INSTITUTIONS OF MORAL THEOLOGY

According to the Doctrine of St. Thomas and St. Alphonsus

by Gennaro Bucceroni, S.J.

Sixth Edition, revised and enlarged by the author

VOLUME II

The Seventh and Tenth Precepts: Justice, Contracts, Restitution · the Eighth Precept · the Precepts of the Church · Appendices (nn. 832–1626)

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Title Page

According to the doctrine of St. Thomas and St. Alphonsus By Januarius Bucceroni of the Society of Jesus Volume II Sixth Edition Rome

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Approval of the Work

Since some theologians of the Society of Jesus have reviewed the work entitled *Institutions of Moral Theology*, etc., of Fr. Januarius Bucceroni, S.J., and have approved that it can be brought to light, we grant the faculty that it may be printed, if it shall so seem to those whom it concerns. Rome, March 7, 1904. Augustus Ferretti, S.J. Provincial of the Roman Province

We grant the faculty that the aforesaid work, reviewed and enlarged by the author himself, may be published for the sixth time, if it shall so seem to those whom it concerns. Rome, July 8, 1913. Octavius Turchi Provincial of the Roman Province, S.J.

Abbreviations

S. Th. S. q. 1. a. 1. = St. Thomas, *Summa Theologica*, Supplement, question 1, article 1.

L. 5., H. A. tr. 1. n. 37. = St. Alphonsus de Liguori, *Theologia Moralis*, Naples, 1819, in the same treatise, n. 5; and *Homo Apostolicus*, Bassano, 1826, treatise 1, number 37.

A. A. S. v. 1. p. 6. = *Acta Apostolicae Sedis*, volume 1, page 6.

A. S. S. v. 1. p. 6. = *Acta Sanctae Sedis*, volume 1, page 6.

E. M. = *Enchiridion Morale*, fourth edition, at the same number.

The codes of Italy, France, Switzerland, Spain, Portugal, and Austria are indicated by their initial letters: C. I., C. G., C. He., C. H., C. L., C. A.

The German Code is indicated by the initial letters C. B., the Prussian Code. Customary citations of Roman law:

Inst. *de Mand.* section 1. *Mandantis* = the *Institutes*, under the title *On Mandate*, section 1, beginning *Mandantis*.

L. 7. section 4. *Sed cum de Pactis* = the Pandects, law 7, section 4, beginning *Sed cum*, under the title *On Agreements*, or with D. or ff. added before the title, that is, *Digestum* in Latin, *Pandectae* in Greek.

L. *Creditor* C. *de Usuris* = the law which begins *Creditor*, in the Code, title *On Usury*. Nov. 22. C. 1. = the Authentic Novels, Novel 22, chapter 1.

Lib. 1. f. tit. 7. C. un. = Book 1 of the feudal laws, title 7, sole chapter. Customary citations of canon law: Decree of Gratian:

First Part: Can. *Ieiunium* 7. Dist. 76; or Dist. 76, chapter 7.

Second Part: Can. *Qui viderit* 13, question 5, cause 32; or cause 32, question 5, chapter 13. Treatise on Penance, Distinction 1, canon 1.

Third Part: Can. *Est unitas* 49. Dist. 4 *de Consecr.*; or *de Consecr.*, Dist. 4, chapter 49.

Decretals of Gregory IX: Cap. *Presbyter* 2. *de Peculio Clericorum*.

Decretals of Boniface VIII: Cap. *Non putamus* 2. *de Consuetudine* in the Sixth. Clementines of Clement V: Clem. 3. *de Haereticis*. Extravagants of John XXII: Extr. 2. *de Conc. praeb.* Common Extravagants: Extr. Comm. 5. *de Poenit.* Pr. d. = condemned proposition. Cf. 119. = confer here number 119.

A small line at the end of any paragraph or number has the same meaning as "confer." Citations refer to the things which immediately precede; after a small line at the end, they refer to the things which precede in that very number or paragraph.

On the Seventh and Tenth Precepts of the Decalogue

I. On Justice Considered Generally

832. What are the seventh and tenth precepts of the Decalogue? - "You shall not steal... You shall not covet your neighbor's house, nor his servant, nor his maidservant, nor his ox, nor his ass, nor anything that is his." Exod. 20:15, 17. By the seventh precept, formally negative, under the name of theft taken broadly, every injury, or unjust lesion or damaging of one's neighbor in the temporal goods of fortune, is prohibited; and consequently, by the same precept, insofar as it is virtually and implicitly affirmative, it is commanded that to each one his own right with respect to temporal goods must be rendered. Certainly it pertains to the same precept and to the same virtue both to prohibit another's right from being injured through injustice, and especially to oblige that to each other person his own right be rendered through restitution and other modes.

But as by the seventh precept the external act is prohibited, so by the tenth the internal act injurious to one's neighbor in the goods of fortune is prohibited. For by it every inordinate and unjust appetite for the goods of fortune of one's neighbor is prohibited. Therefore against this tenth precept sin not only the envious, but also the avaricious, who seek riches with excessive eagerness, and desire to increase wealth by unjust modes. Both these precepts regard the virtue of justice.

833. What is justice? - Justice is so called from *iustari*, or from two things being made equal to each other. Justice taken broadly imports all virtues; hence a man is customarily called simply just if he preserves every honesty in every matter. Taken strictly, insofar as it is the special virtue with which we are here dealing, it is defined: the constant and perpetual will of rendering to each one his own right. Inst. 1. 1. t. 1. "Constant and perpetual will," because there must be a firm disposition not only for one or another day, but always, of rendering to each one his own right; for otherwise it is not a perfect virtue, just as penance is not a perfect virtue unless it includes the firm purpose of never sinning. The virtue is defined from the act. Therefore it can be said otherwise that "justice is a habit according to which someone, by a constant and perpetual will, renders to each one his own right." S. Th. 2. 2. q. 58. a. 1. "Right" here is not understood as right broadly so called, which is the exigency of right reason toward something as honorable, that is, toward something to be done because of its honesty, or omitted because of its dishonesty; but right strictly so called is understood, which is a moral power toward something as one's own, that is, toward something to be done, omitted, had, retained, demanded as one's own, that is, as subject to one's own liberty, with others excluded, namely so that it may fall to one's own advantage and utility. This right is founded in the very nature of man, who by reason of his liberty must move himself toward the end and apply the means necessary for obtaining that end. C. L. 359 ff., 2167 ff., 2287, 2339, 2354; C. He. 641; C. I. 438; C. A. 362, 366; C. B. 903; Lugo d. 1. n. 6.

This right, however, is one thing as right of jurisdiction, another as right of property. The first is the legitimate power of a superior to command or prohibit something to subjects for their own good, or for the good of the whole community. The necessity and utility of administering the community is the measure of this right as to its acts. The other is the legitimate power of any private person to

dispose of some thing for the advantage of his own liberty, or as his own. Hence in the right of property the thing exists for the proprietor; in the right of jurisdiction neither the Prince exists for the people, nor the people for the Prince, but each exists for the common good.

