ex debito aliquo principali tanquam ex radice nascuntur alia debita, tanquam fructus; tunc si fiat solutio primo, censetur fieri pro fructibus illis: deinde si quid superfit, computatur in sortem, ut patet ex praxi in solutione censuum, et solutione debitorum Societatis. Sic Filliucius* num. 471. *Bonacina* de contract. disput. 3. quaest. 5. puncto unic. *Lessius* dub. 10. *Salas* de Camb. num. 25. *Bassaeus* loco cit. num. 12. *Quod attente est servandum.*

# Disputation IX: On the Contract of Partnership

1 ALTHOUGH there are various kinds of Societies — for Societies are entered into in taking up Tax-farms, in executing offices, and in dispensing other goods — yet that is called Society simply which is occupied with lucrative, and profitable return from letting, selling, and the like: Wherefore, although such a contract concerns all goods, nevertheless Society is not understood to be entered into simply of them; but of the foregoing lucrative one, as Bonacina rightly admonishes *disp. 3. de contract. quaest. 6.* unless the wills of the contracting parties have otherwise declared themselves, *leg. quaestus, ff. pro socio*, to be cited below.

> ***De Contractu Societatis.***
>
> *LICET Societatum varia sint genera, in suscipiendis enim Vectigalibus, in exequendis officiis, et in caeteris bonis dispensandis Societas initur; illa tamen simpliciter Societas vocatur, quae versatur circa proventum lucratorium, et quaestuosum ex locatione, venditione, et similibus : Quare quamvis sit talis contractus circa omnia bona, non tamen de eo intelligitur Societas simpliciter inita; sed de praecedenti lucratorio, ut recte monet Bonacina* disp. 3. de contract. quaest. 6. *nisi aliter voluntates contrahentium se declaraverint,* leg. quaestus, ff. pro socio*, infra citanda.*

## Question I: In what the contract of partnership consists, and what is required that it be just

1 THE RATIO of this contract consists in this, that some, having made a pact among themselves, and joined their goods fit for gaining — money, industry, or labor — wish by some trading, or even by a craft, or agriculture to make some common gain among themselves to be divided, prepared likewise to divide among themselves a common loss, if perchance they incur one.

> In quo consistat CONTRACTUS SOCIETATIS, et quaenam requirantur, ut sit iustus.
>
> *RATIO huius contractus in eo consistit, ut aliqui inito inter se pacto, et coniunctis suis rebus ad lucrandum idoneis pecunia, industria, vel opera velint per negotiationem aliquam, sive etiam per opificium, aut agriculturam facere commune aliquod lucrum inter se dividendum, parati similiter ad dividendum inter se damnum commune, si quod forte incurrant.*

2 THAT this contract is licit is plain *ex Cod. et ff. pro socio, et cap. per vestras extra de donat. inter virum, et uxorem*, and from the Doctors of both laws in the same places, and from D. Thom. *quaest. 78. art. 2. ad 5.* and commonly from other Theologians with Valentia *disput. 5. quaest. 24. puncto 1.*

> *HUNC contractum esse licitum patet* ex Cod. et ff. pro socio, et cap. per vestras extra de donat. inter virum, et uxorem*, et Doctoribus utriusque iuris iisdem locis, et a D. Thom.* quaest. 78. art. 2. ad 5. *et communiter ab aliis Theologis apud Valentiam* disput. 5. quaest. 24. puncto 1.

3 IT IS PROVED by D. Bonavent. in the *Bibliis pauperum, cap. 119.* because holy Jacob had a contract of Society with Laban, and was enriched, *Genes. 30.*

> *PROBATUR a D. Bonavent. in* Bibliis pauperum, cap. 119. *quia Iacob sanctus Societatis contractum habuit cum Laban, et ditatus est,* Genes. 30.

4 IT IS PROVED secondly by D. Bonavent. *ad cap. 4. Ecclesiastae*, where he weighs those words: *Melius est duos esse simul: habent enim emolumentum Societatis mutuae;* The holy Doctor says moreover that this

Society is conformable to the virtue of CHARITY, since the avaricious man hates Society in its gains, that he alone may profit.

> *PROBATUR secundo a D. Bonavent.* ad cap. 4. Ecclesiastae*, ubi ea verba ponderat :* Melius est duos esse simul : habent enim emolumentum Societatis mutuae; *Ait autem S. Doctor, hanc Societatem esse virtuti conformem Charitatis, cum avarus Societatem in emolumentis odio habeat, ut solus lucretur.*

5 HENCE I argue by reason: that which is licit to do alone, much more is it licit to communicate a good with one's neighbor; but it is licit for one alone to exercise contracts: Therefore.

> *HINC arguo ratione : id, quod licet facere solum, multo magis licet communicando cum proximo bonum; sed licet soli exercere contractus : Ergo.*

6 ¶ BUT that this contract be licit, three conditions are to be observed.

> ¶ *UT autem hic contractus licitus sit, tres sunt observandae conditiones.*

7 THE FIRST is required on the part of the trading, that it be just.

> *PRIMA requiritur ex parte negotiationis, ut sit iusta.*

8 THE SECOND on the part of the gain to be divided, that it be justly divided among the Partners: as, if each contribute an equal amount, let it be divided equally; if unequal, let it be divided according to that inequality; and if that be doubtful, let it be defined by the judgment of a prudent man.

> *SECUNDA ex parte lucri dividendi, ut iuste inter Socios dividatur, ut si singuli ponant aequale; aequaliter dividatur; si inaequale, dividatur iuxta illam inaequalitatem, quae si sit dubia, definiatur iudicio prudentis.*

9 THE THIRD is, that the loss also be divided by the same reason. So commonly, with Valentia *quaest. 24. puncto 1.* Toletum *lib. 5. cap. 41.* Tannerum *disput. 4. quaest. 7. dubio 8.*

> *TERTIA est, ut etiam damnum eadem ratione dividatur. Ita communiter apud Valentiam* quaest. 24. puncto 1. *Toletum* lib. 5. cap. 41. *Tannerum* disput. 4. quaest. 7. dubio 8.

## Question II: Whether, and how, other contracts can be united with the contract of partnership

1 FIRST, it is certain that in a partnership all contracts that are just can come together.

> An, et quomodo cum Societatis contractu possint uniri alii contractus.
>
> *PRIMO certum est, in Societate posse concurrere omnes contractus, qui sunt iusti.*

2 SECOND, it is held to be certain, says Valentia, that by the law of nature one may enter with another partner into that other contract of assurance of a certain lesser gain for a share of the greater gain hoped for, provided, however, that he takes the risk upon himself and retains it. The same is the judgment of Conradus *q. 96.*, although he concludes that it involves risk.

> *SECUNDO certum esse, ait Valentia, secundum ius naturae, posse cum altero socio iniri illum alium contractum assecurationis lucri minoris certi pro parte maioris lucri sperati, si tamen periculum super se accipiat, et detineat. Idem censet Conradus* q. 96. *etsi periculum esse concludat.*

3 FOR MY PART, I do not approve of this contract, even if the usurious intention of lending be absent, and the dominion of the thing indeed retained, and the risk too (as the Saintly Doctor

requires as necessary, *cap. 2. speculi animae;*) for thus, according to the probability of the hoped-for gain, to impose upon the other partner the burden of assuring the other part of the gain for a share of that gain (even with his consent) is a hardship, not sufficiently well divided by equity among the shares; Nevertheless I do not entirely condemn this manner of contracting.

> *EGO quidem non laudo hunc contractum, etiam si absit mutuandi intentio usuraria, et retento rei quidem dominio, et periculo (ut necessarium iniungit S. Doctor* cap. 2. speculi animae;*) nam ita iuxta probabilitatem spei lucri, pro eius lucri parte imponere alteri Socio onus assecurandi partem lucri alteram, (esto eo consentiente) est gravamen, non satis bene iuxta aequalitatem divisum super capita; Attamen neque hunc contrahendi modum omnino reprobo.*

4 THE CONTROVERSY, however, is: whether besides the contract of partnership and the contract of assurance of the lesser gain that is hoped for, Peter, for example, who puts one hundred into the partnership, can also at the same time conclude with Paul his partner a contract of assurance of the capital, for a share of the hoped-for gain as well; We speak, however, according to the law of nature.

> *CONTROVERSIA est autem : an praeter contractum Societatis, et contractum Assecurationis lucri minoris, quam speratur, possit etiam Petrus v. g. qui centum in Societatem exponit, celebrare simul cum Paulo Socio contractum assecurationis capitalis pro parte quoque lucri sperati; Loquimur autem secundum ius naturae.*

5 IT WAS the opinion of Accursius *leg. si non fuerint, ff. pro socio*, of Panormitanus *in cap. Per vestras de donat. inter virum, et uxorem*, whom Sotus follows *lib. 6. de Iustitia, quaest. 6. art. 2.*, denying that this can be done.

> *FVIT opinio Accursii* leg. si non fuerint, ff. pro socio*, Panormit.* in cap. Per vestras de donat. inter virum, et uxorem*, quos sequitur Sotus* lib. 6. de Iustitia, quaest. 6. art. 2. *negans id posse fieri.*

6 THE OPPOSED opinion is that of Ioannes Maioris *in 4. dist. 15. quaest. 49.*, who testifies that this opinion was defended by the most learned Ioannes Echius at Bologna; Gabriel *ea dist. quaest. 11. dist. 10.* Conradus *quaest. 97.* Sylvester *ver. Societas, quaest. 2.* Couarruvias *lib. 3. var. cap. 2.* Nauarrus *in manuali, cap. 17. num. 254.* Angles *in 4. quaest. de Societate*, Caietanus *opusc. 17. responsionum, resp. 11.* Valentia *disp. 5. quaest. 24. puncto 3.* These, besides the two alleged above, say that this third contract also can be joined in a partnership. Tanner subscribes with others, *disp. 4. quaest. 7. dub. 8.* He concludes that this opinion is approved everywhere by most learned men, *at number 211.* So also Bassaeus.

> *OPPOSITA sententia est Ioan. Maioris* in 4. dist. 15. quaest. 49. *qui testatur, sententiam hanc fuisse ab eruditissimo Ioanne Echio defensam Bononiae; Gabrielis* ea dist. quaest. 11. dist. 10. *Conradi* quaest. 97. *Sylvester* ver. Societas, quaest. 2. *Couarruuiz* lib. 3. var. cap. 2. *Nauarri* in manuali, cap. 17. num. 254. *Angles* in 4. quaest. de Societate, *Caietani* opusc. 17. responsionum, resp. 11. *Valentae* disp. 5. quaest. 24. puncto 3. *Hi, praeter duos allegatos supra, hunc etiam tertium in Societate coniungi posse aiunt. Subscribit cum aliis Tanner.* disp. 4. quaest. 7. dub. 8. *Quam sententiam approbatam ubique ab eruditissimis Viris concludit* numero 211. *Sic etiam Bassaeus.*

7 IT IS PROVED *from cap. Per vestras, extra, de donat. inter virum, et uxorem.* If with a husband verging on poverty, and not having sufficient security for preserving his wife's dowry, the dowry is exposed to peril, such a dowry is commanded to be given to some merchant for trading, that it may of course be safe with him, and from it, intact, the burdens of matrimony may be sustained. This cannot be done except by those three contracts made with the merchant, as Nauarrus noted above, and Ioannes Andreas on the said chapter *Per vestras*. Likewise *by leg. si non fuerent. ff. pro socio*, and by the opinion of

Cassius it is said that a partnership can be so entered into that neither party feels any part of the loss; but the gain is common. See Valentia, who says this opinion was approved at Rome by many most learned Theologians.

> *PROBATUR* ex cap. Per vestras, extra, de donat. inter virum, et uxorem. *Si apud maritum vergentem ad inopiam, neque habentem pro conservanda uxoris dote sufficientem cautionem, dos versetur in periculo, iubetur talis dos dati alicui mercatori ad negotiationem, ut nimirum secura apud illum sit, et ex ea salva possint onera matrimonii sustentari, Quod non possit fieri, nisi per tres illos contractus cum mercatore initos, ut notavit Nauar. supra, et Ioan. Andreas ad dictum caput* Per vestras. *Item* per leg. si non fuerent. ff. pro socio*, et Cassii sententia dicitur, ita iniri Societatem posse, ut nullam partem damni alter sentiat; lucrum vero commune sit. Vide Valentiam, qui ait, hanc sententiam Romae a pluribus eruditissimis Theologis fuisse approbatam.*

8 Therefore this contract can be so made that Peter gives the merchant a large sum of money with the pact that the merchant receive at the end of the year, for example, five or six per cent, assuring the Capital for a share of the hoped-for gain. Nor indeed is this a loan, or usurious gain from a loan, as Caspensis notes *sect. 10.* and Valentia *in the place cited.*

> *Itaque sic potest hic contractus iniri, ut Petrus det mercatori magnam summam pecuniarum cum pacto, ut mercator accipiat in fine anni v. g. quinque, vel sex pro centenario, assecurando Capitale pro parte lucri sperati. Neque vero hoc est mutuum, aut ex mutuo lucrum usurarium, ut notat Caspensis* sect. 10. *et Valentia* loco citato.

9 *You will object* the Bull of Sixtus V, which begins: *Detestabilis avaritia*, and prohibits a partnership made with an assurance of the capital.

> Obiicies *Bullam Sixti V. quae incipit:* Detestabilis avaritia*, prohibetque societatem factam cum assecutatione capitalis.*

10 *Caspensis answers* it is to be understood of an assurance made without the burden being compensated at a just price, or of a partnership in which no other just contract is mixed in, as Reginaldus notes *l. 25. num. 490.* Bassaeus *v. Societas, num. 4.*

> Respondet *Caspens. intelligi de assecuratione facta, non compensato onere iusto pretio, vel de societate, in qua non admisceatur alius iustus contractus, ut notat Reginald.* l. 25. num. 490. *Bassaeus* v. Societas, num. 4.

11 *You will ask*, what is given to the merchant for that assurance of the capital,

> Quaeres*, quid detur mercatori pro illa assecuratione capitalis,*

12 *Filliucius answers, num. 55. tract. 38. cap. 3.* that a part of the uncertain gain is given, which in the judgment of a prudent man seems just to all who hope for it, or that something is remitted from the certain gain which he would have; otherwise he would not thereby enter into a contract of assurance, but only of sale of an uncertain gain for a certain one, which would certainly be greater than if, besides, the contract of assurance were also concluded,

> Respondet *Filliuc.* num. 55. tract. 38. cap. 3. *dari partem lucri incerti, qui iudicio prudentis omnibus speratis videatur iusta, vel remitti aliquid de lucro certo, quod haberet; alioqui, sic non iniret contractum assecurationis, sed tantum venditionis lucri incerti pro certo, quod certe maius esset, quam si praeterea etiam contractus assecurationis celebretur,*

## Question III: Whether a contract by which, the capital being secured, a certain fixed gain is received each year is lawful

1 Doctors who undertake this contract enumerate many titles, both just and unjust,

> An liceat contractus, per quem, securo capitali, accipitur annuatim certum aliquod lucrum.
>
> *MULTOS titulos iustos, et iniustos recensent Doctores huius contractus ineundi,*

2 THE FIRST is just by reason of lucrum cessans.

> *PRIMUS iustus est ratione lucri cessantis.*

3 THE SECOND is, if a partnership is entered into with the pact of assurance of the capital, and of sale, for example, of the gain of five per cent for the greater gain hoped for, which is left to the partner in compensation for burdens of this kind, whether those pacts are made with an explicit intention, or implicit, as I said in question 2.

> *SECUNDUS est, si societas ineatur cum pacto assecurationis capitalis, et venditionis, v. g. lucri quinarii pro maiori lucro sperato, quod socio in compensationem huiusmodi onerum relinquatur, sive ista pacta fiant explicita intentione, sive implicita, ut dixi quaestione 2.*

4 THE THIRD is, if a real census is bought with the pact of redemption and assurance on both sides.

> *TERTIUS est, si ematur census realis cum pacto utrinque redimendi, et assecurandi.*

5 THE FOURTH, if, without an express determination of a contract of partnership, or purchase of a census, or of interest of lucrum cessans, or damnum emergens, with a certain general intention, having made a choice of the person with whom he contracts, his partner also consenting, he wishes to gain those five per cent in some manner at last, which, the circumstances of the persons and of the fact having been considered, by the judgment of experts could justly be done.

> *QUARTUS, si absque expressa determinatione contractus societatis, vel emptionis census, seu interesse lucri cessantis, aut damni emergentis generali quadam intentione, habito delectu personae, quacum contrahit, consentiente etiam socio, velit lucrari illa quinque aliquo tandem modo, quo personarum, et facti circumstantiis consideratis, peritorum iudicio iuste id fieri possit.*

6 LEDESMA adds a fifth just title, *p. 2. tract. 8. cap. 35.*, because he who gives money for that time deprives himself of his liberty, and takes upon himself the burden of not reclaiming that money for that time, which indeed is estimable at a price, and consequently some gain can be taken from it for that without the vice of usury; which opinion Diana seems to approve, *p. 1. tract. 8. resol. 48.*, against Molina *T. 1. tract. 2. disput. 308.* Laymann *l. 3. sect. 5. tract. 4. cap. 16.* Turrianus *2. 2. q. 2. disp. 61. dub 3.* Salas *de Usura, disp. 9.* Lessius *lib. 26. cap. 20. dub. 14.*

> *QUINTUM titulum iustum addit Ledesma* p. 2. tract. 8. cap. 35. *quia is, qui pecunias dat per illud tempus, privat se sua libertate, et suscipit in se onus non repetendi illas pecunias per illud tempus, quod quidem est pretio aestimabile, atque adeo posse aliquod lucrum inde accipi pro eo sine usurae vitio, quam sententiam videtur approbare Diana* p. 1. tract. 8. resol. 48. *contra Molinam* T. 1. tract. 2. disput. 308. *Laym.* l. 3. sect. 5. tract. 4. cap. 16. *Turrianum* 2. 2. q. 2. disp. 61. dub 3. *Salam* de Usura, disp. 9. *Less.* lib. 26. cap. 20. dub. 14.

7 Yet to these last the Saintly Bonaventure seems to nod assent, *in speculo animae, cap. 2. at the end;* For, not to reclaim a loan for so long a time does not detract from the nature of a loan, and is a condition

common to all loans, and consequently, since from a loan no gain can be given without usury, it follows, etc. Hence *in §. tertius fructus principalis;* he condemns such a loan. Bassaeus approves, *v. Societas, num. 4.*, and others cited by him. Hence such gain was condemned by Alexander VII, as we saw, while treating of the Acts of Man, *disp. 17. quaest. 10. sect. 40.*

> *His postremis tamen videtur arridere S. Bonav.* in speculo animae, cap. 2. ad finem; *Etenim, non repetere mutuum tanto tempore, non distrahit a ratione mutui, et est conditio omnibus mutuis communis, atque adeo, cum mutuo non possit dari lucrum absque usura, sequitur, etc. Hinc* in §. tertius fructus principalis; *tale mutuum damnat. Arridet Bassaeus* v. Societas, num. 4. *et alii apud illum. Hinc tale lucrum damnatum est ab Alexandro VII. ut vidimus agendo de Actibus humanis* disp. 17. quaest. 10. sect. 40.

8 But suppose we were to admit such a deprivation as estimable at a price; nevertheless to demand for it annually seven, or even nine per cent (as very many do), exceeds measure. The reason of this is, because if real exchangers are granted alone that they may demand so much, nine per cent, and this by reason of lucrum cessans, and those who enter with the same men a contract of partnership, seven, provided the conditions assigned above are present, and to both is common the lack of money, the deprivation of liberty, and the obligation of not reclaiming the principal within a year; how can these men demand a like gain, not by reason of lucrum cessans, for there is none, nor by reason of the partner's risk, which is also absent, because they not only give money, but moreover receive a mortgage, or pledge equivalent, for security.

> *At esto talem privationem admitteremus pretio aestimabilem, tamen exigere pro ea annuatim septem, aut etiam nouem pro centenario (ut plurimi faciunt) annuatim, excedit. Ratio huius est, quia si mercatoribus cambii realis solum conceditur, ut tantum possint exigere, nouem pro centenario, et hoc ratione lucri cessantis, et ineuntibus cum eisdem contractum societatis septem, dummodo adsint conditiones assignatae supra, et utrique communis est carentia pecuniae, privatio libertatis, et obligatio non repetendi sortem intra annum; quomodo hi possunt simile lucrum exigere, non ratione lucri cessantis, quia nullum est, neque ratione periculi socii, quod neque adest, quia non solum dant pecuniam, sed insuper recipiunt hypothecam, seu pignus aequivalens pro securitate.*

9 THERE are therefore many unjust titles assigned by Valentia *disp. 5. quaest. 15. p. 1. et 2.* and Caspensis *sect. 11.*

> *SUNT ergo tituli iniusti multi assignati a Valentia* disp. 5. quaest. 15. p. 1. et 2. *et Caspensi* sect. 11.

10 THE FIRST is, if anyone gives a sum of one hundred, and from him to whom he gives it, for that reason receives five beyond the hundred; because that man uses the money for his own advantage. For this is usury, nor is it sufficiently covered by the cloak of piety by saying that it is given to the wretched to relieve necessity, as D. Bonaventure says, *loc. cit.*; but who is there in our age affected with so great a piety?

> *PRIMUS est, si quis centenariam summam det, et ab eo, cui dat, ideo recipiat quinque ultra centum; eo quod ille ad suum commodum ea pecunia utatur. Haec enim est usura, neque satis pallio pietatis tegitur dicendo, dari miserabili ad necessitatem sublevandam, ut ait D. Bonav.* loc. cit. *sed quis est, qui hoc nostro saeculo tanta sit pietate affectus?*

11 THE SECOND unjust title is, if, although there be not present the mind of receiving that gain on account of the use of the money lent, and without any other probable title, he nevertheless takes that gain, as Caspensis notes with D. Bonaventure, *loc. cit.*, who gravely admonishes all these men to remember that God is the searcher of the innermost heart.