The right of property is one thing in the thing, another to the thing. The first is that by which someone has the thing itself immediately bound and juridically obligated to himself as his own. Hence a thing obligated to someone by such a right carries its obligation with it, and wherever it may come, it can be sought back by its owner and juridically claimed. The second, however, is that by which someone does not have the thing itself immediately bound and juridically obligated to himself, but rather has another person bound to hand over some thing to him. Therefore a right in the thing makes the thing already his own; a right to the thing makes the thing become his own. A right in the thing gives an immediate real action against the thing itself, so that you may take it to yourself. A right to the thing gives an immediate personal action against the person himself, so that you may compel him to hand the thing over to you, for example by the sentence of a judge. By a right to the thing someone has a just title to having it, for example by title of legacy, but he does not yet have possession of the thing. By a right in the thing someone has possession of the thing itself. For a right in the thing, therefore, there is required a title transferring ownership, of a thing determined in the individual, and its possession, at least regularly. For a right to the thing a just title for having it suffices. And thus the owner of a farm has a right in the thing as regards the existing fruits of that farm; he has a right to the thing as regards the rent of a leased farm. C. A. 307, 308; Inst. 1. 4. t. 6. Whenever a thing is sought by force of an obligation by which someone has not yet acquired ownership of the thing, the action is personal; but if a thing is sought of which he has full ownership, the action is real. Finally, an action is mixed, personal and real, and, as is said, the action is personal written upon the thing, if by the petition of the thing someone acquires ownership of the thing, and then the lawsuit instituted over it begins with a personal action and is concluded by a real action, as in the case in which, by the office of the judge, the sale made of a thing is dissolved, and the thing returns to the seller as his own. A personal action is from some personal fact, that is, from contract or from delict. A real action is from the defect of another's right. Inst. 1. 4. t. 6. section 1. Cf. Troplong, *On Sale*, article 1654, nn. 624-630; on article 1659, n. 698; on article 1664, nn. 728, 729; on article 1674, nn. 806, 807. "His own"; a thing can be one's own in three ways, if the person is considered in society as its member. Hence right also is distinguished in three ways: into high right, low right, and right of property. High right is that which the Prince, the republic, or the community has over the goods of the members, which it can demand as its own for the common good, by the "ownness" of the community, since whatever the part is belongs to the whole and exists for the whole. S. Th. 2. 2. q. 64. a. 2; q. 65. a. 1. Low right is in the member of the community, as such, to common goods, which the member can demand in their distribution as his own by the "ownness" of a member. The right of property, however, is in the member of the community, as such, to proper goods, which one member can demand from another as his own, by the "ownness" of property. "Of rendering to each one his own right," that is, of equating the right of another by the rendering of what is owed; for to right, as to a certain moral exigency, debt correspondingly responds. Therefore, as is clear, justice is not a virtue toward oneself, but toward another. And as charity has its foundation in the conjunction of men among themselves, so justice rests upon the distinction of one man from another. S. Th. 2. 2. q. 57, 58; Gousset 670, 674.

834. You will resolve: The Prince can indeed, if at some time this is required for the common good, take a thing from a subject, because right to the end necessarily imports right to the means without which the end cannot be obtained. But the public good sometimes requires that someone be deprived of his own thing, for example of a field for the construction of a public road, etc. But then the Prince, in so far as can be done, is bound to just compensation, because it is not equitable that one person be despoiled while others remain untouched, as is clear from natural and positive law. C. I. 438; C. G. 545; C. H. 349; C. A. 365; C. L. 2360.

But in no way can he, without a grave cause of the public good, but for his own convenience, take away by law from a subject some notable thing of his, or an acquired right, because he has no power over the goods of private persons unless the reason of the common good altogether demands it. Therefore he is then bound to restitution. S. Th. 2. 2. q. 66. a. 8.

Equity is distinguished from justice. First, equity is justice itself. And thus in L. 14. *de Condict. indeb.* it is said: "It is equitable by nature that no one be enriched with the loss of another." But equity proceeds further, by constituting a certain fitting measure in justice itself, and generally in all laws, namely by tempering according to various circumstances the rigor and subtlety of right and laws. Rigor, for example: "It is of the highest equity that one who has promised money, or something else, by reason of donation, should not owe interest because of delay in payment of the money." L. 22. *de Donat.* Subtlety, for example: "If a surety, though freed by lapse of time alone, nevertheless pays the creditor, he will rightly have an action of mandate against the principal debtor; for although he paid when already freed, nevertheless he fulfilled his pledge and freed the debtor. Therefore, if he is prepared to defend the principal debtor against the creditor, it is most equitable that by the judgment of mandate he recover what he paid." L. 29. section 6. *Mandati.* Cf. also L. 17. *de Iniu. rupto irr. f. testam.*; L. 85. *de R. I.*

Equity, taken in this way, is the same as epicheia, which is a part of justice commonly so called, and is a subjective part of justice; and justice is said of it prior to legal justice, for legal justice is directed according to epicheia. For legal justice follows the words of the law; equity or epicheia follows the intention of the legislator. S. Th. 2. 2. q. 120. a. 2. Equity is to be observed in interpreting laws and acts, and also in onerous contracts.

It is altogether unlawful to exercise one's right when an exercise of this sort has no other end than to inflict damage on another. Likewise it is unlawful to exercise that right against the prescription of the laws. C. B. 226, 826, 907, 908, 909, 912. Likewise it is unlawful to exercise one's right excessively, with damage to others. C. He. 679, 684. But it is not unlawful to violate the property of another in order to avoid one's own greater damage, compensation afterward being made to the other for the damage inflicted on him. C. He. 701.

The print's appendix has more on this paragraph: [On Epicheia](/manuals/bucceroni/on-epicheia). (ed.)

835. How many kinds of justice are there? - Justice is threefold, namely general or legal, distributive, and commutative. For since justice is wholly situated in this, that it render to another his own right, it is specified and divided according to right. But right, as was just said, is threefold, namely high, low, and of property. Hence there are three species of justice, each of which renders what is owed according to equality.

Legal justice equates high right through the actions and goods which are owed to the Prince or to the republic for promoting the common good; and this is justice of the part toward the whole, or of the members toward the head and the community. It is called legal because it has for its object that which is owed to the community by reason and force of the laws, "because by it man agrees with the law ordering the acts of all virtues to the common good." S. Th. 2. 2. q. 58. a. 5.

Therefore this justice is a general and special virtue at the same time. General, insofar as it orders the acts of all virtues to the common good; special, insofar as it regards the common good as its proper object. "And thus it is in the Prince principally and as it were architectonically; but in subjects secondarily and as it were administratively." S. Th. 2. 2. q. 58. a. 6. Legal justice, insofar as it is in the Prince, inclines him to procuring the common good, for example by establishing laws necessary for it. Insofar as it is in private citizens, it inclines them to the obedience owed to the laws by reason of the common good. Illegal injustice is opposed to this legal justice, which "is a special vice insofar as it regards a special object, namely the common good, which it contemns"; and general, insofar as "through contempt of the common good man can be led to all sins," and insofar as "all vices are repugnant to the common good." S. Th. 2. 2. q. 59. a. 1.