> *SECUNDUS titulus iniquus est, si quamvis non adsit animus accipiendi illud propter usum pecuniae mutuo datae, et sine alio omni probabili titulo, lucrum illud accipit, ut notat Caspens. cum D. Bonav.* loc. cit. *qui graviter admonet hos omnes, ut recordentur, Deum intimi cordis esse scrutatorem.*

12 THE THIRD is, when under the pretext of applying the rules of justice, which are the touchstone (lapis Lydius), falsities appear; and in this what is intended must be examined.

> *TERTIUS est, cum praetextus appliciti regulis iustitiae, quae sunt lapis Lydius, apparent falsi; et in hoc examinandus est id, quod intenditur.*

13 I DISPOSE of the matter here most briefly, since I have seen nothing more in the Seraphic Doctor on this subject,

> *BREVISSIME me hic expedio, cum nihil amplius in Seraphico hac de re viderim,*

# Disputation X: On Emphyteusis, Letting, Hiring, and the Fief

1 EMPHYTEUSIS is manifold; For one kind is given indefinitely, no mention of time being made, and is called Perpetual; Another is given for certain fixed generations, and is called temporal. Likewise it is either Ecclesiastical, or Secular, according to the diversity of Dominion; New, or Old, according to the variety of time, in which it is newly instituted, or renewed. There is also an Emphyteusis hereditary simply, hereditary mixedly, and familial; and this diversity arises by reason of the persons for whom it is granted; This division having been assigned, it is asked what Emphyteusis properly is; afterwards we shall treat also of the other contracts noted in the title.

> *EMPHYTEUSIS multiplex est; Alia enim datur indefinite, nulla temporis mentione facta, et dicitur Perpetua; Alia datur ad certas quasdam generationes, vocaturque temporalis. Item vel est Ecclesiastica, vel Saecularis pro diversitate Dominii; Nova, vel Vetus, pro varietate temporis, quo de novo instituitur, vel renovatur. Est etiam Emphyteusis haereditaria simpliciter, haereditaria mixte, et familiaris; et haec diversitas oritur ratione personarum, pro quibus conceditur; Hac assignata divisione; quaeritur quid proprie sit Emphyteusis, postea de aliis etiam contractibus, in titulo notatis, agemus.*

## Question I: What emphyteusis is

1 THE SAINTLY Doctor treats briefly of Emphyteusis in Laconic style in the Diaeta salutis, Title 2. cap. 5., where he also treats of the Feud.

> *EMPHYTEUSIM Laconice percurrit S. Doctor in Diaeta salutis, Titulo 2. cap. 5. ubi etiam agit de Feudo.*

2 It is called in Greek Emphyteusis, as it were an implanting, or ingrafting. In question here is the grant of an immovable thing with the translation of the useful dominion, the direct dominion being retained, for a certain sum of money, which is called Laudemium; and with the burden of a certain rent to be paid to the Proprietor, and that either in perpetuity, or for the life of one or of several (in which case it is called a vitalitium), or for certain years, however not fewer than ten. He who sells is called the Direct Lord; he who buys, or receives, is called the Emphyteuta.

> *DICITUR Graece Emphyteusis, quasi implantatio, seu insitio. In proposito est concessio rei immobilis cum translatione dominii utilis, retento directo pro certa pecuniae summa, quae Laudemium dicitur; ac onere certae pensionis Proprietario solvendae, idque vel in perpetuum, vel ad vitam unius, vel plurium (quo casu vitalitium dicitur) vel ad certos annos, non tamen pauciores decennio. Qui vendit, Dominus directus dicitur; qui emit, seu accipit, Emphyteuta vocatur.*

3 IT DIFFERS from Leasing. First, because it is constituted only in an immovable thing, which can be made better by cultivation. Second, because by it the useful dominion is transferred. Third, because a lease properly cannot be made for ten years or more, for then by common law the useful dominion is transferred to the lessee, and accordingly it ceases to be a proper Lease, and becomes an Emphyteusis, and this is gathered *from Leg. 1. ff. de superficiebus*, and from common practice, as Couarruvias teaches, *l. 2. var. cap. 16.*, and Tanner *disp. 4. quaest. 7. num. 116.* Bassaeus *v. Emphyteusis.*

> *DIFFERT a Locatione. Primo, quia solum in re immobili, quae cultura melior effici potest, constituitur. Secundo, quia per eam transfertur dominium utile. Tertio quia locatio proprie non potest fieri ad decennium, vel supra, quia tunc communi iure transfertur dominium utile in conductorem, ac proinde desinit esse propria Locatio, et fit Emphyteusis, et*

> *colligitur* ex Leg. 1. ff. de superficiebus, *et ex communi docent Couar.* l. 2. var. cap. 16. *et Tanner.* disp. 4. quaest. 7. num. 116. *Bassaeus* v. Emphyteusis.

4 FOR the contract of Emphyteusis, that it may be legitimate, these conditions are established by common Caesarean law, as Lessius reports, *l. 2. cap. 24. dub. 9.*, Tanner *disput. 4. quaest. 7. dubio 6.*, although according to various Provinces different ones and different ones are laid down.

> *AD contractum Emphyteusis, ut sit legitimus, statuuntur iure communi Caesareo hae conditiones, ut referunt Less.* l. 2. cap. 24. dub. 9. *Tanner.* disput. 4. quaest. 7. dubio 6. *quamvis iuxta varias Provincias aliae, et aliae ponantur.*

5 THE FIRST is, that it be constituted in immovable and fruitful things, as in fields, houses, pastures, etc.

> *PRIMA est, ut constituatur in rebus immobilibus, et fructiferis, ut in agris, domibus, pascuis, etc.*

6 THE SECOND, that the useful dominion be in the hands of the Emphyteuta, who is therefore bound to all the burdens and taxes which are otherwise usually paid by reason of that dominion, even if the goods should otherwise belong to the Church.

> *SECUNDA, ut dominium utile sit penes Emphyteutam, qui proinde tenetur ad omnia onera, et tributa, quae alioqui ratione eius dominii solvi solent, etiamsi bona aliter sint Ecclesiae.*

7 THE THIRD, that the Emphyteuta be bound to pay an annual rent, as D. Bonaventure also notes, *in the place cited.*

> *TERTIA, ut Emphyteuta teneatur ad pensionem annuam solvendam, ut notat etiam D. Bonaventura* loco citato.

8 THE FOURTH, that if he does not pay within a certain time, he lose the emphyteutic thing with all the improvements, whether expenses, or works, which he made upon it, and that it return to the former lord.

> *QUARTA, ut si non solvat intra certum tempus, amittat rem Emphyteuticam cum omnibus meliorationibus, vi Emponematibus, seu operibus, quae in ea fecit, illaque redeat ad priorem dominum.*

9 THE FIFTH, that if the thing entirely perishes without fault of the Emphyteuta, he be freed from the rent, unless he has bound himself to fortuitous cases.

> *QUINTA, ut si res sine culpa Emphyteutae omnino pereat, is a pensione liberetur, nisi obligaverit se ad casus fortuitos.*

10 THE SIXTH, that, if he renders the thing seriously deteriorated, he lose it.

> *SEXTA, ut, si rem graviter deteriorem reddat, eam amittat.*

11 THE SEVENTH, that the Emphyteuta not sell the improvements except to the direct lord, first admonished, so that he may buy before others if he wishes.

> *SEPTIMA, ut Emphyteuta non vendat meliorationes nisi domino directo, ante admonito, ut ille ante alios emere possit, si velit.*

12 THE EIGHTH condition is, that if the thing is sold, or alienated in another way, he who receives it pay the direct lord the Laudemium for the investiture which he receives from him.

> *OCTAVA conditio est, ut si res venditur, vel alio modo alienatur, is, qui eam accipit, solvat domino directo Laudemium pro investitura, quam ab eo accipit.*

13 NOW the Laudemium is a certain part of the price, or valuation, of the thing sold, which indeed by common law is a fiftieth, but by custom a thirtieth, as Sylvester notes, *verb. Emphyt. num. 28.*, from the Ostiense; Lessius *num. 57.* and Tanner *num. 170.* Bassaeus *in the place cited.*

> *EST autem Laudemium certa pars pretii, seu aestimationis rei venditae, quae quidem iure communi est quinquagesima, consuetudine vero trigesima, ut notat Sylvester* verb. Emphyt. num. 28. *ex Ostiensi Less.* num. 57. *et Tanner.* num. 170. *Bassaeus* loco cit.

## Question II: What letting is

1 LEASING and Hiring are the same contract, by which a person, or some thing, is granted to another for use for a price, and is received by the same. For on the part of the one granting it is a Letting: on the part of the one receiving it is a Hiring, as D. Bonaventure teaches on those words of Luke 20, *A certain man planted a vineyard, and let it out to husbandmen.*

> *LOCATIO, et Conductio est idem Contractus, quo persona, vel res aliqua alteri ad usum pro pretio conceditur, et ab eodem accipitur. Ex parte enim concedentis est Locatio: ex parte accipientis est Conductio, ut docet D. Bonav. ad ea verba Lucae 20.* Homo quidam plantavit vineam, et locavit eam agricolis.

2 DOCTORS admonish, moreover, that if an impediment arise on the part of the thing hired, which hinders its use without fault of the hirer, for that time he is not bound to the rent; otherwise if the impediment cling to the hirer's own side. So Sylvester, *verb. Locatio,* Navarrus, *Manuali cap. 17. num. 187. et 197.* Couarruvias, *l. 4. var. cap. 13.* Tanner, *disp. 4. quaest. 7. dub. 6. etc.* Bassaeus. It is gathered *from Leg. Habitatores, and Leg. Qui operas, and Leg. si uno, ff. locati.*

> *ADMONENT autem, si impedimentum superveniat ex parte rei conductae, quod usum eius impediat sine culpa conductoris, pro eo tempore non tenetur ad pensionem; secus si impedimentum se teneat ex parte conductoris. Ita Sylvester* verb. Locatio *Navar.* Manuali cap. 17. num. 187. et 197. *Couar.* l. 4. var. cap. 13. *Tanner.* disp. 4. quaest. 7. dub. 6. etc. *Bassaeus. Colligitur* ex Leg. Habitatores, et Leg. Qui operas, et Leg. si uno, ff. locati.

3 IF by reason of barrenness, or calamity without fault of the hirer, in any year nothing be received from the thing hired, the whole rent is to be remitted; otherwise, if the barrenness be not great, it is to be remitted pro rata, unless it has been otherwise agreed, or unless it be compensated by the fruitfulness of the following years. So runs the common opinion of Doctors according to the Law *ex conducto and Leg. si merces, ff. Locati.* See Bassaeus, *loc. cit.* and Diana, *p. 3. tract. 6. miscell. resol. 17. and others there.*

> *SI ob sterilitatem, aut calamitatem citra culpam conductoris anno aliquo nihil e re conducta percipiatur, tota pensio remittenda est; alias, si sterilitas non sit magna, pro rata est remittenda, nisi aliter sit conventum, vel nisi sequentium annorum foecunditate compensetur. Ita communis Doctorum fert opinio iuxta Legem* ex conducto et Leg. si merces, ff. Locati. *Vide Bass.* loc. cit. *et Dianam* p. 3. tract. 6. miscell. resol. 17. et alios ibi.

4 LESSIUS extends the same, *cap. 24. dub. 3.*, if fruits stored in a barn perish by lightning, or the arrival of an enemy. So also Bassaeus, *v. Locatio.*

> *IDEM extendit Less.* cap. 24. dub. 3. *si fruges in horreo conditae, fulmine, vel hostis superventu pereant. Sic et Bassaeus* v. Locatio.

5 THE CAUSES for expelling the hirer are set forth by the *Lex AEde, C. de Locato*, in these words: *As to the dwelling-house which you say you have hired, if you have paid the rent in full, you ought not to be expelled*

*against your will; unless the lord proves that he needs it for his own uses, or shall prefer to correct, or restore, the house, or unless you have dealt badly with the thing let*. See the Doctors cited in Bassaeus, *num. 4.* and Bonacina, *disp. 3. quaest. 7. p. 2.*

> *CAUSAS expellendi conductorem exponit* Lex AEde, C. de Locato, *his verbis:* AEde, quam te conductam habere dicis, si pensionem in solidum solvisti, invitum te expelli non oportet; nisi propriis usibus dominus eam necessariam esse probaverit, aut corrigere, seu reficere domum maluerit, aut tu male in re locata versatus es. *Vide Doctores apud Bassaeum* num. 4. *et Bonac.* disp. 3. quaest. 7. p. 2.

6 AND to the same sense Gregory IX, *cap. propter sterilitatem, de locato, et conducto*, explaining the civil law more fully, says: *Truly you will be able to inhabit, or repair, the house with an unwelcome tenant, if necessity (which however did not impend at the time of the letting) so demand: the rent for the remainder of the time being remitted to him: who also is reasonably removed from it, if he has conducted himself perversely there, or if, when he had not paid the rent for two years, he did not provide for himself by speedy satisfaction.*

> *ET in eundem sensum Gregorius IX.* cap. propter sterilitatem, de locato, et conducto *magis explicans ius civile, ait:* Verum inviso inquilino domum inhabitare, vel reficere poteris, si necessitas (quae tamen non imminebat locationis tempore) id exposcat: remissa sibi pro residuo temporis pensione: qui etiam inde rationabiliter amovetur, si perverse ibi fuerit conversatus, vel cum pensionem per biennium non solvisset, sibi satisfactione celeri non providit.

## Question III: What a fief is, and of how many kinds

1 A FEUD, named from fides (faith), is the grant of an immovable thing with the translation of the useful dominion, the proprietorship retained, under the burden of exhibiting fidelity and personal service: by which reason it differs from Emphyteusis.

> *FEUDUM a fide dictum, est concessio rei immobilis cum translatione utilis dominii, proprietate retenta sub onere fidelitatis, et obsequii personalis exhibendi: qua ratione ab Emphyteusi differt.*

2 He who grants the feud is the Lord of the feud: he who receives it, however, is the Feudatory. Or he is called a Vassal, as D. Bonaventure notes in the Diaeta, *titulo 2. cap. 5.*

> *Is, qui feudum concedit, est Dominus feudi: qui vero accipit, Feudatarius. Seu Vassallus dicitur, ut notat D. Bonav. in Diaeta,* titulo 2. cap. 5.

3 ONE feud is proper, another improper: one noble, another not ennobling; the noble one, one regal, another not. One is called Liege, in which fidelity is sworn against every man: another not Liege, ligium, in which the prior lord is excepted. One is frank, another not frank, from services. One Ecclesiastical: another secular.

> *FEUDUM aliud est proprium, aliud improprium: aliud nobile, aliud non nobilitans; nobile, aliud regale, aliud non. Aliud vocatur Ligium, in quo iuratur fidelitas contra omnem hominem: aliud non Ligium, ligium, in quo prior dominus excipitur. Aliud est francum, aliud non francum a servitiis. Aliud Ecclesiasticum: aliud saeculare.*

4 FOR a feud the same conditions are required as for an Emphyteusis, except that the Vassal, where the feud is pure, is not bound to a rent, but in place of the rent to service, which, omitting it when it is required, he loses the feud. Fidelity, moreover, is sworn to the Lord, as is had in Sylvester, *verb. Feudum*: not to harm the lord, nor to divulge his secrets.

*AD feudum eaedem conditiones requiruntur, quae et ad Emphyteusim, nisi quod Vasallus, ubi feudum est purum, non tenetur ad pensionem, sed loco pensionis ad obsequium, quod omittens, cum requiritur, amittit feudum. Iuratur autem Domino fidelitas, ut habetur apud Sylvestrum* verb. Feudum, *non nocendi domino, nec secreta pandendi.*

5 THE Vassal, however, is bound to seek the investiture of the feud within a year and a day, provided, however, that if he be a knight, he has a year and a month; or if he be under 14 years of age, or impeded by a just cause: See Tanner, *disp. 4. quaest. 7. dub. 6.* Balzus, *v. Feudum* and the others cited by these.

*TENETUR autem Vasallus intra annum, et diem petere investituram feudi, si tamen sit miles, habet annum, et mensem; vel si sit minor 14. annis, vel iusta causa impeditus: Vide Tannerum* disp. 4. quaest. 7. dub. 6. *Balzaeum* v. Feudum *et caeteros apud istos.*

# Disputation XI: On Testaments

1 TESTAMENTS were instituted chiefly, lest the goods of the deceased, uncertain, fixed to the dominion of no one, should provoke free men and kinsmen to lawsuits and Discord: Truly, the laws, providing for this inconvenience, incline to the other extreme, in such a way, appending so many conditions, circumstances, and causes to Testaments, that the lawsuits which were formerly threatened by reason of the lack of Testaments are now undertaken with a more difficult outcome, attacking their validity by reason of defects. Hence in disentangling these, laws busy themselves abundantly: here, however, I shall treat briefly of those things which rebound from Testaments into Consciences, remitting the rest to the Jurists. The name of Testament, moreover, is derived from testando (testifying), because by this instrument one soon to die testifies of his own will what he wishes to be done after his death with his goods.

> ***De Testamentis.***
>
> *PRAECIPUE instituta sunt Testamenta, ne bona defuncti incerta, nullius Dominio affixa, ad lites et Discordias liberos, et consanguineos provocarent: Verum Iura, huic incommodo providentia, in aliud extremum ita vergunt, tot Testamentis conditiones, circumstantias, et causas apponendo, ut quae prius ob Testamentorum carentiam intentarentur lites, nunc difficiliori exitu ob defectus, ipsorum validitatem labefactantes suscipiantur. Hinc in his extricandis leges profuse versantur: Hic autem ego, quae e Testamentis in Conscientias resiliant, breviter agam. Caetera ad Iuristas remittendo. Nomen vero Testamenti a testando derivatur, eo quod hoc instrumento mox moriturus de sua voluntate testetur, quid post obitum fieri velit de suis bonis.*

## Question I: What a testament is, and of how many kinds

1 A TESTAMENT is defined from Ulpian, *Leg. 1. ff. de testamentis*: *A testament is the just sentence of our will concerning that which one wishes to be done after his death*, to which the Gloss of Accursius adds, and Bartolus, *l. 1. ff. de testamentis cum directa haeredis institutione*, which clause is intrinsic to a testament, for without it a testament does not subsist. *§. Ante haeredes, Instit. de legatis, and l. 1. ff. de haeredibus instituendis*, and the Doctors teach, cited in Fagundez, *de contract. l. 6. cap. 1.*; now, however, you except a testament for pious causes. This I gather from D. Bonaventure on chapter 4 of *our Rule*, at the end, where from that he gathers its immobility, since it is the last will; for if many testaments be present, only the last has force, although several codicils may be able to have force, because these do not dispose adequately of the whole right, but of certain parts. He has the same in the *Dicta Tu. 1. cap. 1.*

> ***Quid sit TESTAMENTUM, et quotuplex.***
>
> *TESTAMENTUM ex Ulpiano* Leg. 1. ff. de testamentis *definitur:* Testamentum est voluntatis nostrae iusta sententia de eo, quod quis post mortem suam fieri vult, *cui addit Glossa Accursii, et Bartol.* l. 1. ff. de testamentis cum directa haeredis institutione, *quae particula intrinseca est testamento, sine hac enim testamentum non subsistit.* §. Ante haeredes, Instit. de legatis, et l. 1. ff. de haeredibus instituendis, *et docent Doctores apud Fagundez* de contract. l. 6. cap. 1. *modo tamen testamentum ad causas pias excipias. Haec colligo ex D. Bonav. in caput 4.* Regulae nostrae *ad finem, ubi inde immobilitatem eius colligit, cum sit ultima voluntas; nam si multa adsint testamenta, ultimum tantum valet, etsi plures valere queant codicilli, quia hi non disponunt adaequate de toto iure, sed de quibusdam partibus. Idem habet in* Dicta Tu. 1. cap. 1.

[2] MOREOVER, a Testament is divided into the closed, and the open. A closed testament is that which is composed secretly by the Testator with his own hand, or another's, and with a notary, the witnesses being present and called, and ignorant of what it contains, and it is handed over for approbation. The open, which is also called nuncupative, is that which in the presence of the very witnesses is openly made and declared in words, and for this reason it is called open, and without writings, because although ordinarily it is put in writing, nevertheless it can subsist without writing.

> *DIVIDITUR autem Testamentum in clausum, et apertum. Testamentum clausum est illud, quod secreto a Testatore conditur manu propria, vel aliena, et tabellione, testibusque praesentibus, ac vocatis, et ignorantibus quid contineat, traditur approbandum. Apertum, quod nuncupativum etiam dicitur, est, quod praesentibus ipsis testibus verbis palam fit, et declaratur, et ob hanc causam apertum dicitur, et sine scriptis, quia licet ordinarie in scripto ponatur, tamen sine scripto potest subsistere.*

[3] TO COMPOSE a testament was instituted by the law of nations, although some solemnities have been imposed by the civil law. Thus the Doctors commonly assert: For before the civil law, in which the solemn manner of testaments is provided, existed, testaments already existed before. Thus *Genes. 48.* Jacob left to Joseph the city of Sichem, which he had taken by arms from the Amorrhite.

> *TESTAMENTUM condere ex Iure gentium institutum est, tametsi aliquae solemnitates iure civili sint impositae. Ita communiter Doctores asserunt: Nam antequam ius civile, in quo disponitur modus solemnis testamentorum existeret; iam antea erant testamenta. Sic* Genes. 48. *Iacob reliquit Ioseph urbem Sichem, quam tulerat armis Amorrhaeo.*

[4] From which it follows that a Prince cannot justly take away from anyone a dominion acquired by testament, which he could do if it were of the civil law, as Clarus notes, *l. 1. sent. §. Princeps, and l. 3. §. Testamentum, quaest. 2.* at the end, and Fagundez *l. 6. de contract. cap. 1. num. 10.*

> *Ex quo sequitur, non posse Principem iuste auferre alicui dominium, e testamento acquisitum, quod facere posset, si esset de iure civili, ut advertit Clarus* l. 1. sent. §. Princeps, et l. 3. §. Testamentum, quaest. 2. *in fine, et Fagundez* l. 6. de contract. cap. 1. num. 10.

[5] A CODICIL is defined, *Instit. et C. de codicillis: It is the last disposition of the will, without the direct institution of an heir,* as Molina notes, *Tom. 1. de iust. tract. 2. disp. 124.*

> *CODICILLUS definitur,* Instit. et C. de codicillis: Est ultima voluntatis dispositio, sine directa haeredis institutione, ut *notat Molina* Tom. 1. de iust. tract. 2. disp. 124.

[6] A LEGACY is a certain donation left in a testament, to be paid after the death of the testator by the heir, *§. 1. Instit. de Legatis: of which in the following disputation.*

> *LEGATUM est donatio quaedam in testamento relicta post mortem testatoris ab haerede solvenda,* §. 1. Instit. de Legatis: de quo seq. disp.

[7] A FIDEICOMMISSUM is a legacy which is committed to the faith of the heir, that it be rendered by him to another: Moreover it is called a fideicommissum, a species of the more urbane legacy; for it is made by the words, *I wish, I ask,* but it has no less force than I command, etc., as is gathered from *Leg. et fidei commissum, ff. de Legatis 3.*

> *FIDEICOMMISSUM est legatum, quod fidei haeredis commissum est, ut alteri ab eo praestetur: Dicitur autem fideicommissum species legati urbanioris; fit enim per verba,* volo, peto, *sed valet non minus, quam praecipio, etc. ut colligitur ex* Leg. et fidei commissum, ff. de Legatis 3.

## Question II: What solemnity is required for a testament, closed and open

1 BY the common law, for the validity of a testament in writing there are required seven witnesses, male, free, or held as free, of age, and requested for that act not by chance, and present, likewise subscribed, before whom the testator declares that this is his testament, and he subscribes it, if he knows how to write; otherwise let him have it subscribed through another as an eighth witness.

> ***Quae solemnitas requiratur ad Testamentum clausum, et apertum.***
>
> *DE iure communi ad valorem testamenti in scriptis requiruntur septem testes masculi, liberi, aut qui pro liberis habeantur, puberes, et rogati ad eum actum non fortuito, et praesentes, itemque subscripti, coram quibus testator declaret, suum illud esse testamentum, illudque subscribat, si scribere sciat; alias per alium octavum testem subscribi faciat.*

2 FOR the nuncupative testament it is further required that the witnesses hear the testator and understand his will; yet the witnesses need not subscribe or sign the testament itself *l. Hac consultissime, C. de Testam.* where it is added, *if any of these is lacking, the testament is not valid.* The same is laid down in *Instit. de testam. §. sed paulo infra.*

> *AD Nuncupativum vero exigitur etiam, ut testes audiant testatorem, et intelligant voluntatem illius, non tamen opus est, ut testes subscribant, aut signent ipsum testamentum* l. Hac consultissime, C. de Testam. *ubi subiungitur,* si aliquid horum desit, testamentum non valere. *Idem disponitur* Instit. de testam. §. sed paulo infra.

3 IN codicils, however, and any other last will, regularly five witnesses must be employed, whether requested or chance witnesses. When indeed it is done in writing, they must subscribe *L. ult. C. de codicillis*, and in these women too can be witnesses; except the codicils of the blind, in which the solemnity of testaments is necessary *L. Hac consultissime, C. de his qui testamenta facere possunt.*

> *IN Codicillis vero, et quavis alia ultima voluntate regulariter quinque testes, vel rogati, vel fortuiti adhibendi. Quando sane fit in scripto, debent subscribi* L. ult. C. de codicillis, *et in his etiam foeminae possunt esse testes; Exceptis codicillis caecorum, in quibus solemnitas testamentorum est necessaria* L. Hac consultissime, C. de his qui testamenta facere possunt.

4 FOR the validity of a testament it is also required that the witnesses be requested, which must be proved by two witnesses without exception.

> *AD valorem testamenti requiritur etiam, ut testes sint rogati, quod probari debet duobus testibus, non patientibus exceptionem.*

5 FOR a sealed Testament it is also required that the witnesses be present when the testator hands it with his own hand to the Notary, and hear him saying that it is his Testament.

> *AD Testamentum clausum requiritur etiam, ut testes praesentes sint, quando testator manu propria illud Notario tradit, et audiant dicentem, illud esse suum Testamentum.*

6 It is also required that the witnesses themselves all subscribe together, and if they do not know how, others do this in their name. Note, however, that witnesses who are subscribed are not valid for legacies, or the inheritance disposed in the same testament, as is had in the law, as Molina notes *disput. 125.* and Fagundez *cap. 2. num. 25.*

> *REquiritur etiam, ut ipsi testes subscribant omnes simul, et si nesciant, alii nomine eorum hoc faciant. Adverte autem testibus subscriptis non valere legata, vel haereditatem in eodem testamento disposita, ut habetur in iure, et notant*

*Molina* disput. 125. *et Fagundez* cap. 2. num. 25.

7 IN time of plague, two or three witnesses suffice, as is commonly taught. The law, however, though it relaxes the number of witnesses, does not relax the conditions, that they be male, of age, etc. In codicils, however, women can also be witnesses. See Fagundez.

*TEmpore vero pestis, duo, vel tres sufficiunt testes, ut docent communiter. Ius tamen, licet remittat numerum testium, non remittit conditiones, ut sint masculi, puberes, etc. In codicillis vero possunt esse etiam foeminae. Vide Fagundez.*

8 IT is put into the testament, that if it be not valid as a testament, it may be valid as a codicil in every better way, which clause, once added, was inserted, as if the solemnity of the testament be lacking, whence it is made null; let it be valid with the solemnity of a codicil *l. finali, §. Illud quoque, C. de Codicillis*, in such a way that, although the direct institution of an heir is null, the legacies left in it are nevertheless valid: Nay, even, when the necessary heirs fail, the institution of an extraneous heir be converted into a fideicommissary one, and the heirs ab intestato be bound to restore the inheritance to him, with only the Trebellian quarter deducted from it: likewise, if the testator in his testament unjustly passes over some necessary heir, and institutes an extraneous heir, then the heir passed over is bound to restore the remainder of the inheritance to the extraneous one, his own legitimate portion alone reserved to him, as Molina proves from the law *disp. 132.* Less. *l. 2. cap. 19. dub. 1.* Tanner. *disp. 4. quaest. 7. num. 305.*

*APponitur in testamento, ut si non valeat pro testamento, valeat pro codicillo, omni meliori modo, quod additum inseruit, ut si deficiat solemnitas testamenti, unde fiat nullum; valeat solemnitate codicilli* l. finali, §. Illud quoque, C. de Codicillis*, ita quidem, ut, quamvis directa haeredis institutio sit nulla; valida tamen sint legata in eo relicta: Imo etiam, deficientibus haeredibus necessariis, institutio haeredis extranei convertatur in fidei commissariam, haeredesque ab intestato teneantur illi restituere haereditatem, detracta sibi solum quarra Trebellianica: itemque si testator testamento iniuste praetereat aliquem haeredem necessarium, instituatque haeredem extraneum, tunc haeres praetermissus teneatur extraneo restituere reliquum haereditatis, servata sibi solum sua legitima portione, ut ex iure probat Molina* disp. 132. *Less.* l. 2. cap. 19. dub. 1. *Tanner.* disp. 4. quaest. 7. num. 305.

9 YOU will ask: whether a testament begun, but not completed because death supervened, is valid for that part by which it was begun.

*QUaeres: an testamentum inceptum, sed morte superveniente non completum, valeat pro ea parte, qua inceptum.*

10 IT is answered negatively; nay, even if it be completed, and he die before it is read, it will still be invalid *l. fideicommissum, §. Quoque, ff. de Legatis 3.* according to Bartolus and others. See Molina *disp. 127.* Couar. *de Testam. C. relatum 1. num. 9.*

*REspondetur negative; imo si completum sit, et antequam legatur, decedat, erit adhuc invalidum* l. fideicommissum, §. Quoque, ff. de Legatis 3. *iuxta Bartolum, et alios. Vide Molinam* disp. 127. *Couar.* de Testam. C. relatum 1. num. 9.

11 SINCE, however, in *C. Relatum*, and *cap. cum omnes, de testamentis*, it is decreed that the testament of clerics be valid even for non-pious things with two suitable witnesses, and the parish Priest, present. And indeed in the Ecclesiastical state it is valid.

*QUoniam vero in* C. Relatum*, et* cap. cum omnes, de testamentis*, decernitur, ut clericorum testamentum valeat etiam ad non pia, duobus testibus idoneis, et Presbytero parochiali, praesentibus. Et quidem in statu Ecclesiastico valet.*

12 THE question is: whether it is valid also in the states of all Princes.

> *QVaestio est: an sit validum etiam in statibus Principum omnium.*

13 SOME deny it, as in Fagundez *cap. 2. num. 28.*

> *ALiqui negant apud Fagundez* cap. 2. num. 28.

14 YET, that it is valid, Julius Clarus asserts *l. 3. sent. quaest. 6.* Sylvest. *v. Testam. 1. quaest. 3.* Vallascus *consult. 74.* and others, as in the Gloss on *cap. cum esses, de testam.*

> *ATtamen, valere asserunt Iulius Clarus* l. 3. sent. quaest. 6. *Sylvest.* v. Testam. 1. quaest. 3. *Vallascus* consult. 74. *et alii apud Glossam in* cap. cum esses, de testam.

15 IT is proved from *cap. cum esses, de testam.* where the supreme Pontiff derogates from the laws of secular Princes in this part: for Alexander III., most expert in law, says there to the Bishop of Ostia that two witnesses suffice with the presence of the parish priest, and he rejects the contrary custom that had prevailed in that Episcopate, lest the testaments of clerics, etc.; and the reason is given, *because upon the mouth of two or three witnesses every word stands.*

> *PRobatur ex* cap. cum esses, de testam. *ubi summus Pontifex derogat legibus Principum saecularium hac in parte: ait enim ibi Alexander III. iuris peritissimus, ad Episcopum Hostiensem, sufficere duos testes cum praesentia presbyteri parochialis, et reprobat consuetudinem contrariam, quae in eo Episcopatu obtinuerat, ne testamenta clericorum, etc. reddique rationem,* quia in ore duorum, vel trium testium stat omne verbum.

16 NAY, *C. cum esses, de testamentis* seems to speak even of the testaments of the Laity, and of these the passages cited speak. The canonical law, moreover, relies on the fidelity of the Parish priest, who, if he is faithful in the greater matter, namely the business of the soul, will be faithful also in the business of things. The canonical law judges the same of the Judge, and of the cleric Notary, namely that their presence with two witnesses will exclude all fraud; yet the witnesses must be suitable, as Couar. warns *ad cap. cit. not women.*

> *IMo de testamentis etiam Laïcorum videtur loqui* C. cum esses, de testamentis *et de his loquuntur allati. Confidit autem Ius canonicum fidelitate Parochi, qui si fidelis est in maiori, nempe negotio animae, erit fidelis etiam in negotiis rerum. Idem censet Ius canonicum de Iudice, et clerico Notario, nempe eorum cum duobus testibus praesentiam, exclusuram omnem fraudem; debent tamen esse testes idonei, ut monet Couar.* ad cap. cit. non foeminae.

17 FOR the negative is the more common view, as Fagund. says *l. 6. cap. 2. num. 30.* and it avoids litiis and controversies; but in the matter of testaments the safer way must be trodden. The Decree of Alex. III., moreover, was made for the Episcopate of Ostia and other places of the Church; nor is it credible that the Pope wished to derogate everywhere on earth from a law so common and celebrated among all Princes. So Zabatella, Archid. Ioan. Andr. and others *ad C. illud, cum esses;* with whom Fagund. subscribes *num. 38.*

> *ENim vero negativam esse communiorem ait Fagund.* l. 6. cap. 2. num. 30. *eamque lites et controversias vitare; in materia autem testamentorum via securior calcanda est. Decretum vero Alex. III. factum est pro Episcopatu Ostiensi, et aliis locis Ecclesiae; Neque credibile est, Papam voluisse ubique terrarum derogare iuri adeo communi, ac celebrato ab omnibus Principibus. Ita Zabatella, Archid. Ioan. Andr. et alii* ad C. illud, cum esses; *quibus subscribit Fagund.* num. 38.

18 NOTE also that testaments made by parents among their children are valid with only two witnesses present, and the same is laid down of testaments for pious causes, *l. Hac consultissima, §. ex imperfecto, C. qui testamentum facere possunt, et l. ult. C. Familia Erciscundae;* witnesses suffice whether male or female. And by sons are understood also grandsons and descendants. Yet in a sealed testament the subscription must be made by the testator, or by the children instituted by him, according to *Auth. si modo, C. familia erciscundae*, or at least let the testator write distinctly the names of the sons whom he leaves as heirs with their portions, with the time added at which the testament is drawn up, according to *Auth. Quod sine, C. de testamentis*.

> *ADverte etiam, testamenta condita a parentibus inter liberos valere, solis duobus testibus praesentibus, et idem disponitur de testamentis ad pias causas,* l. Hac consultissima, §. ex imperfecto, C. qui testamentum facere possunt, et l. ult. C. Familia Erciscundae; *sufficiunt vero testes, sive masculi, sive foeminae. Et per filios intelliguntur etiam nepotes, et descendentes. Debet tamen in testamento clauso fieri subscriptio a testatore, vel a liberis ab eo institutis, iuxta* Auth. si modo, C. familia erciscundae*, vel certe testator scribat distincte nomina filiorum, quos relinquit haeredes cum suis portionibus, addito tempore, quo testamentum conficit iuxta* Auth. Quod sine, C. de testamentis.

19 BUT if besides the children some extraneous person is mixed into that testament, it is invalid as regards her, and what was left devolves upon the children *ex l. ult.* as Molina pursues at length *disp. 128.* Tanner. *disp. 4. quaest. 7. dub. 11. num. 304.*

> *QVod si praeter liberos in eo testamento aliqua persona extranea admisceatur, invalidum est quoad eam, et relictum devolvitur ad filios* ex l. ult. *ut late prosequitur Molina* disp. 128. *Tanner.* disp. 4. quaest. 7. dub. 11. num. 304.

20 NOTE that a testament made before the Prince is valid without the solemnities. *L. omnium, C. de testam.* Likewise the testament of a soldier, which is valid with only two witnesses, even women *l. Divus, ff. de militari testam.* Nay, when he is engaged in battle, any signs whatsoever suffice, as is had in the *Bavarian law*, that he may write in blood on his shield, scabbard, etc., and two witnesses prove his Chyrograph. See Bassaeus *num. 3*.

> *ADverte, testamentum factum coram Principe valere absque solemnitatibus.* L. omnium, C. de testam. *Item testamentum militis, quod validum est cum duobus tantum testibus, etiam foeminis* l. Divus, ff. de militari testam. *Imo, cum in praelio versatur, sufficiunt quaecumque signa, ut habetur* iure Bavarico*, ut scribat sanguine in clypeo, vagina, etc. et eius Chyrographum probent duo testes. Vide Bassaeum* num. 3.

### Question III: Who can and ought to make a testament, or be instituted heirs

1 I ASSERT first, that all those, and only those, can make a testament who, having the use of reason, have a peculium, unless they are prohibited by law. They are prohibited, first, the Under-age. Second, sons under paternal power, except as regards castrense, or quasi-castrense goods: likewise as regards adventitious goods, which they have acquired after entering the clerical state, except for pious causes with the father's consent. Third, those intestable by law on account of the crime of a deed *l. Is cui. Et l. cum lege, ff. Qui testam. et C. Falcidia, de poenis in 6.* and other laws. Fourth, Religious, except by concession of the supreme Pontiff for pious causes. Fifth, those condemned to natural or civil death, and to perpetual prisons, except for pious causes. All which the law proves and declares more fully, as Sylvester *verb. Testam. 1. quaest. 3. et 4.* Molina *T. 1. disp. 136. ad 138. et* Less. *l. 2. cap. 19. dub. 4.*

> Qui possint, et debeant testari, aut haeredes institui.

*ASsero primo, omnes illos, et solos posse testari, qui rationis usum habentes, peculium habent, nisi iure prohibeantur. Prohibentur vero primo Impuberes. Secundo filiifamilias, nisi de bonis castrensibus, vel quasi castrensibus: Item de adventitiis, quae post clericatum consecuti sunt, nisi ad pias causas ex patris consensu. Tertio ob crimen facti iure intestabiles* l. Is cui. Et l. cum lege, ff. Qui testam. et C. Falcidia, de poenis in 6. *aliaque iura. Quarto Religiosi, nisi ex concessione summi Pontificis ad pias causas. Quinto damnati ad mortem naturalem, vel civilem, carceresque perpetuos, nisi ad pias causas. Quae omnia ex iure fusius probant, et declarant Sylvester* verb. Testam. 1. quaest. 3. et 4. *Molina* T. 1. disp. 136. ad 138. et *Less.* l. 2. cap. 19. dub. 4.

2 ALTHOUGH, speaking per se (where the paying of due debts, or the avoidance of litiis, or scandals, does not require it) no one is held under grave obligation to make a testament; yet those sin gravely against justice who prevent anyone from freely making a testament, or from changing, if he wishes, a testament already made, and who try to restore to those to whom the goods of the deceased would have come. And in the external forum, besides other penalties, they are deprived of every emolument of the goods of such a deceased person, according to *l. 1. et 2. ff. si quis aliquem Testam. prohib. l. 2. C. eodem titulo, Leg. Testamenti, C. de inoff. Testam.* as Molina proves *disp. 135.*

*QVamvis autem per se loquendo (ubi debita solvenda, vel lites, aut scandala vitanda id non exigunt) nemo sub gravi obligatione teneatur testamentum facere; graviter tamen contra iustitiam peccant ii, qui impediunt, ne quis libere testetur; aut ne quis mutet, si velit, testamentum iam factum, et tentent restituere iis, ad quos bona defuncti fuissent perventura. Et in foro externo, praeter alias poenas, privantur omni emolumento bonorum talis defuncti, iuxta* l. 1. et 2. ff. si quis aliquem Testam. prohib. l. 2. C. eodem titulo, Leg. Testamenti, C. de inoff. Testam. *ut probat Molina* disp. 135.

3 I ASSERT second: Heirs, or legatees, cannot first be instituted as heretics, apostates, and those adhering to them *Leg. fin. Cod. de haeret. et Leg. hi, qui sanctum, Cod. de Apost.* Second, those who persecute Cardinals, and strike or capture them, *C. felicis, ne panis in 6.* Third, the Intestable on account of crime, as above. Fourth, the Friars Minor, and not a few other religious, who nevertheless can receive Legacies under the title of alms, as Clement V. declares in *Exivi de Paradiso.*

*ASSERO secundo: Haeredes, vel legatarii institui non possunt primo haeretici, apostatae, iisque adhaerentes* Leg. fin. Cod. de haeret. et Leg. hi, qui sanctum, Cod. de Apost. *Secundo qui persequuntur Cardinales, eosque percutiunt, vel capiunt,* C. felicis, ne panis in 6. *Tertio IntestabiIes ob crimen, ut supra. Quarto fratres Minores, nonnullique alii religiosi, qui tamen ad titulum eleemosynae possunt recipere Legata, ut declarat Clemens V.* Exivi de Paradiso.

4 THE inheritance can also be left in their favor, that it be sold by executors and the price given to them, as Less. teaches *l. 2. cap. 19. dub. 5.*

*POTEST etiam in eorum favorem haereditas relinqui, ut per executores vendatur, et detur eis pretium, ut docet Less.* l. 2. cap. 19. dub. 5.

5 I ASSERT third, that the necessary heirs are the sons, grandsons, etc., and in default of these the ascendants; the Father, and Mother, and when these fail the Grandfather, Great-grandfather, as Molina declares *disp. 159.*

*ASSERO tertio, haeredes necessarios esse filios, nepotes, etc. et in horum defectum ascendentes; Patrem, et Matrem, et his deficientibus Avum, Proavum, ut declarat Molina* disp. 159.

6 A distinction must be made concerning illegitimate sons: for Natural children, who are from simple fornication, can be instituted heirs, even universal heirs, if they themselves have no legitimate offspring, *Leg. licet Cod. de fil. natur.* nay, they even succeed to their mother ab intestato in full if she

lacks legitimate children; but if she has legitimate ones, they succeed equally with them *Leg. si qua illustris, Cod. ad Senatusconsult. Orficianum.* To the father, however, if he lacks legitimate children, they do not succeed ab intestato except in two unciae, that is, in the sixth part of the goods, according to *Leg. licet, Cod. de filiis natur.* Yet even those having legitimate sons can leave them an Uncia, that is, a twelfth part of the goods.

> *De filiis illegitimis est distinguendum: Naturales enim, qui e simplici fornicatione sunt, possunt haeredes institui, etiam universales, si ipsi legitimas proles non habeant,* Leg. licet Cod. de fil. natur. *quin etiam matri, carenti legitimis, succedunt ab intestato ex asse: habenti autem legitimos succedunt ex aequo cum illis* Leg. si qua illustris, Cod. ad Senatusconsult. Orficianum. *Patri vero carenti legitimis non succedunt ab intestato, nisi in duabus unciis, hoc est in sexta parte bonorum, iuxta* Leg. licet, Cod. de filiis natur. *Potest tamen etiam ab habentibus filios legitimos eis relinqui Uncia, hoc est pars duodecima bonorum.*

7 BUT Spurii, who are from a union condemned by the laws, cannot receive anything from their father *leg. Licet Cod. de natur. lib. et Novella 74. cap. 6.*

> *AT vero Spurii, qui ex damnato a legibus concubitu sunt, non possunt aliquid a patre accipere* leg. Licet Cod. de natur. lib. et Novella 74. cap. 6.