Distributive justice equates low right through the distribution of common goods, public functions, offices, rewards, namely the right which a member of the community, as such, has to these; and this is justice of the whole toward the part, or of the head or community toward the members. "When something from common goods is distributed to individuals, each one in some way receives what is his own." S. Th. 2. 2. q. 61. a. 1 ad 2. Distributive justice is in the Prince as distributing common goods according to the dignity of persons; but in the particular persons themselves it is present insofar as they are content with what is owed to them.

Acceptance of persons is opposed to distributive justice; for in distributive justice those conditions of persons are considered which make for the cause of dignity or debt; but in acceptance of persons other conditions are considered, which do not make for the cause of dignity or debt. For whatever condition does not make for the cause on account of which someone is worthy of such a thing is referred to the person. S. Th. 2. 2. q. 63. a. 1.

Commutative justice, however, equates the right of property, or the low right of one member against another member, through the exchange of things and prices; and this is justice of part toward part. Therefore, as legal justice orders man immediately to the common good, so commutative justice orders man concerning those things which are directed to another singular person, namely concerning external actions and things by which men can communicate with one another. S. Th. 2. 2. q. 58. aa. 7, 8.

Hence special injustice is opposed to commutative justice insofar as it imports "a certain inequality toward another," according to the aforesaid actions and things owed to another. S. Th. 2. 2. q. 59. a. 1. Therefore theft and robbery are opposed to commutative justice, through which harm is inflicted on one's neighbor in exterior goods by secretly or violently taking them away. And since harm of this sort can also be inflicted in the goods of the body and of the soul, and also of the whole person, hence by reduction many other sins are opposed to the same justice: homicide, mutilation, damaging, etc.; calumny, detraction, insult, etc., whether outside judgment or in judgment through an unjust sentence, false testimony, etc.

Now if justice is not taken generally, namely insofar as it is also a certain general justice, but insofar as it is particular justice ordered to some private person, then there are only two species of justice, commutative and distributive. For there is only a twofold ordering to a private person, namely of part to part, which commutative justice directs, and of whole to parts, which distributive justice directs. The former directs the exchanges of private persons among themselves. The latter directs the distributions of the Prince to particular persons. But in them the notion of what is owed is diverse. For what is proper is owed to someone in one way, and what is common in another way.

These two kinds of justice are particular justices, while legal justice is general justice; for motion receives species from the terminus, and it pertains to legal justice to order those things which belong to private persons to the common good; but, on the contrary, to order the common good to particular persons, and those things which are done mutually between two particular persons to one another, belongs to particular justice. Therefore justice can well be divided into general and particular; and the latter into distributive and commutative. S. Th. 2. 2. q. 61. a. 1.

But in the strict sense, by the name justice, only commutative justice is meant. For general or legal justice does not regard entirely distinct persons; for each citizen is part of the community, and what is contributed to the community is contributed also to that same citizen. But distributive justice by no means includes right strictly so called, or right of property. For it supposes only dignity and aptitude in the person for receiving such common goods.

Vindictive justice, which is customarily added to the three prior species of justice, is not properly a fourth species of justice, because justice, taken generally, is specified and divided according to the diversity of the right which it regards; and this is only that threefold right just mentioned. For it would be incongruous to say that a guilty person has a right to punishment. It is a potential part of justice itself. Nevertheless, under a diverse respect it can be reduced to all those three species. Insofar as a superior provides for the common happiness of citizens by punishments, it pertains to legal justice; insofar as he decrees the punishments themselves proportioned to the gravity of crimes, it pertains to distributive justice; finally, insofar as a superior carries out the offices of vindictive justice from a certain quasi-contract entered into with the republic concerning the right administration of public affairs, it pertains to commutative justice. L. 486; S. Th. 2. 2. q. 58, q. 61, q. 80, q. 108. a. 2 ad 1.

836. Whether the mean of the thing, or equality, must be observed in the same way in commutative and distributive justice? - In commutative justice arithmetical equality must be observed; in distributive justice geometrical proportion. Commutative justice is exercised by citizen toward citizen, by private person toward private person, and has place in contracts and in other affairs pertaining to social commerce; in this only the things themselves are considered, which are the object of contracts and of the exchanges by which commerce is exercised. Therefore in it there must be preserved equality of the things themselves, namely equality of thing to thing, as if, for example, you owe one hundred, you render one hundred, considering only what is owed, so that, except in cases in which regard for persons is prescribed by the law itself, for example when minors are involved, in all other cases no respect is had for the condition or merits of the person. And this is that equality which they call arithmetical.

But distributive justice is exercised by a superior toward a subject, and has place in distributing common goods, dignities, offices, honors, burdens, rewards and punishments; and therefore it must

not have regard of thing to thing, but of condignity, merits, and condition of persons, for example their capacity or need, with respect to imposing taxes, or granting subsidies to a person, whether physical or moral. For so much more of common goods is owed to someone, the greater principality he has in the community. And likewise so much more is owed, for example, to some community from common goods, the greater its need may be, for example for hospitals to be erected, schools, etc. From this arises and is constituted what is called geometrical proportion, which namely is not equality of thing to thing, but proportion of thing to person, that is, to the merits and quality of persons, so that just as one person exceeds another, so also the thing which is given to one person exceeds the thing which is given to another. Hence equality is considered not according to quantity, but according to proportion; or, what is the same, equality not of things but of ratios is considered. Therefore if to him who has merits as five there are given, for example, ten coins, to him whose merits are as ten, twenty must be given. S. Th. 2. 2. q. 58. a. 10; q. 61. a. 2; Inst. 1. 4. t. 4. sections 7, 8; Gousset 670.

837. What is the obligation of justice? - Both commutative justice and also distributive, vindictive, and legal justice oblige per se under grave sin. For the violation of commutative justice, as is clear from several places of Sacred Scripture, is to be punished with eternal punishment, 1 Cor. 6:10. Besides, it is per se, or from its nature, repugnant to charity, which moves one to will the good of another; for it itself consists essentially in inflicting harm on another. Therefore per se and from its genus it is a mortal sin. But a lesion of distributive, vindictive, and legal justice induces per se a grave disorder, since it gravely harms the necessary order of society. Per se, because in this matter smallness of matter is admitted. S. Th. 2. 2. q. 59. a. 4.

838. What is ownership? - Among the three species of justice, as has already been said, commutative justice alone is strictly and properly justice altogether. For in legal justice there is lacking distinction toward another; for every citizen is part of the community. But in distributive justice there is lacking right strictly so called; for in the distribution of common goods, toward obtaining a part of them, there is given only mere dignity, and in no way property. But since commutative justice is exercised only between private persons, and renders to each one what is his own proper thing, hence it alone is strictly and properly justice altogether, and it is chiefly treated in this treatise. But since commutative justice regards equality of thing to thing, it is concerned only with the right of property, which is customarily called property and ownership.

Ownership is: the moral power of disposing at will of some corporeal thing as one's own, unless nevertheless it is prohibited by law, agreement, or the will of a testator. "Moral power," and thus it is distinguished from physical power; moral power, and therefore legitimate. "Of disposing of a thing," and thus it is distinguished from jurisdiction, which is also called ownership of jurisdiction, so that it may be distinguished from ownership of property: for jurisdiction is the moral power of governing; nor is it exercised immediately over a thing, but over a subject person. "Corporeal," because of incorporeal things one does not have ownership, but rather a right. "At will," that is, by selling, donating, or even destroying without cause, which although otherwise prohibited, because God permits ownership to each one only for this purpose, that it may serve his own necessity and utility and that of his own people, nevertheless does not violate the right of another and is not against commutative justice. "As one's own," for ownership properly is a right in the thing, and not precisely a right to the thing, which tends to that right and is perfected and completed by it. Much less is

ownership mere possession of a thing. "Unless prohibited by law": by natural law, if one cannot dispose of his own thing without injury to anyone; by positive law, and thus alienation of their things is not permitted to minors except from a just cause and with certain solemnities observed, though in this case ownership is not taken away, but only its use is impeded. "By agreement": this would be, for example, if it were agreed between seller and buyer that the buyer is not to use the thing bought except after a certain day. "By the will of a testator": this would be, for example, if the testator had bequeathed a farm to someone on this condition, that he not use it except after a year. C. I. 436; C. G. 544; C. H. 348; C. A. 353, 354; C. B. 903; C. He. 641; C. L. 2167 ff.; S. Th. 2. 2. q. 66; Gousset 673; E. M.

839. How many kinds of ownership are there? - Ownership of property is immediately divided into perfect ownership and imperfect ownership. Perfect ownership of property, or full ownership, is the legitimate power of receiving in one's own name every advantage of one's liberty from some thing, by disposing of it and using it. Imperfect ownership, however, is the legitimate power of receiving from a thing some advantage, yet not every advantage, of one's liberty.

Imperfect ownership is immediately subdivided into direct ownership and useful ownership. The former is the legitimate power over the substance of a thing without the fruits. The latter is the legitimate power of receiving fruits and emoluments from another's thing, while its substance remains intact. Useful ownership, according to the various advantages of things to be received, is divided into various species, principally into use, habitation, surface right, usufruct, servitude, possession, emphyteusis, fief, and census. Each ownership, however, is either perpetual or revocable. By its nature ownership is full and perpetual. Here it will be necessary to speak of the first six species; of the last three it will be necessary to speak below, when there will be discussion of contracts. C. G. 543; C. He. 641 ff.; C. L. 2187-2189; L. 487.

840. What is use? Use is defined: The right of using another's things, their substance being preserved both as to matter and also as to form. "Right" signifies the faculty which belongs to a competent user, for thus the one to whom use belongs is called; but the one to whom the property or ownership of the thing belongs is called the proprietor. Therefore use here is not taken generally for the actual exercise of any ownership whatever, but specially for a certain special power. "Right," and therefore there is question of use of right, not of use in fact, which is the actual use of another's thing, revocable at the will of the one granting it. "Of using" signifies that the faculty belonging to the user extends only to those things which are necessary. C. I. 521; C. G. 630; C. H. 524; C. A. 504; C. L. 2254. This necessity, however, is to be measured according to the condition, state, and dignity of the user himself and of his family, with servants included, and with children born after the exercise of use not excluded. C. I. 521, 523; C. G. 630; C. H. 524, 526; C. A. 505, 506. Yet use of a thing can be granted to a person for daily personal necessities, C. L. 2254, and from mere agreement altogether limited to some act, for example if someone grants to a friend that he may walk through his forest, hold a banquet in his house, or pluck apples from the trees of his field. "Another's things" indicates that use cannot consist in one's own things; for each one is said to have in his own things not use only, but also ownership. "Their substance being preserved"; otherwise it would not be use but abuse. From this it follows that the user cannot change the thing whose use he has obtained even into a better form; and therefore those words are also added: "both as to matter and also as to form." C. A. 507. And this is the principal obligation of the user; hence he is also bound to ordinary repairs and

taxes, yet in proportion to the fruits, so that the thing may be preserved whole for its owner. C. I. 537; C. G. 635; C. L. 2259, 2260. Cf. C. A. 508; C. H. 527.

Use is acquired and ceases in the same modes by which usufruct is acquired and ceases. C. I. 529; C. G. 625; C. H. 529; C. L. 2255; Inst. 1. 2. t. 5. sections 1, 3, 4; L. 487. Cf. here 848, 849.

841. Hence it is clear: that under use, as also under usufruct, there do not come things consumable by one act, such as wine, oil, bread, etc., because through such use the substance of the thing does not remain preserved. In the case of destruction of the thing, one is bound to repay an equivalent price. Therefore prior security must be given, and the condition of immovables and an inventory of movables must be made. C. I. 525; C. G. 626; C. L. 2256. Cf. C. A. 520.

Considering the nature of use itself, the user cannot lease, sell, or donate his right to another. For use consists in this, that someone uses a thing according to the measure of his necessity. C. I. 528; C. G. 631, 634; C. H. 525; C. A. 507; C. L. 2258. Make exception, unless it clearly appears that this faculty also was granted to them by a special agreement, or if the use would be altogether useless unless it could be alienated. A user of a fruitful thing, such as a garden, fields, vineyards, etc., cannot justly collect more from the fruits than is required for necessary support; hence if he collects more fruits, he is bound to restore them to the direct owner. C. I. 821; C. G. 630; C. A. 505, 506; C. L. 2257.

842. What is habitation? Habitation is: The right of inhabiting another's buildings, their substance being preserved. And thus to noble widows there is often granted by husbands the right of dwelling for the days of life in the house of the heir. He to whom habitation of a house has been granted can dwell in it with his family, although at the time when he acquired the habitation of the building he was not married, and can receive guests in it; nevertheless he cannot transfer his right to another by selling it, or by leasing the building and acquiring for himself the price of the lease. One who inhabits the whole house is bound to all necessary and ordinary expenses and taxes; one who inhabits only part is bound only according to the proportion of the thing.

Habitation begins and ceases as use, with which it is almost confused according to more recent laws. C. I. 521 ff.; C. G. 625 ff.; C. A. 521-522; C. H. 524, 525, 529; C. He. 776, 777; C. L. 2254, 2259, 2260. Cf. C. A. 508; C. H. 527; C. B. 1093. C. I. 1415; C. G. 1570: besides clothing, habitation is owed to a widow from the inheritance of her husband for the year of mourning. C. B. 1969: the heir is bound for one month to permit use of the house to members of the family of the deceased, from the inheritance devolved to him. Inst. 1. 2. t. 5. sections 2, 5.