8 Yet the Spurius can receive aliments, and his parents owe them, if he has them from no other source *cap. cum haberet de eo, qui duxit in matrim.* notwithstanding the civil law *Leg. ex complexu Cod. de Incest. nupt.* for it was rightly derogated from by the canons. Whence it follows that to a spurious daughter a dowry is owed, which takes the place of aliments, even if the parent be a priest. So Nauar. in *C. Non liceat, §. 19. Couar. ibi, num. 15.* Less. *lib. 2. cap. 19. dub. 6.* Nay, Henriquez *cap. 20. num. 4.* thinks that these aliments can be left to spurious children even if they are not in need, which Less. does not disapprove *num. 69.* But the Mother is bound, if she can, to nourish the son during the first triennium, at the end of which the father is bound, until the son can do so by his own industry, *l. Haec filium, Cod. de patr. potestate, et C. fin. de convers. infid.* as Couar. teaches *num. 19.* Molina *disp. 169.* Lessius *num. 70.* Tannerus *disput. 4. quaest. 7. dubio 11.*

> *Potest tamen Spurius recipere alimenta, et parentes ea debent, si aliunde non habeat* cap. cum haberet de eo, qui duxit in matrim. *non obstante iure civili* Leg. ex complexu Cod. de Incest. nupt. *huic enim merito per canones derogatum est. Quo fit, ut filiae spuriae debeatur dos, quae in locum alimentorum succedit, etiamsi parens fuerit sacerdos. Ita Nauar. in* C. Non liceat, §. 19. Couar. ibi, num. 15. *Less.* lib. 2. cap. 19. dub. 6. *Imo Henriquez* cap. 20. num. 4. *putat, haec alimenta spuriis relinqui posse, etiamsi ipsi non egeant, quod non improbat Less.* num. 69. *Tenetur autem Mater, si potest, alere filium primo triennio, quo finito, tenetur pater, donec filius sua industria id possit,* l. Haec filium, Cod. de patr. potestate, et C. fin. de convers. infid. *et docet Couar.* num. 19. *Molina* disp. 169. *Lessius* num. 70. *Tannerus* disput. 4. quaest. 7. dubio 11.

9 YOU ASK, what Substitution is, and that it is fourfold.

> *QUAERES, quid sit Substitutio, et quadruplex.*

10 IT is answered, with Tannerus *n. 314. disp. 4. quaest. 7.* that it is a vocation, made in a last will, of one or more into the place of another or others, to some thing, which generically is twofold, *Direct, and Indirect*, according to Molina *t. 1. disp. 182.*

> *RESPONDETUR cum Tannero* n. 314. disp. 4. quaest. 7. *esse unius, aut plurium in alterius, aut aliorum locum ad rem aliquam, in ultima voluntate factam, vocationem, quae generatim duplex est,* Directa, et Indirecta, *iuxta Molinam* t. 1. disp. 182.

11 EACH of these again is sixfold, namely vulgar, pupillary, exemplary, fideicommissary, reciprocal, and compendious, of which the first four are simple; the last two are composed of several.

> *UTRAQUE rursus sextuplex est, nimirum vulgaris, pupillaris, exemplaris, fideicommissaria, reciproca, et compendiosa, e quibus quatuor priores sunt simplices; duae vero postremae compositae e pluribus.*

12 VULGAR substitution is that by which the testator substitutes to the heir, whether instituted by himself or succeeding ab intestato, any other person not prohibited by law, in the case that he will not, or cannot, be heir.

> *SUBSTITUTIO vulgaris est, qua testator aliam quamvis personam, iure non prohibitam, haeredi, sive a se instituto, sive ab intestato succedenti substituit casu, quo ipse nolit, vel non possit esse haeres.*

13 PUPILLARY substitution is that by which he substitutes someone to an under-age child placed under his power, if that child should die before puberty; whence it comes about that not only the goods of the pupil left by the father, but also other things, come to the substitute; according to *§. Igitur, Instit. de pupil. substit.*

> *SUBSTITUTIO pupillaris est, qua proli impuberi sua potestate constitutae aliquem substituit, si is ante pubertatem decesserit; qua fit, ut non solum bona pupilli, a patre relicta, sed etiam alia ad substitutum perveniant; iuxta §.* Igitur, Instit. de pupil. substit.

14 EXEMPLARY substitution (as if invented on the pattern of the pupillary) is that by which substitution is made to a son who is demented, or deaf and mute at once, or a prodigal; which therefore also contains the vulgar one, should it happen that the son die before the testator. But if the son be under age, the same substitution will also be pupillary, etc.

> *SUBSTITUTIO exemplaris (velut ad exemplum pupillaris inventa) est, qua filio amenti, vel surdo simul et muto, vel prodigo fit substitutio; quae proinde etiam vulgarem continet, si contingat, filium mori ante testatorem. Quod si filius sit impuber, eadem substitutio erit etiam pupillaris, etc.*

15 FIDEICOMMISSARY substitution is that by which the heir is burdened to restore the whole inheritance, or a certain portion of it, to another, who is called the fideicommissary; and since it is a substitution introduced, it can also be made by Codicil.

> *SUBSTITUTIO fideicommissaria est, qua haeres gravatur, ut haereditatem totam, vel partem eius aliquotam restituat alteri, qui fideicommissarius dicitur, quae cum sit substitutio inducta, potest etiam fieri Codicillo.*

16 RECIPROCAL substitution is that by which those instituted are substituted to one another in turn; as if you were to say: I institute as heirs Peter and John, and I substitute these to each other.

> *SUBSTITUTIO reciproca est, qua instituti sibi vicissim substituuntur; ut si dicas: Instituo haeredes Petrum, et Ioannem, et hos sibi invicem substituo.*

17 COMPENDIOUS substitution is that which contains several substitutions according to diverse times, and ages, or conditions of those who are substituted.

> *SUBSTITUTIO compendiosa est, quae plures continuit substitutiones secundum diversa tempora, et aetates, seu conditiones eorum, qui substituuntur.*

18 YOU ASK what is called the legitimate portion, which ought always to be Salic for heirs legitimately to be instituted.

*QUAERES, quae dicatur legitima, quae haeredibus legitime instituendis semper Salica esse debet.*

19 BY the Caesarean law it is had that, if the testator has four sons, or fewer, a third part of the goods be divided equally among them; but if there are more, the half part of the goods be divided. See Molina *disp. 158.* With respect, however, to the ascendants, the Father and Mother, it is a third part *Auth. de triente, et semisse, §. 1. et gloss. ibi.*

*IURE Caesareo habetur, quod si testator quatuor filios habeat, vel pauciores, tertia bonorum pars aequaliter inter eos dividatur; si vero plures sint, media pars bonorum dividatur. Vide Molinam* disp. 158. *Respectu vero ascendentium Patris, et Matris est tertia pars* Auth. de triente, et semisse, §. 1. et gloss. ibi.

20 BUT the legitimate portion ought to be left free *leg. quoniam in prioribus, Cod. de inofficioso testam.* See Molina *t. 1. disput. 177.* Fagund. *l. 6. cap. 13. num. 19.*

*DEBET autem legitima relinqui libera* leg. quoniam in prioribus, Cod. de inofficioso testam. *Vide Molinam* t. 1. disput. 177. *Fagund.* l. 6. cap. 13. num. 19.

21 NOTE that in default of ascendants and descendants, even if the testator has collateral kinsmen and brothers, it is free for him to institute as heir even an extraneous person *§. 1. Instit. de inoffi. test. lib. fratres, Cod. eodem.*

*NOTA in defectu ascendentium, et descendentium licet testator habeat cognatos collaterales, et fratres, liberum ei esse instituere haeredem etiam extraneum* §. 1. Instit. de inoffi. test. lib. fratres, Cod. eodem.

22 Yet if he leave the inheritance to an infamous person, the brother will be able to act for the rescission of the testament, provided he be not merely uterine, etc., according to the same laws.

*Si tamen haereditatem relinquat infami, poterit frater agere ad testamenti rescissionem, dummodo non sit mere uterinus, etc. iuxta iura eadem.*

23 But to this testator, when free, poor kinsmen are commended, on whom he may have mercy, and that he not institute unfit heirs, whom Sylvest. enumerates *v. haereditas 3. quaest. 1. et alii Summistae.*

*Huic vero testatori libero commendantur propinqui pauperes, quibus misereatur, et ne inhabiles haeredes instituat, quos recenset Sylvest.* v. haereditas 3. quaest. 1. et alii Summistae.

24 In these Sylvest. enumerates the excommunicate, but wrongly, as Suar. proves *3. p. t. 5. disp. 15. sect. 9. et* Ioan. Baptist. Villalob. *l. com. op. v. Excommunicatio.* Heretics, however, and others expressly designated by the law, are excepted, as Fagund. notes *loc. cit. num. 21.*

*In his recenset Sylvest. excommunicatos, sed male, ut probat Suar.* 3. p. t. 5. disp. 15. sect. 9. et *Ioan. Baptist. Villalob.* l. com. op. v. Excommunicatio. *Excipiuntur tamen haeretici, et alii iure expressi, ut notat Fagund.* loc. cit. num. 21.

25 NOTE that all who are not prohibited by law can be executors of testaments. It happened, however, that one of ours, dying, when he had been left by his Father to assist his demented brother, with the faculty of naming another at death, named another; it was asked whether he had done this licitly.

*NOTA executores testamentorum esse posse omnes, qui iure non prohibentur. Accidit vero, ut unus e nostris moriens, cum esset a suo Patre relictus ad assistendum suo fratri amenti, cum facultate alium in morte nominandi, alium nominauerit, quaesitum fuit, an id licite fecisset.*

26 IT IS ANSWERED affirmatively, because, although the Friars Minor cannot become executors of last wills, according to *Clem. Exivi, §. Proinde iur. Sanctus, de verb. signif.* they can nevertheless name executors with the license of a superior. So Rodriq. *t. 3. qq. Reg. quaest. 70. art. 2. et in summa, p. 2. cap. 70.* Vecchis *Praxi, disp. 8. dub. 13.* Couar. *in C. Tua nos, num. 1. de testam.* Sanch. *l. 6. Moral. cap. 11.* Diana *p. 8. tract. 5. resol. 13.* where he enumerates 25 Doctors in this opinion. Nay, Bassaeus our own adds to them that it is probable that the same Friars Minor, and a fortiori the others, can be constituted, with the license of their Superiors, Commissaries for making a testament in the name of the one committing it.

> *RESPONDI assertiue, quia, licet fratres Minores nequeant fieri, ultimarum voluntatum executores, iuxta* Clem. Exivi, §. Proinde iur. Sanctus, de verb. signif. *possunt tamen nominare executores de licentia superioris. Ita Rodriq.* t. 3. qq. Reg. quaest. 70. art. 2. et in summa, p. 2. cap. 70. *Vecchis* Praxi, disp. 8. dub. 13. *Couar.* in C. Tua nos, num. 1. de testam. *Sanch.* l. 6. Moral. cap. 11. *Diana* p. 8. tract. 5. resol. 13. *ubi in hanc sententiam 25. Doctores enumerat. Imo cum eis addit Bassaeus noster, probabile esse, eosdem fratres Minores, et a fortiori caeteros, posse constitui, de licentia suorum Superiorum, Commissarios, ad faciendum testamentum nomine committentis.*

27 IN explanation of the decree of Clement I say that there the matter concerns properties, and therefore the friars are excluded from executing it by their own authority, but not by the authority of another, the testator's, for the doing of the work. Thus I explain D. Bonav. epist. ad Provinciales.

> *AD declarationem Clement. dico ibi agi contra proprietates, ideo excludi fratres propria authoritate id exequi, non autem authoritate aliena testatoris ad operandum. Sic explico D. Bonav. epist. ad Provinciales.*

## Question IV: Whether an heir instituted in a testament invalid at civil law through defect of solemnity can take the inheritance in the forum of conscience, despoiling the heir who succeeds on intestacy

1 THE first opinion is that the will of the testator is to be executed, and consequently that the heir, though invalid by civil law, can in conscience take possession of the inheritance. So Innoc. in cap. sicut de elect. and in cap. celebrata de cler. excom. Abbas in cap. Quae plerique, de immun. Eccl. Iason. in l. Nemo potest, de legatis, where it is had expressly from c. ultima voluntas, 13. quaest. 2. deduced from the Decretals of D. Gregory Pope there: *The last will of the deceased ought to be preserved in every way.* Which the Doctors understand of testaments of this kind. So also Bartholus in Minor. l. 1. cap. 3. ad l. Nemo potest, ff. de legatis 1. and other Jurists, as in Couar. in cap. cum esses, de testam. Fagundium de contr. l. 6. cap. 7. Sotus l. 4. de iust. quaest. 5. art. 3. Medin. de rebus restituat. quaest. 23. Adrian. quodl. 6. Molina T. 1. de iust. disp. 81. Less. l. 2. cap. 19. dub. 3. Sylvest. v. haered. quaest. 7. Reginald. l. 25. num. 105. Bassaeus v. Haeres.

> An possit haeres institutus in testamento, e defectu solemnitatis invalido iure civili, haereditatem in conscientia foro adire, spoliando haeredem succedentem ab intestato.
>
> *PRIMA opinio est exequendam voluntatem testatoris, ac proinde in conscientia posse haeredem illum, iure civili invalidum, adire haereditatem. Ita Innoc. in cap. sicut de elect. et in cap. celebrata de cler. excom. Abbas in cap. Quae plerique, de immun. Eccl. Iason. in l. Nemo potest, de legatis, 1. habetur expresse ex c. ultima voluntas, 13. quaest. 2. deducto e Decretalibus D. Greg. Papae ibi:* Ultima voluntas defuncti, modis omnibus servari debet. *Quod intelligunt Doctores de testamentis huiusmodi. Ita et Bartholus in Minor. l. 1. cap. 3. ad l. Nemo potest, ff. de legatis 1. et alii Iuristae apud Couar. in cap. cum esses, de testam. Fagundium de contr. l. 6. cap. 7. Sotus l. 4. de iust. quaest. 5.*

*art. 3. Medin. de rebus restituat. quaest. 23. Adrian. quodl. 6. Molina T. 1. de iust. disp. 81. Less. l. 2. cap. 19. dub. 3. Sylvest. v. haered. quaest. 7. Reginald. l. 25. num. 105. Bassaeus v. Haeres.*

2 THE NEGATIVE, on the contrary, is upheld by Cevallos l. 2. contr. com. quaest. 71. Bald. in l. 1. num. 55. C. de Sacros. Eccles. Couar. in cap. cum esses de testam. de Gomez in l. 3. Tauri, num. 121. Spino in speculo testam. gloss. 8. Cenedo 2. p. collect. 67. ad Decretal. Menchaca de success. creat. §. 2. Gutierrez l. 2. qq. Canonic. cap. 5. Cervant in l. 3. Tauri, num. 189. Ledesm. 2. 4. quaest. 18. art. 1. dub. 12. Victoria 2. 2. de restitut. initio, Sotus l. 4. de iust. quaest. 5. art. 3.

*NEGATIVAM e regione sustinent Cevallos l. 2. contr. com. quaest. 71. Bald. in l. 1. num. 55. C. de Sacros. Eccles. Couar. in cap. cum esses de testam. de Gomez in l. 3. Tauri, num. 121. Spino in speculo testam. gloss. 8. Cenedo 2. p. collect. 67. ad Decretal. Menchaca de success. creat. §. 2. Gutierrez l. 2. qq. Canonic. cap. 5. Cervant in l. 3. Tauri, num. 189. Ledesm. 2. 4. quaest. 18. art. 1. dub. 12. Victoria 2. 2. de restitut. initio, Sotus l. 4. de iust. quaest. 5. art. 3.*

3 THESE, however, are divided; for Sotus, Victoria, and others in Couar. hold that the civil laws concede to the successor ab intestato restitution in the external forum, and retention in the internal, not the translation of dominion to him, but to prevent its being transferred. Others, however, concede even this, with whom subscribe Malderus, Salas, Becanus, Vasquez, Bonacina, and others, as in Diana p. 1. tract. 8. resol. 75.

*DIVISI tamen sunt hi; nam Sotus, Victoria, et alii apud Couar. volunt, iura civilia concedere successoris ab intestato repetitionem in foro externo, et retentionem in interno, non dominii in eos translationem, sed impedire ne transferatur. Alii vero hanc etiam concedunt, quibus subscribit Malderus, Salas, Becanus, Vasquez, Bonacina, et alii apud Dianam p. 1. tract. 8. resol. 75.*

4 THIS seems to be the opinion of D. Bonav. in 2. dist. 44. art. 2. et 3. and in 4. dist. 18. D. Thom. 1. 2. quaest. 62. art. 4. and of as many as assert that the laws of Princes oblige also in the forum of the pole, whom I cited in tract. de Legibus, disp. 5. quaest. 1. et 2.

*HAEC videtur sententia D. Bonav. in 2. dist. 44. art. 2. et 3. et in 4. dist. 18. D. Thom. 1. 2. quaest. 62. art. 4. et quotquot asserunt, leges Principum iustas obligare etiam in foro Poli, quos retuli tract. de Legibus, disp. 5. quaest. 1. et 2.*

5 THIS grave decision is extended to all civil contracts, so that those who are void by civil law are such also in the forum of conscience.

*HAEC gravis decisio extenditur ad omnes contractus civiles, ut qui iure civili sunt irriti; tales sint etiam in foro conscientiae.*

6 MANY, however, follow a middle way, that if the will of the testator be fully established, the heir instituted in a less solemn testament can retain the inheritance. This common opinion Fagund. strengthens num. 6. with Couar. ad cap. cum esses, de testam. and with the authors of the first opinion they bring forward others.

*MULTI tamen mediam sectantur viam, ut si de testatoris voluntate plena constet, e testamento minus solemni possit haeres institutus haereditatem detinere. Hanc communem sententiam astruit Fagund. num. 6. cum Couar. ad cap. cum esses, de testam. et cum authoribus primae sententiae alios adducunt.*

7 THEY SAY second, that if the heir ab intestato reasonably opine, or doubt, that some fraud has been introduced into that testament, he can justly act for its rescission; Fagund. agrees num. 12. with

many in Couar. loc. cit.

> *DICUNT secundo, Si haeres ab intestato rationabiliter opinetur, aut dubitet, fraudem aliquam esse invectam in eo testamento, posse iuste agere ad rescissionem, consentit Fagund. num. 12. cum multis apud Couar. loc. cit.*

8 I ASSERT with the second opinion that it is probable that the Heir ab intestato can rescind a testament in which another is instituted without solemnity, and that in the meantime the inheritance cannot safely be taken possession of by one so instituted.

> *ASSERO cum secunda sententia, probabile esse, Haeredem ab intestato posse rescindere testamentum, in quo alter absque solemnitate instituitur, nec interim secure haereditatem adiri a taliter instituto.*

9 IT IS PROVED first: The laws of Princes, being just, oblige in the forum of the pole; but the Laws decree that heirs instituted without solemnity are excluded, l. hac consultissima, Cod. de testam. and Instit. Quibus modis testamenta infirmentur, §. penult. and these are received throughout the whole world, as just, and most gravely necessary for the public good, lest the resources of the dying be squandered by frauds: Therefore. The major is broadly demonstrated in l. c. de Legibus.

> *PROBATUR primo: Leges Principum iustae obligant in foro poli; at Leges decernunt haeredes institutos absque solemnitate esse exclusos l. hac consultissima, Cod. de testam. et Instit. Quibus modis testamenta infirmentur, §. penult. et hae toto orbe receptae sunt, ut iustae, et ad bonum publicum gravissime necessariae, ne facultates morientium dilapidentur fraudibus: Ergo. Maior late demonstrata est l. c. de Legibus.*

10 IT IS PROVED second from other laws which so dispose, and void in order to avoid frauds, nor do they lack effect even with the fraud removed, as in the alienation of pupils, etc., which therefore is null also in the forum of conscience.

> *PROBATUR secundo ex aliis legibus ita disponentibus, et irritantibus ad vitandas fraudes, nec carent effectu etiam fraude amota, ut in alienatione pupillorum etc. quae nulla idco est etiam in foro conscientiae.*

11 I ASSERT second. If the will of the testator be rightly established in the forum of conscience, the heir can safely in conscience take possession of the inheritance. This is D. Bonaventure's, as I shall show.

> *ASSERO secundo. Si rite in foro conscientiae constet voluntas testatoris, secure haeredem in conscientia adire haereditatem. Est D. Bonaventurae, ut ostendam.*

12 IT IS PROVED first. The laws of Princes are just, and oblige in conscience, which are consonant with the law of nature, and much more if they are thus interpreted by the Legislator: But it is of the law of nature that inheritances be of those to whom the legitimate owners justly leave them, and to this sense even the civil laws come: Therefore. The major is evident, from what was said de Legibus, disp. 1. quaest. 4. and disp. 2. quaest. 6. The minor is shown from both Laws, the Canonical, and the CIVIL.

> *PROBATUR primo. Leges Principum iustae sunt, et in conscientia obligant, quae iuri naturae sunt consonae, et multo magis si ita exponantur a Legislatore: Sed iuris naturae est, ut haereditates sint eorum, quibus legitimi domini iuste eas relinquunt, et ad hunc sensum veniunt iura etiam civilia: Ergo. Maior est evidens, ex dictis de Legibus, disp. 1. quaest. 4. et disp. 2. quaest. 6. Minor ostenditur ex utroque Iure, Canonico, et CIVILI.*

13 And indeed Pope Innocent in cap. quod sicut, and in C. quia propter, de elect. thus decrees: If any election be valid by the law of nature and of nations, even though the solemnities required by civil or

canon law be lacking, it is valid in the forum of the pole, because the solemnities of positive law were invented only to avoid frauds, and in the forum of conscience natural truth is to be preferred. But this is consonant with the law of nature, that the transmission of inheritances be taken from the will of the Lord: it is proved in the Institution de rerum divis. §. per traditionem; where it is said: Nothing is so conformable to natural equity as that the will of the owner, willing to transfer his thing to another, be held valid.

> *Et quidem Innocent. Papa in cap. quod sicut, et in C. quia propter, de elect. sic decernit: Si electio aliqua iure naturae, et gentium, valida sit, tametsi defint solemnitates iure civili, vel canonico requisitae, validam esse in foro poli, quia solemnitates iuris positivi inventae sunt solum ad vitandas fraudes, et in foro conscientiae veritas naturalis est praeferenda. Id autem iuri naturae est consonum, ut haereditatum transmissio sumatur e Domini voluntate: probatur Institutione de rerum divis. §. per traditionem; ubi dicitur: Nihil tam conveniens naturali aequitati, quam voluntatem domini, volentis rem suam in alium transferre, ratam haberi.*

14 THAT the civil laws themselves thus unfold in the forum of the soul is proved from Authent. de nuptiis, §. disponat. collat. 4. where it is related that the last will of the deceased is to be preserved as law. And in C. ultima voluntas, causa 13. quaest. 2. these words are had: *The last will of the deceased ought to be preserved in every way.* But more formal is the text in leg. inutiliter, Cod. de fideicommiss. where, when the Emperor had said that in a less solemn testament a fideicommissum left is uselessly left, namely that for exacting it no action be granted in a judicial forum, he adds: *If the heirs, having discovered the will of the deceased, had performed it, it cannot thereafter be reclaimed.* The Emperor gives the reason, *Because satisfaction seems to have been made to the will of the deceased not from the writing alone, but from the conscience of the fideicommissum left.* It is confirmed by the consensus of Jurists saying that a less solemn testament has such force that the legacies left in it can not only be possessed in the forum of conscience by a legatee in possession, but be defended in a judicial forum by a legitimate exception: so Bartol. ad leg. Nemo potest, ff. de legatis, and others, as is clear from Gamma decis. 347. and Claro §. Testamentum quaest. 90.

> *QUOD vero ipsa iura civilia ita in foro animae se explicent, probatur Authent. de nuptiis, §. disponat. collat. 4. ubi refertur, ultimam defuncti voluntatem pro lege servandam. Et C. ultima voluntas, causa 13. quaest. 2. habentur haec verba:* Ultima voluntas defuncti modis omnibus servari debet. *Sed formalior est textus in leg. inutiliter, Cod. de fideicommiss. ubi cum Imperator dixisset in minus solemni testamento inutiliter fideicommissum relictum esse, quod videlicet ad illud exigendum in foro iudiciali actio non concedatur, subdit:* Si haeredes comperta voluntate defuncti illud praestitissent, repeti deinde non posse. *Rationem reddit Imperator,* Quia non e sola scriptura, sed ex conscientia relicti fideicommissi voluntati defuncti satisfactum esse videatur. *Confirmatur ex Iuristarum consensu dicentium, Testamentum minus solemne ita habere vim, ut legata in eo relicta non solum possint a legatario possidente in foro conscientiae possideri, sed eam in iudiciali defendi per legitimam exceptionem: Ita Bartol. ad leg. Nemo potest, ff. de legatis, et alii, ut patet ex Gamma decis. 347. et Claro §. Testamentum quaest. 90.*

15 If they say that this text proceeds concerning legates, and fideicommissa, not concerning heirs.

> *Si dicant, hunc textum de legatis, et fideicommiss. procedere, non de haeredibus.*

16 I say that it is commonly conceded concerning these also by Jurists and Theologians, as we have seen.

> *Dico et de his concedi communiter a Iuristis et Theologis, ut vidimus.*

17 Hence I argue a fortiori from D. Bonav. Laws are to be kept from conscience the more gravely, the graver are the things commanded: But the laws yield to the last will in conscience, that last wills be fulfilled, interpreting the legacies, etc.; therefore much more as regards inheritances. For these are much graver, and it would be much more grave and hard for the testator to see the inheritance distraught, against his will, than a legacy. Therefore by the instinct of nature no one, even of timid conscience, will wish to restore the inheritance conferred on him by a testator, even if less solemnly.

> *Hinc arguo a fortiori ex D. Bonav. Leges sunt ex conscientia servandae eo gravius, quo graviores sunt res praeceptae: At leges voluntati ultimae deferunt in conscientia, ut ultimae voluntates impleantur, explicantes legata, etc. ergo multo magis quoad haereditates. Nam multo graviores sunt, multoque gravius, ac durius esset testatori videre distrahi haereditatem, se invito, quam legatum. Ideo ad naturae instinctum nullus etiam timoratae conscientiae haereditatem sibi delatam a testatore, etiamsi minus solemniter, restituere volet.*

18 Therefore from the observance of the laws, enjoined on us in the forum of conscience according to the mind of the Legislators, it is brought out that the SS. Doctors are for the first opinion, not for the second, as Fagund. thinks *num. 3.* nay, that they agree with the third.

> *Igitur ex legum observantia, nobis in foro conscientiae iniuncta ad mentem Legislatorum educitur, SS. Doctores esse pro prima sententia, non pro secunda, ut putat Fagund.* num. 3. *imo cum tertia consentire.*

19 From what has been said for the second assertion the response to the arguments of the first is clear: For laws are to be interpreted, and observed with great wisdom, discretion, and spirit; for so they are enjoined by God and the Apostles for the good of the Republic, for justice, and peace, and therefore the rectitude of nature is to be kept, as also justice, etc., as the *S. Doct. de Eccles. Hierar. p. 2. cap. 3.* discusses.

> *Ex dictis pro secundo asserto patet responsio ad argumenta primi: Leges enim sunt magna sapientia, discretione, et spiritu exponendae, et observandae; sic enim iniunguntur a Deo, et Apostolis ad bonum Reipubl. ad iustitiam, et pacem, atque ideo rectitudo naturae est servanda, sicut et iustitia, etc. ut disserit* S. Doct. de Eccles. Hierar. p. 2. cap. 3.

## Question V: In what ways a testament is revocable

1 Not unfittingly is the will of a man called Ambulatory until death *leg. 4. ff. de adimend. leg.* since it often uses to walk and return by the same way, as is clearly proved in the revocations of testaments, on whose occasion this was said.

> Quibus modis Testamentum est revocabile.
>
> *Non incongrue hominis voluntas dicitur Ambulatoria usque ad mortem* leg. 4. ff. de adimend. leg. *cum per eandem viam soleat saepe gradi, et regredi, ut in testamentorum revocationibus clarum probatur, quorum occasione id dictum est.*

2 And first indeed the laws concede to the testator, until his death, to declare his own testament void, unless he be a Religious who made his testament before the solemn emission of his vows; the reason of each is, because until death the testator commonly has free dominion over his own goods; not so if he be a professed Religious: And this stands thus even if the testator should have sworn or promised that the testament of his last will would be irrevocable: because what nature can do can always be retracted, and cannot be made irrevocable by any extrinsic addition: Yet understand this of valid revocation; for a testament confirmed by an oath will not be able licitly to be revoked, since thus God

would be brought in as witness to falsehood: Vasquez, however, says that in the forum of conscience a second testament would be not only illicit but also invalid, if the first had earlier been strengthened by oath; the opposite, however, is the more common view, for many things are done validly that are not done licitly.

> *Et primo quidem leges concedunt testatori usque ad mortem suum testamentum irritum declarare, nisi fuerit Religiosus, qui ante votorum solemnem emissionem testatus sit; ratio utriusque est, quia usque ad mortem communiter testator liberum habet dominium suorum bonorum; non sic si sit Religiosus professus: Et hoc ita stat etiamsi iurasset, vel promitteret testator suae ultimae voluntatis testamentum esse irrevocabile: quia quod natura potest semper retractari, nequit aliqua extrinseca adiectione reddi irrevocabile: Hoc tamen intellige de revocatione valida; nam licite non poterit testamentum iuramento firmatum revocari; quia sic Deus in testimonium falsitatis adduceretur: Vasquez tamen in foro conscientiae non solum illicitum, sed et invalidum fore ait secundum testamentum, si prius fuerit iuramento roboratum; oppositum tamen communius est, nam multa fiunt valide, quae non licite.*

3 Nor does it stand in the way that the Oath is accessory to the testament, as to a principal, whose nature, licitly revocable of itself, it ought to follow. For this is true, when the conditions are not expressly excluded; but one swearing that he will not revoke is held to exclude all revocatory conditions, since he intends to expel that celebrated condition: *unless it be revoked.* Let the following be read on this matter, Vasquez *opusc. de testam. cap. 2.* Couar. *2. parte rubr. de testam.* Antonius Gomez in *3. l. Tauri,* Sylvester *verbo testamentum 1. §. 12.* With Bonacina *de contract. disp. 3. quaest. 17. puncto 6.* who adds that any form of words by which it is established that the testator earlier held his testament void suffices; nor is it necessary that he institute anew, even if he have used only a verbal revocation, although this is true only of royal law, as Vasquez, to be cited, has it.

> *Nec obstat, quod Iuramentum sit accessorium testamento, tanquam principali, cuius naturam, ex se licite revocabilem, debeat sequi. Hoc enim verum est; quando conditiones expresse non excluduntur; iurans autem se non revocaturum, censetur omnes conditiones revocatorias excludere; cum intendat explodere illam celebrem conditionem:* nisi revocetur. *Legantur de hac re Vasquez* opusc. de testam. cap. 2. *Couar.* 2. parte rubr. de testam. *Antonius Gomez in* 3. l. Tauri*, Sylvester* verbo testamentum 1. §. 12. *Cum Bonacina* de contract. disp. 3. quaest. 17. puncto 6. *qui addit quamlibet verborum formam, qua constet testatorem prius suum testamentum habere irritum, sufficere; nec opus est, ut novum instituat, esto verbali tantum revocatione sit usus, licet hoc tantum verum sit de iure regio, ut habet Vasquez citandus.*

4 Second, a testament is revoked by the breaking of the writing, of the seal, or of another necessary solemnity: but if some part be erased or cancelled with interlineations, the remainder of the testament is valid; and only that part can be called into doubt. So it is gathered *ex leg. ad testam, §. si signa, ff. de testamentis, et leg. nostram, C. de testam.* These, however, are modified, for if the illicit manner be proved in which such breaking or cancellation was made, or if the tabellion teach that the breaking and cancellation were made before his sign and do no harm, the testament is not invalidated, as is said in *leg. 1. §. 1. ff. de iis, quae in testam. delentur.* Likewise if there be two writings, of which only one is broken; the other still subsists; because although they are one in the thing, they are nevertheless two in proof; which Vasquez nevertheless so limits, that both writings must be equally principal; for if one be a transcript and transumpt held by the testator, although the Original remained with the Tabellion; this does not help, if the former be cut apart; so teaches Paulus Castr. *in leg. nostram, C. de testam. quaest. ult.* It must nevertheless be seen whether it was broken by the will of the testator himself, or against his pleasure.

*Secundo testamentum revocatur fractione Scripturae, sigilli, aut alterius necessariae solemnitatis: si vero pars aliqua deleatur, aut cancelletur cum interlineis, reliquum testamentum valet; et solum pars illa in dubium potest revocari. Ita colligitur* ex leg. ad testam, §. si signa, ff. de testamentis, et leg. nostram, C. de testam. *Haec tamen modificantur, nam si probetur modus illicitus, quo facta sit talis ruptura, seu cancellatio, vel si tabellio eam ruptam, et cancellationem ante suum signum factam, doceat non nocere, testamentum non invalidatur, ut dicitur* leg. 1. §. 1. ff. de iis, quae in testam. delentur. *Item si duae sint Scripturae, quarum una tantum rumpitur; altera adhuc subsistet; quia licet una sit in re, sunt tamen in probatione duae, quod tamen ita Vasquez limiter, ut utraque scriptura fuerit aeque principalis; nam si fuerit una transcripta, et transsumpta apud testatorem, licet Originalis manserit penes Tabellionem; Haec non iuvat, si prior fuerit discissa; ita docet Paulus Castr.* in leg. nostram, C. de testam. quaest. ult. *videndum tamen, si voluntate ipsius testatoris, vel contra eius placitum fuerit rupta.*

5 Third, the first testament is invalidated by the making of a second, which is solemn and according to the disposition of law; which is true to that point, even if it were made before the Prince himself; who cannot by simple assistance take away the liberty of testating, which follows the dominion of goods until death; truly, if by special mandate he should declare such a testament irrevocable, such a mandate would have to be stood by; for as the laws can prohibit, for a just cause, the revocability of testaments, so also can the Prince.

*Tertio invalidatur testamentum primum confectione secundi, quae solemnis, et iuxta iuris sit dispositionem, quod eo usque verum est, licet factum esset coram ipso principe; qui non potest simplici assistentia libertatem testandi, quae usque ad mortem sequitur bonorum dominium, auferre; verum si speciali mandato tale testamentum irrevocabile declararet, standum esset tali mandato; sicut enim leges prohibere possunt ob iustam causam testamentorum revocabilitatem; ita etiam Princeps.*

6 Fourth, the first testament, though valid, can be revoked by a second less solemn one, provided it be completed with five witnesses, so long as those coming as heirs ab intestato be instituted in it: but that this may stand, three conditions are required. The first, that in the first testament some extraneous heir be named, for if one or more coming ab intestato were there, the testament still subsists. The second condition is, that those coming ab intestato be nearer heirs. The third is, that all those nearer heirs, coming ab intestato, be of the first grade, nor does any one of them alone suffice: which conditions are only of the common law; but by royal law it is otherwise determined, at least in nuncupative testaments; which are always equally solemn with the first ones, since they must have five, or at least three witnesses with the tabellion; so Vasquez *loco citato.*

*Quarto testamentum primum, licet validum, revocari potest per secundum minus solemne, modo cum quinque testibus perfectum sit, dummodo ab intestato haeredes venientes, sint in eo instituti: ut hoc tamen stet, tres requiruntur conditiones. Prima, ut in primo testamento nominatus sit haeres aliquis extraneus, nam si fuerit unus, vel plures venientes ab intestato; subsistit adhuc testamentum. Secunda conditio est; ut venientes ab intestato sint haeredes viciniores. Tertia est, ut omnes illi haeredes proximiores, ab intestato venientes, sint primi gradus, nec ullus eorum solus sufficiat: quae conditiones sunt solum de iure communi; sed iure regio aliter statuitur, saltem in testamentis nuncupativis; quae semper aeque solemnia sunt cum primis; cum habere debeant quinque, aut ad minus, tres testes cum tabellione; ita Vasquez* loco citato.

### Question VI: What obligation heirs instituted by testament undertake

1 Since the heir is in the place of the testator, and in a certain way assumes his nature, it is certain that he is held to all the real debts to which the testator was held; for he who receives the real advantages ought also to undergo the real disadvantages, *argument. leg. haeres in omne, ff. de acquirenda*

*haereditate*. but otherwise must be said of a personal right that the testator had to be paid; for this was extinguished together with his person.

> Quam obligationem subeunt Haeredes, testamento instituti.
>
> *Cum haeres sit in loco testatoris, eiusque naturam quodammodo induat; certum est eum teneri ad omnia debita realia, ad quae testator tenebatur; nam qui suscipit realia commoda, subiri etiam debet realibus incommodis,* argument. leg. haeres in omne, ff. de acquirenda haereditate. *aliter tamen dicendum de iure personali, quod habebat testator solvendum; hoc enim simul cum eius persona extinctum est*.

2 It is conceded, however, by law that the Heir has a trimester period, within which time he can take possession of the inheritance or reject it, and within that time he ought not be molested by anyone: he is held, however, in the meantime to make an Inventory before a Notary, with the legatees and creditors present, if they wish to be present. So Bonacina above, with Sà, Reginald, and others cited. Yet if he omit to make it, not from fraud but from another just cause, he will be held to pay only as much as the inheritance can bear: otherwise if he negligently omit it fraudulently, he will be obliged even beyond the resources of the inheritance, as is had in *leg. finali, C. de iureiurando*.

> *Conceditur autem a iure trimestre Haeredi, intra quod tempus potest haereditatem adire, vel abiicere et intra illud tempus a nullo debet molestari: tenetur tamen interim facere Inventarium coram Notario praesentibus legatariis, et creditoribus, si adesse velint. Ita Bonacina supra, citatis Sà, Reginaldo, et aliis. Si tamen illud facere omiserit, et non ex fraude, sed ex alia causa iusta, tenebitur tantum solvere quantum importare poterit haereditas: secus si fraudulenter neglexerit, etiam ultra vires haereditatis obligabitur; ut habetur* leg. finali, C. de iureiurando.

3 The heir is held to pay not only debts, but also whatever legacies left by the testator; for by taking possession of the inheritance tacitly he is held to contract thus with the one testating; yet if the legacies were paid before death, although they were not cancelled in the testament, they are not to be paid *leg. lucius, ff. de legatis*. The mind of the testator, however, is to be examined, concerning whose intention, if it is established, the heir is held to observe it, leaving the ambiguity of the words; for all presumptions arising from words cease, once the will of the testator has been discovered.

> *Non solum debita, sed et legata quaecumque relicta a testatore, tenetur haeres solvere; nam tacite haereditatem adeundo ita censetur contrahere cum testante; si tamen legata fuerint soluta ante mortem, licet in testamento non sint cancellata, resolvenda non sont* leg. lucius, ff. de legatis. *Testatoris autem mens est inspicienda, de cuius intentione si constat, tenetur eam observare haeres, relicta verborum ambiguitate; nam omnes praesumptiones ex verbis ortae cessant, comperta voluntate testatoris.*

# Disputation XII: On Legacies

1 A bequest (Legatum) and a fideicommissum are in effect the same thing, though they differ in manner and form; for the latter is made with oblique words, which look directly to the heir, who is burdened by the testator with handing over, e.g. to Titius, what has been entrusted to his good faith. The bequest, however, looks directly to the legatee, without any mention of the heir, as when it is said: *I bequeath to Peter one hundred sheep*, so that the same thing, with respect to the one to whom it is owed or given, is called a Legatum; and with respect to the one who is ordered to give, it is named a Fideicommissum: hence nearly the same judgment must be formed about both.

> *Legatum, et Fideicommissum in effectu sunt idem, licet differant in modo, et forma; nam posterius fit verbis obliquis, quae directe respiciunt haeredem, qui a testatore gravatur reddere, v. g. Titio, quod eius fidei creditum est. Legatum autem directe legatarium respicit, absque ulla haeredis mentione, ut cum dicitur:* Lego Petro centum oves*, ita ut idem respectu eius, cui debetur, vel datur, dicitur Legatum; et respectu eius, qui dare iubetur, Fideicommissum nuncupatur: hinc eodem tenore de utroque fere sentiendum.*

## Question I: What a legacy is, and of how many kinds

1 A bequest (Legatum) is defined as: *A kind of donation left by a testator and to be furnished by the heir.* So all the Jurists, in *leg. legatum est, ff. de legat. 1. et 2.*

> *Legatum definitur:* Donatio quaedam a testatore relicta, et ab haerede praestanda. *Ita omnes Iuristae in* leg. legatum est, ff. de legat. 1. et 2.

2 It is called a *Donation*, because it is left not by any right of kinship but out of sheer liberality; for the testator has, up to the very last instant of his life, full power over his goods, so that it is lawful for him to bequeath and legate them at his pleasure. It is called *to be furnished by the heir*, for the reason adduced above in the last question.

> *Dicitur quidem* Donatio*, quia nullo propinquitatis iure, sed ex mera liberalitate relinquitur; habet enim testator usque ad ultimum vitae instans plenam suorum bonorum facultatem, ita ut de eis testari, et legare liceat ad libitum. Dicitur* ab haerede praestanda*, ob rationem supra quaestione ultima allatam.*

3 The bequest is divided first into pious and profane, as is gathered from the cited Holy Doctor.

> *Dividitur Legatum primo in pium, et profanum ut colligitur e Sancto Doctore citato.*

4 Second, the bequest is divided into universal and particular; the former rarely occurs, since it is of all one's goods, and is called a universal fideicommissum: the particular, however, is in common use, when the heir is compelled to hand over some definite thing.

> *Dividitur secundo Legatum in Universale, et Particulare; illud raro contingit, cum sit omnium bonorum, diciturque fideicommissum universale: Particulare vero usitatum est, quando haeres cogitur tradere rem aliquam certam.*

5 Then it is divided into absolute and conditional. The former occurs when something is left without any determination, which must be restored to the legatee without delay after the death of the testator. The latter is made thus, with a condition added: *I bequeath to Paul fifty gold pieces, if a son is born to him*, and this must be fulfilled upon the condition's occurring. Now this condition varies with the variety of the object, or of the manner in which it is attached: it is sometimes tacit or express;

possible or impossible; necessary or contingent; finally, honorable or shameful; likewise it is sometimes signified of the past, at times of the present and future.

> *Deinde dividitur in Absolutum, et Conditionatum. Primum fit, quando absque ulla determinatione aliquid relinquitur, quod legatario debet reddi absque mora post mortem testatoris. Secundum ita fit adiecta conditione:* Ego Paulo lego quinquaginta aureos, si filius masculus ei nascatur*, et hoc, adveniente conditione, est adimplendum: Haec autem conditio varia est pro varietate obiecti, vel modi, quo apponitur: est enim aliquando tacita, vel expressa; possibilis, vel impossibilis; necessaria, vel contingens; honesta denique, vel turpis; item aliquando signatur de praeterito, interdum de praesenti, et futuro.*

6 Concerning these conditions the laws thus decree, and the Doctors so judge: that a contingent condition about the future, possible and honorable, suspends the bequest until it is purified; conditions about the present and past annul or bind the bequest in the very instant, since such conditions are necessarily actually true or false; but an impossible condition, or a necessary and shameful one, is considered as not attached. So *Vasquez, De testamentis, cap. 8.*

> *De his conditionibus ita statuunt Iura, et sentiunt Doctores, ut contingens conditio de futuro, possibilis, et honesta, legatum suspendat, donec purificetur; De praesenti, et praeterito, in ipso instanti legatum tollunt, vel obligant, cum tales conditiones sint actu necessario verae, vel falsae: Impossibilis vero conditio, seu necessaria, et turpis tanquam non appositae censentur. Ita* Vasquez de testamentis, cap. 8.