842bis. What is surface right? - With use, surface right also is almost confused. Surface is said to be whatever has been placed upon the soil and stands above the ground, such as a building, tree, plant, vine, etc. Hence there is right of surface; and the one having it is called the superficiary, and the thing itself is called superficiary. Dig. title 18, book 43. The surface yields to the soil. The right of surface can be limited only to occupation of the surface, and only to ownership of the superficiary thing, whether it be above the soil or beneath the soil. C. He. 675, 779.

843. What is usufruct? - Usufruct is: The right of using and enjoying another's thing, by receiving fruits from it in that very mode by which the proprietor himself would receive them, while nevertheless its substance is preserved, both as to matter and also as to form, as in use. C. I. 447; C. G. 578; C. H. 467; C. A. 509; C. B. 1030; C. He. 745; C. L. 2197, 2202; L. 487.

It differs from use in this, that it extends more broadly; for simply to use is to receive only necessary fruits, but to enjoy is to receive them as the proprietor himself would receive them. Thus, for example, if someone has the use of some garden, he can indeed take fruits from it for himself and his own, but he cannot alienate them and bestow them on outsiders; but he can do so if he has usufruct of the same. Those words, "of using and enjoying," are not added in vain; for usufruct, insofar as it regards a fruitful thing, is the right of using; but insofar as it regards the fruits, it is the right of enjoying, or of receiving fruits from it. And thus, if the revenues of some estate are bequeathed, it is not judged to be a usufruct, but a legacy of revenues, which is a personal burden, not a burden of the estate. And therefore it is said, "the right of using and enjoying another's thing, by receiving fruits from it," etc. Hence it is a real right constituted in the thing, and thus it differs from lease. "Another's thing," because usufruct is a servitude. The owner uses his thing by right of property. The one to whom usufruct belongs is called the fructuary. Inst. 1. 2. t. 4. section 1.

844. What is fruit of a thing, and how many kinds are there? Fruit is what a thing bears or produces. For fruits are so called from bearing; and some are natural, which are produced from the thing itself and by the benefit of nature alone, such as grass, apples, nuts; likewise the offspring of animals and the things which come from them, since they are held as a part of the entrails. Others are industrial, which are acquired by industry alone, and it is the profit which is received from money exposed to trade, or from improvements made to a thing. Others, however, are those in which, besides nature, the labor and industry of man also has a part, such as, for example, grain and crops; theologians call these mixed, because they are produced partly by nature, partly by the benefit of human industry. Finally, others are civil, which arise only on occasion of the thing and by force of a particular obligation founded in civil law, for example the price of a leased house, rents of a farm, interest of money given as a loan, etc. C. L. 495.

But fruits are not understood except after expenses have been deducted. The natural and industrial fruits themselves are divided into those to be born and those born; these likewise are customarily divided into pending and received, and these still into existing and consumed. C. I. 444, 445, 480, 494; C. G. 547, 548, 583, 584, 585, 598; C. H. 354-357; C. A. 330, 405; C. B. 99, 100, 102; C. He. 643; L. 609, 610.

845. How many kinds of usufruct are there? - There is a threefold division of usufruct. The first is into proper and improper usufruct. The former is constituted in things which are by no means consumed by use, such as, for example, a house and a garden; the latter, however, is constituted in fungible things, as they are called, namely those which are consumed by use, such as linens and household furnishings. Improper usufruct is also called quasi-usufruct. C. I. 483, 484; C. G. 587, 589; C. H. 481, 482; C. A. 510; C. B. 1031, 1032, 1067.

The second division is into singular usufruct, that is, of certain things in species; particular usufruct, that is, of some part of goods; and universal usufruct, in which all goods are contained. C. G. 612; C. H. 469; C. B. 1038.

Finally, the third division is into usufruct of things and of rights, as, for example, usufruct of a life annuity, which brings a right of receiving even past and unreceived fruits. Thus from C. G. 588. Cf. C. I. 482; C. H. 469; C. A. 510; C. B. 1068 ff., 1085 ff.; C. He. 745; Inst. 1. 2. t. 4. section 2.

846. What are the rights of the usufructuary? - These in general are, apart from a special agreement:

1. Since the usufructuary is judged to act as the person of the proprietor with respect to useful ownership, his first right is that he can receive all fruits, whether natural, industrial, or civil, and make them his own, whether he has collected them by himself or through others. But they are understood to have been collected when they have been separated from the soil or from the thing. Hence, if the fructuary dies, fruits indeed mature but not yet separated from the soil or the thing do not belong to the heir of the fructuary, but to the proprietor of the thing, without the burden of paying for cultivation or seed, etc.; for fruits, as long as they adhere to the farm, are judged one with it. But if that heir, when the fructuary is already near death, has collected immature fruits, he is bound to restore them to the proprietor; for just as the fructuary could not collect immature fruits, so much less can his heir. On the contrary, the usufructuary receives natural and industrial fruits pending at the beginning, also without the burden of paying for cultivation or seed, etc. But civil fruits are acquired day by day, and therefore must be divided according to the proportion of the time during which the usufruct lasted. Inst. 1. 2. t. 1. section 36; C. I. 477, 479, 480, 481, 494, 496; C. G. 578, 582, 585, 586, 588, 598, 600; C. H. 471, 472, 474, 475; C. A. 509, 511. Cf. ib. art. 519; C. H. 472, 476, 477; C. B. 1039; C. He. 755, 756, 757; C. L. 2203 ff., 2252, 2253, 495.

2. In addition, he has a right to all those things without which usufruct cannot be had; therefore he has right of way to the usufructuary thing through the hereditary farm, if access does not lie open from elsewhere; likewise the right of using all servitudes adhering to the farm, because they are held as qualities of the farm itself; likewise he has a right to opened mines and to the individual instruments of the farm, unless the contrary will of the testator appears; for it is not to be presumed that the testator wished the fructuary to furnish instruments for himself for a farm which he is to use only for a time. C. I. 494; C. G. 597, 598; C. A. 511; C. H. 479. Cf. ib. arts. 476, 477; C. B. 1031; C. L. 2206, 2213, 2287.

3. Besides, he has the right that he can sell, donate, lease, lend, and subject to mortgage the fruits and the usufructuary things, and grant them to another to enjoy; indeed even hand them over as a pledge. For one who enjoys through another is seen to enjoy by himself. C. I. 492, 493, 1967; C. G. 595, 2118; C. H. 480; C. He. 758; C. B. 1059; Inst. 1. 2. t. 1. sections 36-38, t. 4. section 1.

4. As the usufructuary is not bound to make improvements, so he has no right to compensation for improvements made. For he is judged to have donated them. Nevertheless, he will be able to compensate an increase of price with losses, if any followed without grave fault of the fructuary. If this compensation cannot have place, it is lawful for the fructuary and his heirs to retake additions made, if they can be removed without detriment to the farm and with the utility of the fructuary, and the proprietor does not prefer to retain the additions made for himself after paying their valuation. But it will always be lawful for the fructuary and his heirs to recover mirrors, painted panels, and other ornaments, provided all things are restored to their former condition. C. I. 495; C. G. 599; C. H. 487, 488; C. He. 753; C. L. 2217, 2220. Cf. C. A. 514-517.