7 In every bequest, moreover, there is understood tacitly: *if the inheritance be entered into, by the common law*, although the royal law has decreed otherwise: there is also a tacit condition underlying an annual bequest, which is understood to have been left for as many years as the legatee shall live; so that nothing passes to his heirs.

> *In omni autem legato intelligitur tacite:* Si adeatur haereditas, de iure communi*, quamvis Ius regium aliter decreverit: tacita etiam conditio subest legato annuo, quod relictum intelligitur quot annis vixerit Legatarius; ita ut ad eius haeredes nihil transeat.*

8 But that slender distinction which exists between a conditional and a modal bequest so torments the Jurists that they plainly do not know: if a girl's dowry is left, *ut nubat* (that she may marry), does it import a condition, or rather a mode?

> *Tenuis autem illa distinctio, quae intercedit inter legatum Conditionale, et Modale, adeo Iuristas torquet, ut plane nesciant, Si relinquatur Dos puellae,* ut nubat*; an conditionem importet; an vero modum.*

9 Baldus, Covarru., Peregrinus, and Simon, on these points in Bonacina *loc. cit. prop. 3.*, hold that the bequest is modal, and therefore that its payment is not to be deferred, at least if it is made by the parents; wherefore, they say, the girl can compel her brother to make the payment even before she is of marriageable age.

> *Baldus, Covarru., Peregrinus, et Simon de praetis apud Bonacinam* loc. cit. prop. 3. *sentiunt legatum esse modale, ac proinde eius solutionem non differendam; saltem si fiat a parentibus; quare, aiunt, puella potest fratrem ad solutionem cogere, etiam antequam sit nubilis aetatis.*

10 On the contrary, Bart. Gomez, Mantica, Molfesius, and others cited in the same place proclaim it to be conditional, and accordingly that one must wait until the girl is ripe for a husband; in the meantime, however, they teach that the brother is bound to nourish her and supply other things according to the decency of her station, since he succeeds to the father's place.

*Econtra, Bart. Gomez, Mantica, Molfesius, et alii ibidem citati, Conditionale esse acclamant, adeoque expectandum donec puella viro sit matura; interim tamen docent teneri fratrem ipsam alere, aliaque iuxta status decentiam suppeditare, cum in patris locum succedat.*

11 The whole difficulty lies in those little words *Si* (if) and *Ut* (that): for if something is bequeathed to a girl, *si nubat* (if she marries), it is certain that it is a condition; but if, *ut nubat* (that she may marry), who does not know that the final cause of the bequest is denoted? and thus it is owed to her even before she marries a husband, and even if she should never marry, provided only that it did not lie with her that she did not join herself to a husband; the reason is, because when a condition is rendered impossible for the legatee without his fault, it is considered as not attached.

*Tota difficultas stat in illis voculis* Si *et* Ut*: nam si legetur aliquid puellae,* si nubat*; certum est conditionem esse: Si vero,* ut nubat*; quis ignorat causam finalem legati denotari? et sic ipsi debetur, etiam antequam viro nubat, et etiamsi nunquam nupserit, si saltem penes ipsam non steterit, quod se viro non iunxerit; ratio est, quia quando conditio redditur legatario impossibilis absque sua culpa, censetur pro non apposita.*

12 Hence Vasquez, in Bonacina, ubi supra, infers that a bequest left to Berta, that she may marry Titius, ought still to be restored to Berta when Titius has died, in case she wishes to marry another. From this one may infer that when something is bequeathed with the burden of a certain action, there is contained in it a tacit condition, if the legatee should wish to undertake such an action; for if he should not wish it, the bequest must be denied to him: whence the dowry bequeathed to Berta, that she may marry, must be handed over immediately after the death of the testator, if she wishes to marry; yet with a caution given; but if she should altogether refuse to marry, the cause and final motive ceasing, the effect will safely cease. Now the decision of this difficulty is of no small consequence, that it may become clear whether a dowry thus left, and not handed over before the death of the girl, is to be transferred to her nearest heirs, or whether rather the heir of the testator himself has a right in it.

*Hinc inferunt Vasquez apud Bonacinam ubi supra, legatum relictum Bertae, ut nubat Titio, ipso mortuo debere adhuc Bertae restitui; modo alteri velit nubere. Ex quo inferre licet, quando legatur aliquid cum onere cuiusdam actionis, inesse conditionem tacitam, si legatarius voluerit talem actionem obire; nam si noluerit; legatum ipsi negandum est: unde Dos Bertae legata, ut nubat, illico post testatoris mortem tradenda est, si vult nubere; cautione tamen praestita; quod si omnino nubere nolit, cessante causa, et motivo finali, tute cessabit effectus: Huius autem difficultatis decisio non mediocris est consequentiae, ut innotescat utrum Dos sic relicta, et non tradita ante mortem puellae, sit traducenda ad eius proximos haeredes; num vero in ea ius habeat ipsius testatoris haeres.*

## Question II: Whether legacies ought to be paid to all those for whom they are made, and how

1 SInce the will of the testator is immovable after death, as *S. Bonaventure, on the Rule of the Friars Minor, cap. 4. letter B.* says, the general rule of all justices is that bequests must be paid to all those persons who are capable of goods. But in order that these may be discerned, it must be noted that the laws declare the liberty of certain persons to be so proscribed that they can have dominion over nothing: and in the first place manifest heretics, where the Holy Inquisition holds dominion, can possess nothing, since their goods are adjudged to the fisc; wherefore bequests made to them, as also to apostates, are invalid by the law itself, as is had in *Leg. Manichaeos, C. de haereticis.*

An legata debeant solvi illis omnibus, quibus fiunt, et quomodo.

*CUm Testatoris voluntas post mortem immobilis sit, ut ait* S. Bonavent. in Regulam fratrum Minorum, cap. 4. littera B. *Generalis omnium Iustitiarum regula est, legata solvenda esse illis omnibus personis, quae sunt bonorum capaces, ut autem hae dignoscantur; notandum est leges libertatem quorumdam, ita proscriptam declarare, ut nullius rei dominium habere valeant: et Imprimis haeretici manifesti, ubi Sacra Inquisitio dominatum obtinet, nihil possunt possidere, cum eorum bona sint fisco adiudicata; quare legata his facta, sicut et Apostatis; ipso iure invalida sunt; ut habetur* Leg. Manichaeos, C. de haereticis.

2 ITEM, bequests left to uncertain persons do not stand: *§. incertis, instit. de legatis.* Yet conceive this thus, if they are altogether uncertain, since nothing can be rendered to those who are known to us in no way. But if there is present, or soon to be present, some ground for discerning such persons, a bequest can validly be made to them: as if one should bequeath in favor of the one who has married his granddaughter or daughter, such a bequest will stand, and it must be rendered to the granddaughter or daughter already wed.

*ITEM legata personis incertis relicta, non valent* §. incertis institut. de legatis. *Hoc tamen ita concipe, si sint omnino incertae, cum nihil potest reddi illis, qui nullo nobis modo sunt cogniti. Verum si adsit, aut brevi adfutura sit ratio aliqua internoscendi tales, potest ipsis valide fieri legatum, ut si quis legaret in favorem illius, qui in uxorem duxerit suam neptem, aut filiam, tale legatum stabit, et reddendum est iam nuptae nepti, vel filiae.*

3 From this rule are excepted bequests made to God, if anyone should so express his will, because God is not reckoned among uncertain persons; and the civil law cannot extend its exceptions to pious causes; wherefore such a bequest will have to be furnished to the greater Church of that place in which it was made, as is noted *§. si quis in nomine magni Dei, Anthem. de Eccles.* The same is to be understood of bequests to pious causes universally, since the civil law holds no authority over them; and if they are made to Churches, this is to be understood of the Church of the place, and where several Churches concur, of the greater Church; if all are equal, it is to be given to the Bishop, that he may distribute it among all according to his prudence. So Bonacina with others cited by him above.

*Ab hac regula excipiuntur Legata facta Deo, si quis ita voluntatem suam exprimeret, quia Deus non reputatur inter personas incertas; et lex civilis nequit suas exceptiones ad pias causas extendere; quare praestandum erit tale legatum maiori Ecclesiae loci illius, in quo factum est, ut notatur* §. si quis in nomine magni Dei, Anthem. de Eccles. *Idem intelligendum de legatis in pias causas universaliter, ut in eas Ius civile nullum imperium habeat; et si Ecclesiae sint facta, id intelligatur de Ecclesia loci, et ubi plures Ecclesiae convenerint, de Ecclesia maiori; si omnes sint aequales, dandum est Episcopo, ut iuxta suam prudentiam illud inter omnes distribuat. Ita Bonacina cum aliis apud ipsum citatis supra.*

4 It is DOUBTED among the Jurists, indeed, whether a bequest left to the poor must be given to the poor of the place, or whether it suffices that it be given to others. Some adjudicate it to those who are held in need in the homeland of the legator, *argument. leg. si quis ad declinando, §. ubi autem*; for the testator is judged to be more affectioned toward them than toward strangers: nevertheless, Bonacina holds as more probable that satisfaction is made to whatever poor it is given; since the last will is to be believed to burn with a more common piety than with particular affection, and that is sufficiently fulfilled in any needy persons whatsoever.

*DUBITATUR vero apud Iuristas, an relictum pauperibus legatum, debet dari pauperibus loci; an vero sufficiat, quod detur alienis. Alii illud adiudicant illis, qui egestate detinentur in patria legantis,* argument. leg. si quis ad declinando, §. ubi autem; *censetur enim testator magis affectus erga illos, quam erga alienos: tenet tamen probabilius*

*Bonacina satisfieri, quibuscumque pauperibus detur; cum ultima voluntas magis communi pietates, quam particulari affectu flagrare credenda est, eaque sufficienter completa sit in quibusvis egenis.*

5 WHEN, however, a bequest is left to Canons, it must not be drawn to their Church but to the whole chapter, which is something other than the Church; and then it must be divided among all in geometric proportion, according to the grade and dignity of each; but if the bequest is to individual Canons: then it is to be distributed equally, or arithmetically, among the individuals. But if it is bequeathed to one alone, let it be handed over to this one, not another, out of reverence and observance of the last will. Bonacina notes this very aptly above, citing Mantica, Covarruvias, Genuensis, Vasquez, and others.

*QUANDO autem legatum relinquitur Canonicis, non debet trahi ad eorum Ecclesiam, sed ad totum capitulum, quod aliud est ab Ecclesia; et tunc inter omnes proportione Geometrica est dividendum, iuxta gradum, et dignitatem cuiusque; si vero singulis Canonicis legatum sit: tunc inter singulos est aeque, seu arithmetice distribuendum. Sed si uni legetur soli, huic, non alteri, tradatur, ob reverentiam, et observantiam ultimae voluntatis. Quod aptissime notandum accinit Bonacina supra, citans Manticam, Covarruviam, Genuensem, Vasquez, et alios.*

6 IN any bequest, however, in which a doubt arises concerning the persons to whom it must be paid, the intention of the legator must be attended to above all, and the simple signification of the words; and these failing, pious causes are more to be favored. Hence you have several resolved cases.

*IN quacumque autem legato, in quo suboritur dubium de personis, quibus debeat solvi, attendenda est potissimum legantis intentio, et simplex verborum significatio; et his deficientibus, piis causis magis est favendum; Hinc plures casus resolutos habes.*

7 FIRST, a bequest left in general to women to be married cannot be dispensed to girls not yet marriageable; for in them it is presumed that the will of the testator is not being fulfilled. So Mantica *de coniect. ultima vol. lib. 21. tit. 21. num. 5.*, Sanchez *de matrimonio, num. 7. disp. 91.*, and several others in Bonacina above.

*PRIMO, legatum in genere relictum foeminis maritandis, non potest dispensari puellis adhuc non nubilibus; in his enim praesumitur, testantis voluntatem non adimpleri. Ita Mantica* de coniect: ultima vol. lib. 21. tit. 21. num. 5. *Sanchez* de matrimonio, num. 7. disp. 91. *et plures alii apud Bonacinam supra.*

8 SECOND, a dowry bequeathed to a girl, if she marry, is nevertheless to be handed over to one wishing to enter religion; so all commonly; say the same of a bequest made to a widow, as long as she leads a widowed life, which she can also lead more honorably in religion. So Sanchez cited above.

*SECUNDO, Dos legata puellae, si nubat, volenti tamen religionem ingredi, est tradenda; Ita omnes communiter; idem dic de legato facto viduae, quamdiu vitam vidualem duxerit, quam etiam in religione honestius ducere poterit. Ita Sanchez citatus.*

9 There is a DIFFICULTY, however, about a bequest made to a widow on this condition, that she always dwell with her sons, and she wishes to fly to second nuptials, the sons refusing to dwell together with the father-in-law.

*DIFFICULTAS tamen est de legato, facto viduae, ea conditione, ut cum filiis semper habitet, et illa voluerit ad secundas nuptias volare, negantibus filiis una cum Socero habitare.*

10 There is a TWOFOLD opinion of the Doctors on this matter. The first is that of Baldus *leg. 1. Cod. ubi pupilli, etc. and leg. 1. at the end, Cod. de leg., Iason.* in the same place, and of not a few others, whom Sanchez reports and embraces ubi supra: that such a bequest becomes void, because a tacit condition must be presumed to be in it, that she not pass to second nuptials; and besides, the sons can plead a just motive of fear; as if a wife should bequeath to a husband on a like condition, and he should take a stepmother to his children, without doubt the children would have just cause to withdraw from her, since she is wont to conduct herself more harshly.

> *DUPLEX est Doctorum hac de re opinio. Prima est Baldi* leg. 1. Cod. ubi pupilli, etc. et leg. 1. in fine, Cod. de leg. Iason. *ibidem, et aliorum non paucorum, quos refert, et amplectitur Sanchez ubi supra, tale legatum irritum iri, quia praesumenda est tacita conditio ei in esse, ut ad secundas nuptias non transeat; et praeterea iustum timotis motivum possunt praetendere filii; sicut si uxor legaret marito simili conditione, et ille Novercam suis filiis adscisceret, proculdubio ab ea recedendi iustam haberent causam filii; cum illa durius se gerere soleat.*

11 The SECOND opinion is Bonacina's, citing Bartolus, Imola, *in leg. cum tale, num. 2. ff. de condit. et demonstr.* and others, who say that such a bequest must be paid even to one flying to second nuptials and wishing to dwell with the sons of the former husband: the reason is, because the bequest is owed to one willing, though not able, to attach a condition; nor is that cohabitation so suspect, since it is customary; but if the sons wish to reject her, it is their fault, which must not bring prejudice to the legatee.

> *SECUNDA opinio est Bonacinae, citantis Bartol. Imolam,* in leg. cum tale, num. 2. ff. de condit. et demonstr. *et alios, dicentes, tale legatum solvendum etiam volanti ad secundas nuptias, et volenti cum prioris mariti filiis habitare: Ratio est; quia legatum debetur volenti, licet non potenti conditionem apponere; nec cohabitatio illa adeo suspecta est, cum sit usitata; quod si filii eam velint respuere, ipsorum est culpa, quae legatario non debet praeiudicium afferre.*

12 I WOULD SAY, however, in conscience, that such a bequest is not owed, if either the mother herself or the sons' tutors had noticed that such a dwelling would be harmful on the part of the father-in-law, and the mother, once admonished, refused to acquiesce; for thus she herself is judged to remove the condition, and she is at fault.

> *DICEREM tamen in conscientia, tale legatum non deberi, si vel ipsa mater, vel filiorum tutores advertissent talem habitationem ex parte Soceri noxiam futuram, et admonita mater noluerit acquiescere; sic enim censetur ipsa conditionem tollere, et in culpa est.*

13 THIRD, a bequest given to a future wife in general, before the testator has been married, can be paid to the second wife, since out of affection for the wife surviving him he is presumed to have so bequeathed. But if he makes the bequest already married, it is presumed to be for the first, and the second is excluded, even though she enjoy it under the same name with the first, because the husband's affection must be judged to have regarded only the former. So Barbosa *leg. divortio, §. 8. ff. soluto matrim.*, Menoch. *lib. 4. praesumptione 122.*, and Sanchez supra *numero 59.*

> *TERTIO, legatum datum futurae uxori in genere, priusquam uxoratus fuerit legator; potest solvi secundae, cum ex affectu ad uxorem sibi superstitem praesumendus est ita legasse. Si vero iam uxoratus legatum facit, pro prima praesumitur, et excluditur secunda, licet eodem nomine cum prima gaudeat, quia censendum est, affectum mariti priorem tantum respexisse. Ita Barbosa* leg. divortio, §. 8. ff. soluto matrim. *Menoch.* lib. 4. praesumptione 122. *et Sanchez supra* numero 59.

14 FOURTH, a conditional bequest made, that there be no passage to second nuptials, must be paid, even if nuptials, but invalid ones, have followed. The reason for this is sought from the rule *non praestat, de regul. iuris in 6.*, because an impediment does not avail which obtains no effect by law. So Gutierrez *capite III. numero 7.*, Sanchez *citat.*, who add, with Sylvester *verbo sponsalia, quaestione 1. dicto 2.*, that such nuptials, even valid ones but not consummated on account of some unforeseen event, do not invalidate the bequest; because in penal, or odious, matter, by the name of nuptials a consummated marriage is understood.

> *QUARTO factum legatum conditionale, ut non fiat transitus ad secundas nuptias, solvendum est, etsi nuptiae, sed invalidae, sint subsequutae. Ratio huius petitur ex regula* non praestat, de regul. iuris in 6. *quia impedimentum non praestat, quod effectum non sortitur de iure. Ita Gutierrez* capite III. numero 7. *Sanchez* citat. *qui addunt cum Sylvestro* verbo sponsalia, quaestione 1. dicto 2. *tales nuptias, etiam validas, sed non consummatas ob inopinatum aliquem eventum, legatum non invalidare; Quia in materia poenali, seu odiosa, nomine nuptiarum, intelligitur matrimonium consummatum.*

15 IN all these cases it must be considered that the legatee ought to receive whatever is left to him from the hand of the heir, not by his own authority; otherwise he will be guilty of *Commissum*, that is, he will suffer the loss of the bequest; understand this, however, after the heir has entered upon the inheritance; and this penalty is inflicted by the law, that time may be given for the Falcidian portion to be deducted; whence it is clear that pious bequests, not subject to the Falcidian portion, do not undergo this penalty; see Bonacin. *de contract. puncto 8. dub. 3.*

> *IN omnibus his casibus considerandum est, legatarium debere recipere, quicquid sibi relinquitur, de manu haeredis, non propria authoritate, alias reus erit* Commissi*, hoc est, legati iacturam patietur; hoc tamen intellige, postquam haereditatem adiverit haeres; et haec poena a lege indicitur, ut detur tempus detrahendi Falcidiam; unde patet, pia legata, Falcidiae non subdita, hanc poenam non subire; vide Bonacin.* de contract. puncto 8. dub. 3.

16 But if the heir should be contumacious in paying the bequest, a threefold action lies for the legatee against him: the first is *Personal*; for since the heir has contracted the debts of the deceased testator, he is judged to obligate himself and his goods to paying them, *leg. 2. Cod. communia de leg.* Yet if he is not an heir by testament but by another title, that action will cease, and the Praetorian action will succeed. The second action is named *Hypothecary*, by which the thing of a definite species remains hypothecated to the legatee; or even all the heir's goods, if the thing bequeathed is only of a definite quantity; *so it has been decreed by said law*. The third action is for the very thing itself, that it be vindicated, whose dominion, since it has been transferred from the day of the testator's death, can be vindicated from whomever possesses it; whence the legatee can seek the aid of the Judge, or bring the interdict Salvianum for the thing; see Bonacina and the Doctors cited by him *puncto 8. §. 4. toward the end.*

> *QUOD si haeres in reddendo legatum contumax sit, competit Legatario in ipsum triplex actio: prima est* Personalis*; cum enim haeres contraxerit testatoris defuncti debita, censetur se et sua obligare ad ea persolvenda,* leg. 2. Cod. communia de leg. *Si tamen non sit haeres ex testamento, sed alio titulo, illa actio cessabit, succedetque actio Praetoria. Secunda actio nuncupatur* Hypothecaria*, qua res certae speciei manet legatario hypothecata; vel etiam omnia haeredis bona, si res legata sit tantum certae quantitatis; ita dicta* lege decretum est. *Tertia actio est in ipsam rem, ut vindicetur, cuius dominium, cum sit translatum a die mortis testatoris, potest vindicari, a quocumque possideatur; unde potest legatarius Iudicis opem postulare, seu Salvianum rei interdictum intentare; vide Bonacinam, et citatos apud ipsum Doctores* puncto 8. §. 4. ad finem.

17 A GREAT difficulty there is, and it is the seedbed of many litigations, when the same thing is bequeathed jointly to several, to whom then must it be rendered: that this may be resolved more clearly:

> *MAGNA difficultas est; et est plurium litigiorum seminarium, quando res eadem pluribus coniunctim legatur, cui tunc reddatur: ut haec enucleatius solvatur.*

18 It must be NOTED first, from the disposition of the laws, that there is given in bequests the *Ius accrescendi* (right of accrual) and the *Ius non decrescendi* (right of non-diminution). The former is a kind of right by which one, by reason of his conjunction with another, obtains that other's vacant part: for if the same thing is left to two, and one wishes to repudiate it, but the other to claim it, the whole title will be of this latter, because he was conjoined with the former, whence the thing repudiated by the latter must accrue to him. But the Ius non decrescendi is that by which some failing thing comes to someone not by his own right but by another's: under this right, if one canon is absent from the choir, the one assisting will be able to claim his distributions for himself.

> *NOTANDUM est primo ex legum dispositione dari in legatis;* Ius accrescendi, *et* Ius non decrescendi. *Prius est ius quoddam, quo unus ob coniunctionem cum altero, vacantem eius partem obtinet: nam si res eadem duobus relinquatur, et unus eam velit repudiare, alter vero repetere; totus huius posterioris titulus erit, quia cum priori erat coniunctus, unde res ab eo repudiata, debet ipsi accrescere. Ius autem non decrescendi est illud, quo non proprio iure, sed alieno, res aliqua deficiens cuipiam obvenit: hoc iure si unus canonicus e choro sit absens, assistens poterit distributiones eius sibi vindicare.*

19 It must be NOTED second, that some can be conjoined in a threefold way: by the thing only; by the words only; and by the thing and words at once.