847. What are the obligations of the fructuary? - These in general are, apart from a special agreement:

1. The burden falls upon the fructuary both of furnishing custody and of undergoing ordinary expenses, so that the thing may be preserved in its whole condition, and also of making expenditures so that he may receive natural fruits from it. He is also bound to pay the ordinary burdens by which the usufructuary thing is burdened, such as salaries, annual taxes, and similar things. He is likewise bound to notify the owner if anything happens which may harm his property. C. I. 477, 501, 504, 506, 509, 511; C. G. 605, 606, 608, 614; C. H. 500-502, 504, 505; C. A. 512, 513; C. B. 1036, 1037, 1041 ff.; C. He. 764, 765, 767, 769; C. L. 2228, 229, 2238, 2240.

2. The fructuary must use another's thing as a good father of a family, and must return it such as it ought to be found after good administration. But the proprietor can do nothing by which the condition of the usufructuary becomes worse, because he suffers him to enjoy. C. I. 495, 497; C. G. 599, 601; C. H. 489, 497, 503; C. A. 513; C. B. 1051 ff.; C. He. 755, 759, 768; C. L. 2223, 2227.

3. The usufructuary thing must be restored to the owner, when the usufruct has ended, such as it was with respect to its substance when it began. C. I. 477; C. He. 751 ff. Therefore security must be given, and the condition of immovables and an inventory of movables must be made. C. I. 496, 497; C. G. 600, 601; C. H. 491; C. B. 1034 f., 1048, 1049. From C. I. 1922 either security or pledge can be given. Cf. C. G. 2041; C. He. 760 ff. But security is not to be given by a father or mother in legal usufruct, nor by one who sold or donated the thing while reserving usufruct to himself. C. I. 497; C. G. 601; C. H. 492. Nor indeed is security to be given, nor an inventory to be made, if the one who constitutes the usufruct remits all these things. C. I. 496, 497; C. H. 493. C. I. 483, 484; C. H. 481, 482; C. G. 587, 589; C. A. 518, 520; C. B. 1034, 1035, 1050, 1055; C. L. 2221, 2224.

4. Things which are consumed by use are to be restored according to their valuation made, or otherwise in the same quantity and quality, or at the current price, when the usufruct ceases. But things which deteriorate by use are restored in the condition in which they are when the usufruct ceases. C. I. 483, 484; C. G. 587, 589; C. B. 1050, 1067; C. He. 772; C. L. 2208, 2209.

From Roman Law: The usufructuary of a field has a right to hay, crops, willows, and trees to be cut, but not to large and fruit-bearing trees, to stakes, to stones, or to sand. In place of trees that have died, he is bound to substitute others, and the former belong to the fructuary; nevertheless he by no means ought to substitute trees overthrown by the force of a storm without fault on his part. And if there are bees, their usufruct also belongs to him. L. 9, 11, 18, 59 *de Usufr.* etc. From C. G. 594; C. I. 490: fruit-bearing trees which perish, or which are overturned by some accidental event, belong to the usufructuary with the burden of substitution. Cf. C. H. 483-485.

Usufruct of a forest. "The fructuary can cut a coppice wood and a reed-bed, as the father of a family was cutting, and sell them, even if the father of a family was not accustomed to sell but to use them himself; for it must be referred to the mode, not to the quality, of using." L. 9. section 7. *de Usufructu et quemadmodum*, etc. Cf. C. G. 590, 591; C. I. 485, 486; C. He. 770; C. L. 2211. "But if there were large trees, he cannot cut them." L. 11. *de Usufructu*, etc. Cf. C. G. 590, 592; C. I. 487, 579. "Labeo says that, when trees have been torn up or thrown down by the force of winds, the usufructuary can take them up to the measure of his own use and of the villa... He thinks that the usufructuary can cut timber as

much as is necessary for the repair of the villa; just as, he says, he can burn lime or dig sand or take anything else necessary for the building." L. 12. *de Usufructu*, etc. Cf. C. G. 592, 593; C. I. 488, 489; C. A. 511; C. L. 2210, 2213, 2226. "I think that the fruit of a nursery belongs to the fructuary, yet in such a way that it is lawful for him to sell and to sow; nevertheless, for the sake of sowing the field, he must always renew the prepared nursery as an instrument of the field, so that, when the usufruct has ended, it may be restored to the owner." L. 9. section 6. *de Usufructu*, etc. Cf. C. G. 590; C. I. 485, 491; C. H. 485; C. L. 2112.

The usufructuary of a flock has a right to wool, milk, and offspring. Inst. 1. 2. t. 1. section 37, t. 5. section 4. But he is bound to substitute other heads from the offspring in place of heads that have died, unless he has the usufruct of the individual heads separately, not of all the heads collectively, or of the flock, herd, or drove, that is, of the universality. L. 68. section 2, 69, 70. section 3. *de Usufructu*, etc. Cf. C. G. 615, 616; C. I. 512, 513; C. H. 499; C. L. 2225.

848. How is usufruct acquired? - Usufruct is acquired: 1. From law, and then it is called legal; such is the usufruct of parents from the goods of children, or of a husband from the goods of his wife. 2. From agreement or contract, and therefore it is called conventional, for example by force of donation or testament. 3. By prescription. In its acquisition, the formalities of the various laws must be observed. C. He. 746.

C. I. 478, 901, 2137; C. H. 468; C. B. 1032, 1033.

849. How does usufruct cease? - "Lest properties be useless in general, when the usufruct has always departed, it has pleased the law that usufruct be extinguished in certain ways and return to the proprietor." Inst. 1. 2. t. 4. section 1; C. L. 2251.

Moreover, usufruct ceases: 1. By the natural or civil death of the fructuary; for since both use and usufruct are personal rights, they ought to be extinguished by the death of the one to whom they belong. Hence usufruct, that is, the stable right itself of using and enjoying, neither passes to heirs nor can even be sold without the consent of the direct owner. C. I. 515; C. G. 617; C. H. 498, 513; C. B. 1059, 1061; C. L. 2250. A usufruct granted to a community or moral body is extinguished after the space of 30 years, C. I. 518; C. G. 619; C. H. 515; C. L. 2244; of 100 years, C. He. 749.