> *NOTANDUM secundo, aliquos posse esse coniunctos tripliciter; re tantum; verbis tantum; et re, et verbis simul.*

20 The FIRST conjunction occurs when one thing is left to two under a diverse formula of words; and then it is bequeathed in solidum to both, whether by testament to one and by codicil to the other, or by both at once: wherefore, one repudiating, or being unable to recover anything, the whole is acquired by the other.

> *PRIMA coniunctio habetur, quando res una sub diversa verborum formula duobus relinquitur; et, tunc in solidum utrique legatur, sive testamento uni, et codicillo alteri; sive utroque simul: quare uno repudiante, aut non potente aliquid recuperare, totum alteri acquiritur.*

21 The SECOND conjunction is made in a twofold way. First, if the same thing is left to two distributively in the same words, as if it were said: my estate at Lyons in parts, portions I leave to Peter and Paul: if one should reject this estate, the other can receive the whole by the right of accrual; for although it was not bequeathed in solidum to both, nevertheless the law decrees *unica, §. his ita, C. de caduc. toll.*, that since the parts are only divided in the mind, not designated to the eye, each, the other failing, obtains the other's part.

> *SECUNDA coniunctio dupliciter fit. Primo si iisdem verbis res eadem duobus distributive relinquatur, ut si dicatur: fundum meum Lugdunensem partibus portionibus Petro, et Paulo relinquo: Hunc fundum, si alter respuat; alter totum recipere potest iure accrescendi; licet enim non sit legatus in solidum utrique, statuit tamen lex* unica, §. his ita, C. de caduc. toll. *ut cum partes sint tantum mente divisae, non oculis designatae, uterque alterius partem, altero deficiente, obtineat.*

22 SECOND, it occurs when diverse things are not bequeathed in diverse words, as when it is said: my house at Bergamo to Titius, and my house at Lyons to Caius I leave: here there is no right of accrual, although the conjunctive particle *and* makes the same context of speech, because the things are utterly diverse.

> *SECUNDO fit, quando res diversae non diversis verbis legantur, ut cum dicitur: Domum meam Bergomensem Titio, et domum meam Lugdunensem Caio relinquo: hic nullum est ius accrescendi, licet coniunctiva particula,* et, *faciat eundem orationis contextum, quia res sunt penitus diversae.*

23 The THIRD conjunction then occurs, when in the same last instrument the same thing is left to several in one context of words, without any division of parts; for example, my field at Bergamo I bequeath to Titius, and the same I bequeath to Paul. This conjunction is the most commodious of all, and by the law of accrual it prevails over the rest: but if conjunctio re tantum (by the thing only) and conjunctio verbis tantum (by the words only) occur at once, many, cited in Bonacina *§. 5.*, wish the force of each to be equal; others, however, consenting, hold that the conjunction by the words only prevails, since it draws forth the more express will of the testator: see Molfesius *in summa, 2. p. tract. 13. cap. 5. num. 75. et seqq.*, Mantica *de tacitis et ambiguis convent. lib. 10. tit. 3.*, Tuscum *verb. ius crescendi conclus. 566.*, with Oinotom. *instit. de legat. §. si eadem res, num. 3. et seqq.*

> *TERTIA coniunctio tunc accidit, quando in eodem ultimo instrumento res eadem, uno verborum contextu, pluribus relinquitur, absque ulla partium divisione; verbi gratia, Agrum meum Bergomensem lego Titio, et eundem lego Paulo. Haec coniunctio est omnium commodissima, caetetisque praevalet iure accrescendi: Verum si simul coniunctio re tantum, et coniunctio verbis tantum, contingant; multi apud Bonacinam citatum* §. 5. *volunt aequam esse utriusque vim; aliis tamen consentientibus, coniunctionem verbis tantum praevalere, quippe quae magis expressam testatoris voluntatem depromit: Vide Molfesium* in summa, 2. p. tract. 13. cap. 5. num. 75. et seqq. *Manticam* de tacitis et ambiguis convent. lib. 10. tit. 3. *Tuscum* verb. ius crescendi conclus. 566. *cum Oinotom.* instit. de legat. §. si eadem res, num. 3. et seqq.

24 Yet the Testator can forbid this right of accrual, so that, one of the conjoined failing, his part falls to the heir; whence there shines forth a great difference between the heir and the legatee: for the latter can obtain nothing by the right of accrual where the express will of the legator shall have expressed otherwise; but an heir instituted in some particular thing, the other heirs failing, can succeed to the whole inheritance, even if the opposite has been expressly provided in the testament; and the reason is, because the testator cannot impede the effect of the common law, which decrees thus, lest anyone die in part testate and in part intestate.

> *POTEST tamen Testator hoc ius accrescendi interdicere, ita ut uno e coniunctis deficiente, pars eius obveniat haeredi; unde elucet differentia magna inter haeredem, et legatarium; nam hic nihil potest iure accrescendi obtinere, ubi expressa legantis voluntas id expresserit; at haeres in aliqua re particulari institutus, aliis haeredibus deficientibus, potest in universam haereditatem succedere, etiamsi oppositum expresse in testamento sit provisum; et Ratio est, quia testator non potest impedire iuris communis effectum, quod ita decernit, ne aliquis pro parte testatus, et pro parte intestatus obeat.*

## Question III: Which things can be bequeathed

1 ANY thing whatsoever that is alienable, to which the testator has a right, can be bequeathed; the reason arises from dominion over the thing, which is subject to the plain disposition of any Lord. But a thing belonging to another cannot be bequeathed, because a bequest imports a translation of dominion, which must be supposed in the one bequeathing. Yet if anyone should make a bequest of

another's thing, willing and knowing that the thing is not his own, then the bequest falls directly upon the heir, who is bound to procure for the legatee that thing or its estimation, as is had in *leg. cum alienam, Cod. de legat.* and *§. non solum, institut. de legat.* Nevertheless it falls to the legatee to prove that it was made known to the testator that that thing was another's: partly because he is the actor, whose it is always to prove; partly, because it clearly stands that the thing is another's, which simply cannot be bequeathed; but the presumption stands for the heir, until the opposite be proved. And these things are so according to the disposition of the civil law; but in the forum of conscience, *Bonac. §. 3. proposit. 1.* judges that such a bequest can neither be made nor paid; with whom accords *cap. filius noster de testamentis*, reproving the civil law because it makes valid a bequest of another's thing; yet *Vasquez dub. 2.* teaches that every bequest of another's thing, even made in ignorance, is valid, if made in favor of a wife, a dear friend, or his own servant, because then it is presumed that the Testator would have done the same even if he had known the thing to be another's; whence the heir is compelled to furnish the estimation of the thing, and this is special in a bequest: for in the institution of an heir, another's goods are invalidly inserted, nor is their estimation owed. So *Vasquez*, citing *Gomez* in the same place.

> ***Quae res possunt legari.***
>
> *RES quaecumque alienabilis, ad quam ius habet testator, legari potest; ratio oritur e dominio rei, quod planae dispositioni cuiusque Domini subiicitur: Res autem aliena nequit legari, quia legatio importat translationem Dominii, quod in legante debet supponi: Si tamen aliquis rei alienae legatam faceret, volens et sciens, rem non esse suam, tunc legatum directe cadit super haeredem, qui tenetur rem illam, vel eius aestimationem legatario procurare, ut habetur,* leg. cum alienam, Cod. de legat. et §. non solum, institut. de legat. *Legatario tamen incumbit probare innotuisse testatori rem illam alienam esse; tum quia actor est, cuius est semper probare; tum, quia clare constat rem esse alienam, quae simpliciter nequit legari; praesumptio autem stat pro haerede, donec oppositum probetur: Et haec ita se habent iuxta dispositionem iuris civilis ; In foro autem conscientiae, tale legatum non posse nec fieri, nec solvi debere sentit* Bonac. §. 3. proposit. 1. *cui consonat* cap. filius noster de testamentis, *reprehendens ius civile, eo quod rei alienae legatum validum faciat; docet tamen* Vasquez dub. 2. *omne legatum rei alienae, etiam ignoranter factum, validum esse, si fiat in favorem uxoris, dilecti amici, aut proprii famuli, quia tunc praesumitur, Testatorem idem facturum, etiamsi scivisset rem esse alienam; unde haeres cogendus est ad rei aestimationem praebendam, et hoc speciale est in legato: nam in haeredis institutione, bona aliena invalide suppurantur; nec eorum aestimatio debetur: Ita* Vasquez, *citans* Gomez *ibidem.*

2 But the things of a Church, or of commonwealths, which are not subject to our commerce, can be bequeathed LESS; for the alienation of these things and the like is prohibited, as is had in *Institut. de legat. §. non solum*, cited above. Yet some thing in which the testator has some right can be bequeathed; and it will stand for that part, if he has bequeathed only his own right; but if he bequeathed the thing, and afterwards obtained the whole of it for himself, the whole bequest will stand, by whatever title he acquired it. So *Vasquez*, and in part *Bonacina*, cited.

> *MINUS autem legari possunt Ecclesiae, vel res publicae, quae nostro commercio non subsunt; nam harum rerum, et similium prohibetur alienatio; ut habetur* Institut. de legat. §. non solum, *supra cit. potest tamen legari res aliqua, in qua testator aliquid iuris habeat; et pro illa parte valebit, si suum tantum ius legaverit; si vero rem, et postea eam totam sibi obtinuerit, valebit totum legatum quocumque titulo eam acquisierit. Ita* Vasquez, *et pro parte* Bonacina, *citatus.*

3 Also a thing of the testator obligated to a creditor can be alienated by bequest; because in it there is always preserved by the Testator some right, which he can transfer to another; and if the testator was ignorant that the thing was obligated, the heir is bound to redeem it and hand it over to the legatee.

> *RES etiam testatoris, creditori obligata, potest legato alienari; quia in ea semper conservatur a Testatore aliquod ius, quod potest in alium transferre; et si ignoraverit testator rem obligatam esse, tenetur haeres eam redimere, et legatario tradere.*

4 Say the SAME of the things of the heir himself, transferred by bequest to another; for the testator can impose that burden upon him, and the heir can accept it, since the entering upon the inheritance takes up every obligation signed in the testament: and this is true, they say, whether the thing is in the heir's possession or he has a right to it: *argum. leg. cum filius, §. dominus, ff. de leg. 1.*, as *Gratianus* discept. forens. *cap. 237. num. 26.* has it, with *Molfesius num. 71.* and others. Yet there is this difference between a thing of the testator and one of the heir bequeathed: that the former is acquired to the legatee as to dominion immediately upon the death of the testator; not so the thing of the heir, which transfers dominion only by delivery.

> *IDEM dic de rebus ipsius haeredis, legato in alium translatis; nam potest testator illud ipsi onus iniungere, et haeres acceptare, cum haereditatis aditio suscipiat omnem obligationem, testamento obsignatam: et hoc verum, aiunt, sive res sit in possessione haeredis, sive ad illam ius habeat:* argum. leg. cum filius, §. dominus, ff. de leg. 1. *ut habet* Gratianus *discept. forens.* cap. 237. num. 26. *cum* Molfesio num. 71. *et aliis. Hoc tamen discrimen est inter rem testatoris, et haeredis legatam, quod illa statim mortuo testatore, legatario quoad dominium acquiratur; non sic res haeredis, quae sola traditione dominium transfert.*

5 But if anyone should bequeath the very own thing of the legatee, such a bequest would be in vain; for the same thing cannot be made the proper thing of the same person twice, *leg. proprias, Cod. de legat.*, since also no one can dispose of a thing not pertaining to himself. Let the same judgment be of a dowry bequeathed to the wife, which pertains to herself, whence she cannot receive it by bequest; yet neither would this bequest be wholly void, because it would serve for anticipating its payment, which must be made immediately upon the death of the husband, since the Dowry of itself is not compelled to be paid except after a year: So *Iustin. in §. sed si uxori, instit. de legat.*

> *QUOD si quis legaret rem legatarii propriam, incassum esset tale legatum; quia non potest idem fieri proprium bis eidem,* leg. proprias, Cod. de legat. *quia etiam nemo potest disponere de re, ad se non pertinente. Idem iudicium esto de dote legata uxori, quae ad ipsam spectat, unde nequit eam legato accipere; non tamen omnino irritum esset hoc legatum, quia subveniret anticipanda eius solutio, quae statim mortuo marito debet fieri, cum Dos ex se non cogitur solvi, nisi post annum: Ita* Iustin. in §. sed si uxori, instit. de legat.

6 WHEN, however, some fruit-bearing thing is bequeathed, it must be seen whether it is of a definite species or of a genus. For if it is in some definite species, the fruits of such a bequest are owed from the day of the testator's death; but if not, and the thing be generic, the fruits must be computed from the day of the heir's delay, which is computed from that time at which the heir defers paying the bequest. But if not the thing itself but its fruits are several times bequeathed, it must be considered whether this was done by demonstrating or by taxing the thing; for if it was said demonstratively, although the thing has deteriorated, nevertheless the whole bequest must be paid; as he who should bequeath a hundred modii of wheat from such a field. But if the thing is taxed limitatively in the bequest, nothing must be paid beyond what is received from the thing. So *Gomez*, *Vasquez*, *Zechius*, *Sanchez*, and others cited in *Bonacina*, who assigns that rule by which the taxing of a thing is discerned

from its demonstration: as if by a double clause the bequest is made, it is judged to have been made demonstratively, as when it is said: I bequeath a hundred to Paul, and I will that they be paid from the revenue of such a field: and then they must be paid, even if the whole revenue of the field has not risen to a hundred; because, the bequest already complete, he only designated the field. So it is gathered *ex leg. quidam testamento, ff. de legat.* But if the manner of bequeathing is completed by one clause only, as: I bequeath a hundred to Paul from the fruits of such a field; it will be a sign that the testator spoke taxatively; and if the field has not yielded a hundred, nothing more must be paid; *leg. nomen debitoris, §. uni ex haeredibus, ff. de legat. 3.*

> *QUANDO autem legatur res aliqua fructificans, videndum est, an sit certae speciei, aut generis: Si enim sit in aliqua specie, fructus talis legati debentur a die mortis testatoris; sin vero, et res generica sit, computandi sunt fructus a die morae haeredis, quae computatur ab illo tempore, quo differt haeres legatum solvere; si vero non ipsa res, sed eius fructus aliquoties legatur, dispiciendum est, an id factum sit demonstrando, vel taxando rem; nam si demonstrative dictum sit, licet res deteriorata fuerit, legatum tamen totum est solvendum; ut qui legaret centum modios frumenti, ex tali fundo: Si vero res taxetur limitative in legato, nihil solvendum est ultra id, quod ex re percipitur. Ita* Gomez, Vasquez, Zechius, Sanchez, *et alii apud* Bonacinam *citatum, qui eam regulam assignat, qua taxatio rei ab eius demonstratione discernatur; ut si duplici oratione legatum fiat, demonstrative factum iudicetur, ut dum dicitur: Lego centum Paulo, et volo, ut solvantur ex talis fundi proventu: et solvenda tunc erunt, etiamsi totus agri proventus ad centum non surrexerit; quia completo iam legato, tantum demonstravit agrum. Ita colligitur* ex leg. quidam testamento, ff. de legat. *Si vero una tantum oratione modus legandi absolvatur, ut: Lego centum Paulo ex fructibus talis fundi; signum erit, testatorem taxative loquutum; et si ager centum non tulerit, nihil amplius solvendum;* leg. nomen debitoris, §. uni ex haeredibus, ff. de legat. 3.

7 CONCERNING a bequeathed thing, indeed, the general Rule is that with any principal bequest, its other accessories are judged to be bound by the same bond. Hence, with a bequest of a bed read, without house, garden, clothing, peculium, provisions, or furniture, all those things ordinarily annexed to it are judged bequeathed, as *Bonacin.* draws out at length and proves with a long series of Laws and Doctors.

> *CIRCA rem vero legatam Regula generalis est, principali quovis legato, censeri et caetera eius accessoria eodem vinculo ligari. Hinc lecto legato, sine domo, viridario, vestimento, peculio, penu, vel supellectili, legata censentur omnia, his ordinarie annexa, ut in longum protrahit, et probat* Bonacin. *citata longa Iurum, et Doctorum serie.*

## Question IV: What a pious, or privileged, legacy is

1 A PIOUS bequest is that which is judged made in respect of piety, and which in very fact contains something for a pious use. The laws have fortified this bequest with various privileges; for it was fitting that the piety of the testator not be so entangled with forensic litigations that it would not the sooner and more certainly have its effect; therefore we name this bequest *Privileged*, being exempt from the ambages and conditions required for profane bequests; but of this a little below.

> *LEGATUM Pium est illud, quod intuitu pietatis censetur factum, et re ipsa aliquid pro pio usu continet. Hoc legatum variis privilegiis iura munierunt; aequum enim erat, ut forensibus litigiis non adeo implicaretur testatoris pietas, quin citius, et certius suum haberet effectum; ideo legatum hoc* Privilegiatum *nuncupamus, quippe exemptum ab ambagibus, et conditionibus ad profana legata requisitis, sed de hoc paulo infra.*

2 IN the first place, however, care must be taken of the testator about to bequeath, that he be conscious of no mortal sin, lest that pious action, done outside grace, profit others only, not himself:

for the state of grace is necessary for the merit of piety, outside which, whatever is done will be reckoned as no act, being dead, as we discussed in treating of *Grace*.

> *IN primis autem curandum est testatori sic legaturo, ut nullius peccati mortalis sit conscius, ne pia illa actio, extra gratiam facta, aliis tantum, non sibi, proficiat: ad meritum enim pietatis necessarius est status gratiae, extra quem, quicquid agitur, pro non actu, utpote mortuum, computabitur, ut agendo de* Gratia *discussimus.*

3 If, however, being conscious of a mortal fault he has confirmed such his will in a last instrument, and afterwards has obtained grace by repenting, the best counsel will be to ratify his bequest anew, which will be equivalent to its first institution as to merit; for as he could revoke it up to death, so he can approve it anew. So warns *Bonacina* cited above *§. 2. propos. 2.*, with others related by him: these things, however, are to be understood in order to the legator himself.

> *SI tamen lethalis culpae conscius talem suam voluntatem ultimo instrumento obfirmaverit, et postea gratiam sit consecutus poenitendo; optimum erit consilium, suum legatum de novo ratificare, quod primae eius institutioni quoad meritum aequivalebit; cum enim ad mortem usque possit illud revocare, ita de novo approbare; Ita monet* Bonacina *supra citatus* §. 2. propos. 2. *cum aliis apud ipsum relatis: Haec autem sunt in ordine ad ipsum legantem intelligenda.*

4 AS TO pious bequests in order to the persons to whom they are made, it must be asserted that whatever is left in honor of God or the Saints; whatever also is bequeathed for the salvation of one's own soul, for the poor, widows, orphans, pilgrims, Monasteries of Mendicants, hospitals, and Churches, breathes this piety; so commonly all.

> *QUOAD legata pia in ordine ad personas; quibus fiunt, asserendum est, quicquid relinquitur in honorem Dei, vel Sanctorum; quicquid etiam pro propriae animae salute, pro pauperibus, viduis, pupillis, peregrinis, Mendicantium Monasteriis, hospitalibus, et Ecclesiis legatur, hanc pietatem redolere; ita communiter omnes.*

5 NOR is it necessary that the poor, of whatever sort they be, be so needy that they are compelled to beg from door to door; but it suffices that there not be available to them that from which they can live according to the exigency of their station; whether to pay their debts or to procure other necessaries; as the holy Doctor notes in the Apologeticum of the Order of Minors, quaest. 9.

> *NEC necesse est, quod pauperes, qualescumque sint, ita egeant, ut ostiatim mendicare cogantur; sed sufficit, quod eis non suppetat, unde iuxta sui status exigentiam vivere valeant; sive ad debita solvenda, sive ad alia necessaria procuranda; ut notat S. Doctor in Apologetico ordinis Minorum quaest. 9.*

6 But if this bequest left to them is specified for their aliments, and afterwards they, or some of them, have attained a more fortunate state or fortune, it will no longer be owed to them, since the final cause ceasing, those things cease which are ordained to it; if, however, they afterwards fall back into their former indigence, the bequest will return with its cause to be paid to them. So Surdus, De Alimentis, quaestione 7, numero 38, and others.

> *SI vero legatum hoc illis relictum, pro ipsorum alimentis specificetur, et postea ipsi vel ipsorum aliqui faeliciorem statum, aut fortunam attigerint; illis amplius non debebitur, cum cessante causa finali, cessent ea, quae ad ipsam ordinantur, si tamen postea in pristinam indigentiam reciderint, redibit simul cum sua causa legatum illis solvendum. Ita Surdus de Alimentis quaestione 7. numero 38. et alii.*

7 By some, that which is left to virgins to be married, or to be made fit for the state of religion, is also reduced to a pious bequest; provided that it not be owed to them under another title of justice. Likewise that which is destined for the repair of fountains, roads, bridges, and the like; likewise that

which is bequeathed for painting the images of Saints, or for promoting the uses of studies: these things, however, we shall not willingly admit among pious bequests, unless it be established that they were made in respect of poverty or piety: since not rarely these and the like are wont to be carried out on account of other motives.