2. When the time has ended, if any has been established by law or constituted by agreement. C. I. 515, 517; C. G. 617, 620; C. H. 513, 516; C. A. 528; C. He. 748; C. L. 2245.
3. By every manner of change, for example if a meadow becomes a pond, or by the total destruction of the thing, if, for example, the whole building is demolished. Total destruction; for if the thing perishes only partially, usufruct is sustained in that which remains. C. I. 515, 519, 520; C. G. 617-624; C. H. 513, 514, 517. Cf. C. A. 525; C. He. 748; C. L. 2243, 2246.
4. Likewise, usufruct is extinguished when the right of the one ceding the usufruct has been resolved. For example, if Titius sells a house to Caius under a pact of redemption, and meanwhile Caius grants its usufruct to Sempronius, once the house has been redeemed by Titius, the usufruct also ceases.
5. By consolidation, namely when the fructuary obtains the property and ownership of the thing itself, or when the owner also acquires the usufruct. C. I. 515; C. G. 617; C. H. 513; C. B. 1063.

6. By renunciation of the fructuary, provided it is not done in fraud of creditors. C. H. 513.
7. By abuse, by which the thing is made worse through the fault of the fructuary. But the sentence of a judge is necessary. C. I. 516; C. G. 618. Otherwise, however, from C. L. 2249, and from C. H. 520, 529, which establishes a distinction between usufruct and use, which is extinguished by grave abuse of the thing.
8. By prescription, namely if the fructuary does not use his right for so much time that the usufructuary thing can be usucapted by another; 30 years are required so that the owner can prescribe against the fructuary. C. I. 515; C. G. 617; C. H. 513; C. L. 2241; Inst. 1. 2. t. 4. section 3; C. G. 621, 622.

850. What is servitude, and how many kinds are there? - Servitude, taken actively and generically, is a right which belongs to someone, so that the thing of another, or another person, serves his thing or himself, that is, is applied to its or his utility. But servitude taken passively is the obligation of another's thing, or of a person, corresponding to the aforesaid right. "The thing of another, or another person"; for one's own thing does not serve its owner. Therefore the advantages which the owner receives from it, he receives by right of ownership, not by right of servitude. The same must be said a fortiori of a person.

Hence servitude can be: 1. Personal, which is owed by a person to a person, and is proper to a slave toward a master. 2. Mixed, which is owed by a thing to a person, of which sort are use, usufruct, habitation. C. A. 521. 3. Real, which is owed to a thing by a thing, as a burden imposed on an estate for the utility of another estate. The thing bearing the burden is called serving; the thing receiving the utility is called dominant. C. I. 531; C. G. 637; C. H. 530; C. A. 473; C. B. 1018, 1019, 1090; C. L. 2267.

Real servitude is divided into continuous and discontinuous. The former is exercised without the act of man, such as servitude of prospect, of drip, of aqueduct, of sewer. The latter is exercised by the act of man, such as servitude of way, of drawing water, etc. C. I. 617; C. G. 688; C. H. 532; C. L. 2270. Besides, one is apparent, another non-apparent. The former appears outwardly by some sign, such as servitude of door, window, aqueduct; the latter lacks this outward sign, such as servitude of not raising a building higher, of pasturing a flock, of cutting wood. C. I. 618; C. G. 689; C. H. 532; C. L. 2270; Inst. 1. 2. t. 3. sections 1, 2, 3; Book 8 of the Digest.

Real servitude is divided into urban and rural, according as it is for the utility of a building or of a field. L. 1. *Communia praediorum*, etc. "The rights of urban estates are such: of raising higher and obstructing the lights of a neighbor, or of not raising higher; likewise of turning drip-water onto the roof or area of a neighbor, or of not turning it; likewise of inserting beams into the wall of a neighbor; and finally of projecting (that is, making a projection; a projection is a member of a building extending out, *sporto*) and protecting (or making a projection in the roof of buildings, namely of projecting the roof, *fare uno sporto nel tetto*), and other things similar to these." L. 2. *de Servit. praed. urbanorum*. "The servitudes of rural estates are these: path, driving-way, road, aqueduct. A path is the right of going, walking for a man, but not also of driving a beast of burden. A driving-way is the right of driving. A driving-way is the right of driving either a beast of burden or a vehicle. Therefore he who has a path does not have a driving-way; he who has a driving-way also has a path, even without a beast of burden. A road is the right of going and driving and walking; for road contains in itself

both path and driving-way. Aqueduct is the right of leading water through another's farm. Among rural servitudes are to be counted drawing water, driving cattle to water, the right of pasturing, of burning lime, of digging sand." L. 1. *de Servit. praed. rustic.*

851. By what modes is servitude constituted? Real servitude can arise from a threefold source. The first is the natural position of places; thus, for example, a farm which is in a lower situation is bound to receive waters flowing down from a farm which is in a higher situation. Servitudes flowing from this source are therefore called natural. C. L. 2271. And thus owners of an estate which has no communication with public roads have a right of passage through another's estates, with damage compensated to their owners. C. L. 2309 ff.

Another source is law, under which name also comes the sentence of a judge; thus, for example, because of public or private utility, the law prescribes rules to be observed as regards the construction and repair of roads, the drawing off of waters, the building of houses, the distance of walls, passages, etc. C. He. 686, 688, 699, 702; C. L. 2325, 2338. Servitudes arising in this way are called legal. C. I. 533 ff.; C. G. 649 ff.

Besides this, a servitude can be acquired by prescription. C. I. 2137; C. A. 480, 1469, 1470. Only apparent and continuous servitudes, such as the servitude of aqueduct through another's farm, can be acquired by usucaption, and only by prescription of 30 years. C. I. 629, 630; C. G. 690, 691; but C. H. 537-539 by prescription of 20 years. Cf. C. A. 1469. But in the forum of conscience good faith is necessary, by which one namely thinks that the owner, who suffers him to use the servitude, is not unwilling. Continuous non-apparent servitudes, such as the servitude of not raising higher, and non-continuous servitudes, whether apparent or non-apparent, cannot be established except by means of title. Possession, even immemorial, does not suffice to constitute them. C. I. 630; C. G. 691; C. H. 539; C. L. 2272, 2273.

Finally, the third source is agreement: namely, the proprietors of neighboring farms can, if law or public order does not obstruct, agree among themselves that one farm serve another, and conversely, if it so pleases. These servitudes are called conventional. C. I. 532; C. G. 639. In them transcription is required. C. I. 1932; C. He. 731, 732. Likewise a servitude can be constituted by destination of the father of a family, by some act of last will, or among the living. C. I. 629, 630; C. G. 692, 693; C. A. 480; C. B. 903 ff.; Inst. 1. 2. t. 3.

But here it must be observed: 1. Servitude in the things of the Church falls under the Extravagant *Ambitiosae*; for it is a certain alienation of right, and therefore cannot be imposed without Apostolic beneplacit. 2. C. I. 556: the faculty of making a contiguous wall common does not extend to buildings of public use, and therefore not to churches. 3. Agreements which constitute burdensome praedial servitudes, or moderate them, must be made by public act or private writing, under penalty of nullity. C. I. 1314. But if they are constituted by gratuitous title, a public act is required, since then donation is had; and all acts of donation without a public act are null. C. I. 1056. Cf. here 1011.