*AD pium etiam legatum reducitur a nonnullis, quod maritandis, vel habilitandis ad religionis statum, virginibus relinquitur; modo hoc illis alio iustitiae titulo non sit debitum. Item quod fontium, viarum, pontium, et similium reparationi destinatur; item quod pingendis Sanctorum imaginibus, vel promovendis studiorum utilitatibus legatur: Haec tamen non libenter inter pia legata admittemus, nisi constaret, ea paupertatis, vel pietatis intuitu fuisse facta: cum non raro haec, et similia propter alia motiva actuari soleant.*

8 HENCE one can discern what kind of bequest is that made to a poor kinsman; for often not poverty but, on the contrary, kinship prevails in the affection of the testator; wherefore, to discern this, the chief rule is, whether in his testament he first named the poor man or the kinsman. For if the poor man is first mentioned, the bequest is judged pious, to which two conditions are always required: the first is piety in the person to whom it is made: the second is piety in the person, or in the motive, by which it is made. For if a bequest is made to a rich man, it will not be judged pious, since in him is not that piety founded in poverty: let the same judgment be, if it is made to a poor man, but not in respect of poverty.

*HINC discernere licet, quale sit legatum consanguineo pauperi factum; nam saepe non paupertas praevalet consanguinitati, sed e contra, in affectu testatoris; quare ad hoc dignoscendum regula potissima est, si in suo testamento prius pauperem, vel consanguineum nominaverit: Si enim primo fit mentio pauperis, censetur legatum pium, ad quod semper duae sunt conditiones requisitae; prima est pietas in persona, cui fit: Secunda est, pietas in persona, vel in motivo, quo fit. Nam si diviti fiat legatum, non censebitur pium; cum in ipso non sit illa pietas, in paupertate fundata: idem esto iudicium, si fiat pauperi, sed non paupertatis intuitu.*

9 FINALLY, bequests made to Confraternities to be erected with Pontifical authority, for withdrawing sinners from an evil state, for burying the dead, and for celebrating Masses, are reckoned among things piously left by the Doctors, as is seen in Bonacina cited. All which the Confessor and the penitent must take note of on account of the reserved case, which is incurred in many places on account of the deferral of the payment of a pious bequest beyond two years; which reservation is observed at Milan, by the report of Bonacina above. Nor does it stand in the way that sometimes pious bequests are made to Mendicants, who are capable of dominion; for although they cannot vindicate the dominion of the bequeathed thing, nevertheless the executors of testaments are bound to convert it to their use. So D. Bonaventure cited.

*DENIQUE legata facta Confraternitatibus, authoritate Pontificia erigendis, peccatoribus a malo statu retrahendis, mortuis sepeliendis, Missisque celebrandis, inter pie relicta, apud Doctores recensentur, ut videre est apud Bonacinam cit. Quae omnia sapere debent Confessarius, et paenitens propter casum reservatum, qui multis in locis incurritur ob dilatam pii legati solutionem ultra biennium; qualis reservatio observatur Mediolani, relatu Bonacinae supra. Nec obstat, quod aliquando sint pia legata facta Mendicantibus, dominii capacibus; nam licet ipsi, rei legatae dominium vindicare nequeant, tenentur tamen testamentorum executores eam in eorum usum convertere. Ita D. Bonavent. citatus.*

10 Nor does it follow that a definite thing bequeathed is meanwhile in the goods of no one. For it is in the goods of the heir, to be expended, not to be reserved, as the holy Doctor cited says expressly.

*Nec sequitur, rem certam legatam interim in nullius esse bonis. Est enim in bonis haeredis erogandis, non reservandis, ut diserte ait S. Doct. cit.*

11 CONCERNING the privileges of a pious bequest, this must be known: that the Falcidian portion, or the Trebellianica, usually deducted from a profane bequest, has no place here; because it is a disposition of the civil law, to which a pious cause is not subject. So Tiraquell. privileg. 26, Tuscus verb. legata, conclus. 111, and all the rest.

*DE privilegiis legati pii id sciendum, quod Falcidia, vel Trebellianica, detrahi solita a legato profano, hic non habet locum; quia est dispositio iuris civilis, cui pia causa non subiicitur. Ita Tiraquell. privileg. 26. Tuscus verb. legata, conclus. 111. et caeteri omnes.*

12 SECOND, it can always be sustained by whatever means it can stand; and if it cannot accrue to one cause, it is applicable to another; so the aforesaid, Tiraquell. privil. 33, and Tuscus, concl. 109, after D. Bonaventure in Reg. Min. cap. 4.

*SECUNDO, semper sustineri potest, quocumque modo valeat; et si uni nequeat competere, alteri causae est applicabilis; ita praefati, Tiraquell. privil. 33. et Tuscus, concl. 109. post D. Bonaventuram in Reg. Min. cap. 4.*

13 THIRD, all the solemnities of the civil law are driven away from this, on account of the reason already given; whence the various conditions of witnesses, as of the testator, are not required in so many dispositions; wherefore it is all the same, whether the witnesses are requested or not; whether men or women; more or fewer; whether the testator be blind, mute, and Deaf or not, wholly testate or in part, capable of profane bequests or not; and it suffices that he have sufficiently expressed himself by naming the heir or legatee loftily. So it stands from Bonacina and others whom he cites. There can be added to the privileges of a pious bequest, that if it is left indefinitely, or in perpetuum, it is not prescribed with any term of time prefixed, as Alexander VII defined for a bequest left annually pro anima, as we saw in treating of *Human Acts*, disput. 17, quaest. 10, sect. 41.

*TERTIO omnes iuris civilis solemnitates hinc abiguntur, ob rationem iam latam; unde testium conditiones variae, sicut et testatoris, tot dispositiones non requiruntur; quare perinde est, sive testes sint rogati, sive non; sint viri, vel foeminae; plures, vel pauciores; sit testator caecus, mutus, et Surdus, sive non, in totum testatus, seu pro parte, habilis ad legata profana, vel non; sufficitque modo se sufficienter expresserit, haeredem, aut legatarium, elate nominando. Ita constat e Bonacina, et aliis, quos citat. Addi potest privilegiis legati pii, ut si indefinite relinquatur, vel in perpetuum, nullo temporis termino praefixo praescribatur, ut pro legato annuo pro anima relicto definiit Alexander VII. ut vidimus agendo de* Actibus humanis, *disput. 17. quaest. 10. sect. 41.*

### Question V: In what ways legacies lapse, so that the heir is not bound to pay them

1 THESE things are understood of profane bequests, not of Pious ones, which are never caducous, as is clear from what has been said: and as D. Bonaventure cited teaches, quaest. 2, saying that if a bequest is repudiated by one of the poor who are left, it is to be given to another.

*HAEC intelliguntur de legatis profanis, non de Piis, quae nunquam sunt caduca, ut patet ex iam dictis: et ut docet D. Bonavent. quaest. 2. citatus, dicens, si legatum ab uno paupere, qui relinquitur, respuatur, alteri esse dandum.*

2 In MANY ways, however, it happens that the Heir is free from the payment of a bequest; the chief are sought from its invalidity, from its tacit or express revocation made by the testator, from the perishing of the thing without the Heir's fault; also from the repudiation of the legatee himself.

*MULTIS autem modis contingit, Haeredem liberum esse a solutione legati; praecipui petuntur ex eius invaliditate, ex tacita, vel expressa revocatione a testatore facta, ex rei peremptione absque Haeredis culpa, Item ex repudiatione ipsius legatarii.*

3 INVALIDITY can arise by reason of the manner in which the bequest is made, and by reason of the person to whom it is left: in the first way it is invalid, if the solemnities of the Law have been omitted, if dominion of the bequeathed thing is lacking in the testator, as has been said, if finally he has named the matter in the supreme or subalternate genus (as I may speak dialectically): otherwise, if in the lowest species; wherefore a bequest of Being, or of Animal, will be judged illusory; not so if an ox or a horse is bequeathed. So §. si generaliter, institut. de legat., and then, according to the more common opinion, the heir is bound to give according to the option of the legatee; for in the same §. it is had: *If a slave, or any other thing, is bequeathed generally, the choice is the legatee's, unless the testator has said otherwise.*

*INVALIDITAS potest oriri ratione modi, quo fit legatum, et ratione personae, cui relinquitur: primo modo invalidum est, si solemnitates Iuris sint praetermissae, si in testante deest dominium rei legatae, ut dictum est, si denique in genere supremo, vel subalterno, (ut dialectice loquar) materiam nominaverit: Secus, si in specie infima; quare Ens, vel Animal legatum, illusorium censebitur; non ita si bos, vel equus legetur. Ita §. si generaliter, institut. de legat. et tunc iuxta communiorem sententiam tenetur haeres dare iuxta optionem legatarii; nam eodem §. habetur:* Si generaliter seruus, vel res alia legetur, electio legatarii est, nisi aliud dixerit testator.

4 In the SECOND way it is invalid, if it is made to an incapable person; as if the testator erred concerning its substance, or it does not yet exist in the nature of things.

*SECUNDO modo invalidum est, si fiat personae incapaci; ut si testator erraverit circa eius substantiam; vel adhuc non sit in rerum natura.*

5 That a bequest fails even when the final cause fails, or the condition attached to it, has been said above.

*QUOD deficiat etiam legatum deficiente causa finali, vel conditione ei apposita, supra dictum est.*

6 REVOCATION also invalidates a bequest. For since the bequeathed thing is under the dominion of the one bequeathing while he lives, he can alienate it at his pleasure; wherefore, as it is left by his will, so it is taken away by a contrary will; for things are dissolved by the same causes by which they are born, as is said in the Rules of Law in 6. Nevertheless it falls to the heir to prove the revocation, otherwise in doubt favor must be given to the legatee, since he is in possession of the fact. For what clearly stands to have been done, but it is doubted whether it has been revoked, is judged in favor of the one to whom it is made, until the opposite is juridically proved, leg. 3. §. si duobus, ff. de adimend. legat.

*REVOCATIO etiam legatum invalidat. Nam cum res legata sit sub dominio legantis, dum vivit, potest eam ad libitum alienare; quare sicut voluntate relinquitur, ita contraria voluntate adimitur; res enim per easdem causas solvuntur, per quas nascuntur, ut dicitur de regulis Iuris in 6. Incumbit tamen haeredi probare revocationem, alias in dubio favendum est legatario, cum sit in possessione facti. Nam quod clare constat esse factum, sed dubitatur num sit revocatum, iudicatur in favorem eius, cui fit, donec oppositum iuridice probetur leg. 3. §. si duobus, ff. de adimend. legat.*

7 I SAID a bequest is revoked tacitly or expressly; because the nature of each is the same; wherefore if, after the bequest is signed, enmity springs up between the Legator and the Legatee, the bequest

will be presumed to have been tacitly revoked, since ordinarily no one is wont to do good to an enemy hostile to himself; yet the Judge ought to use much circumspection in considering this. See leg. nec adiecit, ff. pro socio.

> *DIXI revocari Legatum tacite, vel expresse; quia par est utriusque natura; quare si postquam Legatum obsignatur, enascitur inimicitia inter Legantem, et Legatarium; praesumetur Legatum tacite esse revocatum, cum nullus ordinarie inimico sibi infenso soleat benefacere; multa tamen circumspectione uti debet Iudex in hoc dispiciendo. Vide leg. nec adiecit, ff. pro socio.*

8 ITEM, a bequest of some definite thing which the testator voluntarily alienated otherwise, sold, or gave to another, is judged tacitly revoked; *leg. rem Legatam, and leg. Legatum, ff. de adimend. legat*. And this is true a fortiori if it was done in favor of the Legatee himself; for then the payment will be judged anticipated.

> *ITEM tacite revocatum censetur Legatum alicuius certae rei, quam testator voluntarie aliter alienavit, vendidit, aut alteri donavit;* leg. rem Legatam, et leg. Legatum, ff. de adimend. legat. *et hoc a fortiori verum est, si in favorem ipsius Legatarii factum sit; censebitur enim tunc anticipata solutio.*

9 But if a debt of his own is left to the Legatee, and afterwards it is exacted and consumed, it is judged revoked; truly, if the debt was exacted that it might be kept more securely and laid up, it must be paid: see Mantica, Molfesius, Mascardus, and Gratianus, whom Bonacina reports *cit. §. 8*.

> *Quod si Legatario relinquitur suum debitum, et postea exigitur, ac consumitur, revocatum censetur; verum si debitum exactum est, ut securius custodiatur, ac reponatur, solvendum est: Vide Manticam, Molseium, Mascardum, et Gratianum, quos refert Bonacina* cit. §. 8.

10 Say the same of any consumptible thing, which, after it is bequeathed, is converted by the Legator to his own uses; the heir will not be bound to pay for that thing, unless the testator has reckoned another like thing in its place, or ignorantly consumed the former. So Bartolus, Baldus, and commonly the rest.

> *Idem dic de re quavis consumptibili, quae postquam legatur, a Legante in proprios usus convertitur; haeres ad eam rem solvendam non tenebitur, nisi testator aliam similem rem in eius locum supputaverit, vel ignoranter priorem insumpserit. Ita Bartolus, Baldus, et communiter caeteri.*

11 The third cause, on account of which the Heir is exempted from paying the bequest, is the loss of the thing: for if the thing is determined, and has perished without the fault of the heir, it perishes for the legatee; because the thing perishes for its own lord, *leg. pignus, Cod. de pignorata actione*, but by the death of the Testator the dominion is transferred to the Legatee.

> *Tertia causa, ob quam Haeres a solutione Legati eximitur, est rei perditio: nam si res est determinata, et absque haeredis culpa sit perdita, perit Legatario; quia res perit suo domino* leg. pignus, Cod. de pignorata actione*, morte autem Testatoris, dominium in Legatarium transfertur.*

12 I said: if the thing be determined; for if it is only in the genus, its dominion is not acquired otherwise than by delivery, wherefore, having perished, it perishes for the heir.

> *Dixi: si res sit determinata, nam si sit solum in genere, non acquiritur eius dominium aliter quam traditione, quare perdita, perit haeredi.*

13 A question, however, is disputed, whether, if two things are bequeathed at once, and one perishes without the fault of the heir, the other must be restored: the common opinion holds that the surviving thing must be paid; because the useful is not vitiated by the useless: whence, with an ox and a calf bequeathed, the one having died, the other must be restored; indeed, with a whole herd or flock bequeathed, what remains must be paid: *so leg. grege Legato, ff. de legatis, 1.*

> *Quaestio autem controvertitur, an si duae res sint simul Legatae, et una sine haeredis culpa pereat; altera sit restituenda: Communis opinio tenet rem superstitem esse solvendam; quia utile per inutile non vitiatur: unde Legato bove cum vitulo, altero mortuo, alter est restituendus; imo integro armento, vel grege Legato, quod superest, solvi debet:* ita leg. grege Legato, ff. de legatis, 1.

14 Nor does it tell against this, that a flock is bequeathed; but one sheep does not make a flock. For although a flock cannot be constituted in one sheep, nevertheless the denomination of a flock can be preserved in one surviving from many. Bonacina brings an example above: for although the inhabitation of one man does not suffice to constitute a college, yet after it has been constituted from several, and the rest have died down to one, the college is preserved in that one, *leg. Sicut, §. finali; ff. quod cuiusque universitatis*, from which Law it is gathered that more things are required for the constitution of something than for its conservation.

> *Nec contra facit, quod grex sit Legatus; sed una ovis non facit gregem. Nam licet non possit grex in una ove constitui, potest tamen denominatio gregis in una ex multis superstite conservari. Exemplum affert Bonacina supra; nam licet inhabitatio unius hominis non sufficiat ad constituendum collegium, postquam tamen ex pluribus constitutum est, et caeteri ad unum interierunt; collegium in illo uno conservatur* leg. Sicut, §. finali; ff. quod cuiusque universitatis, *ex qua Lege colligitur plura requiri ad constitutionem, quam ad conservationem alicuius rei.*

15 Nor likewise does it stand in the way that the usufruct of the flock would perish in one alone; whence if the usufruct of a whole flock had been left to someone, with one sheep alone remaining, the heir would not be bound to pay anything. This, I say, does not stand in the way, because the law decreed that of the usufruct specifically, as must be seen, *leg. fin. quibus modis ususfruct.*; but what is decreed in one case is badly drawn to another, where the like reason is wanting. The reason, however, why it was so enacted in the law is sought from the small utility of the usufruct which is received from one sheep; which reason ceases in our case. So Bonacina notes §. 8. *citat.*

> *Nec similiter obstat, quod ususfructus gregis periret in uno solo; unde si cui relictus esset totius gregis ususfructus, una sola ove remanente, non teneretur haeres ad aliquid solvendum. Hoc inquam non obstat, quia de usufructu speciatim id lex decreverit, ut videndum est,* leg. fin. quibus modis ususfruct. *quod autem in una causa decernitur, ad aliam, ubi par ratio deest, male trahitur. Ratio autem, cur ita in lege statutum sit, petitur ex modica utilitate ususfructus, qui ex una ove percipitur; quae ratio in casu nostro cessat. Ita notat Bonacina §. 8.* citat.

16 The fourth cause of invalidating a bequest is the repudiation of the Legatee himself, since every bequest has tacitly that condition, if it be accepted: whence, not being accepted, it accrues to the heir, and this is true even if he wishes to accept part of the bequest and repudiate the rest, because it is enacted, *leg. Legatarius, ff. de legat. 2.*, that the Legatee cannot repudiate in part and accept in part the same thing; yet his heirs, however, can do otherwise: the reason is, because the will of the testator was to bequeath the whole thing, to which the will of the Legatee ought to correspond by accepting the whole; yet since the will of his heirs can be manifold, each of them can reject or receive the part falling to him; for this the testator is judged to have willed to will.

*Quarta causa invalidandi Legatum, est repudiatio ipsius Legatarii, cum omne Legatum habeat tacite eam conditionem, si acceptetur: unde non acceptatum accrescit haeredi, et hoc verum est etiamsi partem Legati velit acceptare, et aliam respuere, quia statuitur,* leg. Legatarius, ff. de legat. 2. *ut Legatarius nequeat pro parte repudiare, et pro parte accipere eandem rem; secus tamen facere possunt eius haeredes: ratio est, quia voluntas testatoris erat totam rem legare, cui correspondere debet voluntas Legatarii totam acceptando; quia tamen voluntas haeredum eius potest esse multiplex; potest eorum quisque partem sibi obvenientem reiicere, vel recipere; hoc enim velle voluisse censetur testator.*

17 If, however, manifold, or disparate, things have been left, even in one codicil or testament, it will lie with the Legatee to have the option of repudiating or accepting for the whole, or in part; but this again must be limited: for if the things are so diverse that a burden is annexed to one, but by no means to the other, the Legatee will not be able to repudiate the onerous thing, taking up the other which has no burden: for the testator is presumed to have left the whole bequest in respect of the burden, wherefore it will not be fair that his will be frustrated.

*Si tamen res multiplices, seu disparatae sint relictae, licet uno codicillo, aut testamento, penes Legatarium erit optio repudiandi, vel acceptandi pro toto, vel pro parte; Hoc autem iterum limitandum est, nam si ita res sint diversae, ut uni sit annexum onus, alteri vero minime; non poterit Legatarius rem onerosam respuere, alteram, quae non habet onus, arripiendo: Nam praesumitur testator in eo casu totum Legatum intuitu oneris reliquisse, quare non aequum erit, ut eius voluntas frustretur.*

18 Some other things remain to be said concerning bequests, namely, when and in what order they are to be paid; what the heir can retain for himself from these; whether things left for one use can be converted to another, and the like, which are treated abundantly, though they are almost of no weight, in Bonacina *de Contractibus quaest. 17.*, Vasquez, Opusculo de testamentis, and others cited by them.

*Nonnulla alia restant de Legatis dicenda, nimirum, quando, et quo ordine sunt solvenda; quid de his sibi possit haeres retinere; an ad unum usum relicta, in alium possint converti, et similia, quae abunde, licet fere nullius sint ponderis, tractantur apud Bonacinam* de Contractibus quaest. 17. Vasquez Opusculo de testamentis, et alios, apud hos citatos.

19 Here therefore it may suffice to say: a bequest left absolutely, which no condition suspends, is to be paid immediately after the death of the Testator; truly, if debts concur at the same time with the bequests, these must be paid first, in that order which we intimated above in treating of restitution. Say the same of real vows, to which the testator was bound; for these are to be preferred before bequests; but when several legatees concur for several bequests, all are to be paid at a ratable rate. See Sanchez in *Summa lib. 4. cap. 15. num. 39.*

*Hic itaque dicere sufficiat, Legatum absolute relictum, quod nulla suspendet conditio, statim post obitum Testatoris solvendum; verum si simul cum Legatis debita concurrant, haec prius sunt solvenda, eo ordine, quem de restitutione agendo supra innuimus. Item dic de votis realibus, quibus obnoxius erat testator; Haec enim sunt Legatis anteferenda; At cum ad legata plura plures concurrant Legatarii, omnibus ad ratam sunt solvenda. Vide Sanchez in* Summa lib. 4. cap. 15. num. 39.

20 As to the commutation of bequests, it can be made for a reasonable cause, at the same time with the authority of a superior intervening; the legitimate superior, moreover, in pious bequests is the Bishop of the place; in profane ones, however, the Prince, who acknowledges no other superior to himself in his kingdom.

*Quoad commutationem legatorum, ea fieri potest rationabili causa simul cum superioris authoritate interveniente; Legitimus autem superior in Legatis piis, est Episcopus loci: in profanis vero est Princeps, qui non agnoscit alium in suo regno sibi superiorem.*

21 Finally, as to what can be deducted from bequests by the heirs, this must be known: that necessary Heirs, to whom the inheritance has come ab intestato, can retain their legitimate part, whether the goods of the testator suffice for paying the bequests or not. But unnecessary heirs, to whom no legitimate part is owed, can deduct from each bequest a fourth part at a ratable rate, which is called the Falcidian portion; the rest is clear from what has been said above concerning the Testament; see the cited authors.

*Quoad id denique, quod legatis potest detrahi ab haeredibus, illud sciendum est, quod Haeredes necessarii, quibus ab intestato haereditas obvenit, possunt partem suam legitimam retinere, sive sufficiant bona testatoris ad solvenda Legata, sive non. Haeredes vero non necessarii, quibus pars legitima non debetur, possunt ad Ratam a singulis Legatis detrahere quartam partem, quae Falcidia nuncupatur; caetera patent ex supradictis de Testamento; vide citatos Authores.*