852. By what modes is servitude ended? - Real servitude is extinguished: 1. When the established time has elapsed, or the condition has been fulfilled. 2. By express or tacit renunciation. 3. By consolidation, by which the owner of the dominant estate at the same time becomes owner of the serving estate, or vice versa. 4. If the thing is changed; if nevertheless the thing is reduced to its former state, the servitudes revive, unless prescription obstructs. 5. By prescription, or non-use of

the right of servitude for 20 years from C. H., for 30 years from C. I. and C. G., if it is discontinuous, for example if someone has ceased to go through another's farm; or, if it is continuous, from the time when someone has done something contrary to the servitude, for example if someone on his own farm planted or built short of the legitimate distance, obstructed an aqueduct, etc. C. I. 662 ff.; C. G. 703 ff.; C. H. 546 ff.; C. A. 524 ff., 1488; C. B. 1028; C. He. 734 ff.; C. L. 2279, 2280.

853. You will resolve: Someone cannot dig a source of water on his own farm with damage to others, unless for the sake of greater public utility, and with the damage repaid, if the judge has judged this equitable. C. I. 578. Nor can he contain it on his own farm, or divert it elsewhere, if some town or suburb needs it, if another has already acquired a right to it, if it is useful to other neighboring estates and otherwise would be lost. C. I. 540, 542, 545, 578; C. G. 641, 643, 674; C. He. 709 ff.

The owner of a higher estate cannot do anything so that the flow of waters is unusually increased, with harm to the lower estate. Nor indeed can the owner of the lower estate do anything which impedes the flow of water with damage to the higher estate. C. I. 536; C. G. 640; C. H. 543, 545; C. B. 1020-1026; C. He. 689, 730, 737.

The owner of a serving estate cannot change the position of a road, of waters, or of a stream, unless the servitude has become more burdensome, or prevents repairs useful to the estate from being made; and then he is bound to bring no harm, or to compensate it for the dominant estate. C. H. 545; C. L. 2278, 2282, 2283.

No one is compelled on his own estate, whether rural or urban, to receive the dripping rainwater of a neighbor. C. I. 591; C. G. 681; C. L. 2327. All can enclose their estates, unless they are subject to a reciprocal servitude of pasturing cattle. C. I. 442, 682; C. G. 647; C. L. 2346.

If the tree of a neighbor extends roots into one's own farm, one can cut them; if its branches overhang, he can compel the owner to cut them. C. I. 582; C. A. 422; C. B. 910; C. L. 2317. But there is a question whether fruits which fall into another's field from the tree of another belong to this latter, as C. He. 687 has it; or to the owner of that field, as C. B. 911 has it. Cf. ib. 923; Gousset 983.

C. L. 2318. He is guilty of damage who prevents a neighbor from restoring on his own farm an embankment destroyed by the force of a river, C. I. 537; likewise he who digs so deeply on his own farm that the wall of the neighbor can no longer stand, C. I. 573, 575; C. He. 685. Every proprietor must permit access or passage through his farm if a neighbor's wall or another work is to be built or repaired, provided the damage inflicted is repaired. C. I. 592, 594; C. L. 2276; C. B. 867, 905 ff.; C. He. 694, 695, 700.

One who plants a hedge, vines, or shrubs is bound to leave half a meter from the neighboring estate; one who plants trees not greater, pear trees, cherry trees, etc., one and a half meters; one who plants greater trees, nut trees, elms, etc., three meters. But with a wall interposed, these spaces need not be preserved, if the trees do not rise above the wall. C. I. 579.

Flowing water belongs to those who possess estates near the banks, and they can use it. Those who possess fields at the banks of navigable rivers cannot obstruct the opening of a way necessary for the course of ships. The same must be said of those whose estates are adjacent to roads or other public works; for they are bound to suffer the servitude as long as it is necessary for the making or repair of

the aforesaid works. But in each case the injured proprietors have a right to a certain indemnity, if it can be made. C. I. 534, 543; C. G. 650; Inst. 1. 2. t. 1. sections 4, 5.

To acquire by prescription the right of servitude, for example of aqueduct, that is, of leading water through another's farm, the one prescribing must exercise positive acts by which he acquires such a right, and at the same time have good faith, by which he believes that right belongs to him. Nor does the knowledge and tolerance of him against whom prescription is made suffice, if he does not have a title. But if he has a title, knowledge and tolerance of this sort are not required. C. I. 630; C. G. 691; C. A. 539; C. He. 740.

Drawing water and driving cattle to water are discontinuous rural servitudes, which cannot be constituted without title. In controversies which arise among proprietors concerning the use of waters, because this concerns the common good by reason of agriculture and industry, the judge has the right to establish between the parties what is more equitable in the case. C. I. 544; C. G. 645.

854. What is possession, and how many kinds are there? "Possession is so called, as Labeo also says, from seats, as if position, because it is naturally held by him who stands upon it; the Greeks call it detention." L. 1. *de Possessione*. Possession is often confused with property. Yet it differs from it, because possession is a right by which a thing is held as one's own; but property or ownership is the very right by which a thing is one's own, and someone is its owner. Possession is rather a matter of fact than of right. Nevertheless, possession is distinguished as twofold: one of fact, the other of right. C. B. 854 ff.; Troplong, *On Prescription*, c. 2, *On Possession*.

855. What is possession of fact and of right? Possession of fact is: the apprehension or detention of a thing, with the support of body, mind, and right. "Of a thing"; by this name we understand not only corporeal things, but also incorporeal things, such as censuses, patronages, etc.; these are said to be quasi-possessed, to distinguish them from corporeal things, which are said to be possessed. "Apprehension or detention"; because possession is considered either in its beginning, or in its continuation; in its beginning it is apprehension of a thing; in its continuation it is detention of the same. "With the support of body"; because, for some corporeal thing to be possessed, it must be apprehended by some bodily act, for example by hands, feet, etc. If the thing belongs to no one, true and real apprehension is required for acquiring it. If the thing belongs to someone who hands it over to another, fictive apprehension suffices, as if he hands over the keys of a house to another. Finally, if the thing is acquired by the disposition of law alone, legal apprehension suffices, as if an heir, without knowing, acquires an inheritance. From C. A. 441 legal possession is had from the fact that a document proving the right of property has been inscribed in a public book. If the thing is incorporeal, apprehension and detention are had by acceptance of the right, and by the very use or exercise of the right, or with the forms prescribed by law observed. "Of mind"; because for a thing to be possessed, it must be apprehended with the intention of having it as one's own, and retained by persuasion that it is one's own. Possession indeed is not had if someone detains a thing without any intention of receiving from it advantage and emolument as from his own. Hence if someone, while he is waiting for a friend, takes in his hand that friend's book which he found in a hall, and looks at the title, he holds the book, but does not possess it. Hence also one who by right of neighborhood or familiarity or mere tolerance enters a neighbor's farm, or draws water from a neighbor's well, is not understood to quasi-possess. Error, whether of law or fact, does not obstruct the aforesaid intention and persuasion, as is openly clear from C. I. 701; C. G. 550; C. A. 326. "Of right," that is, with right

not resisting nor impeding; because for possession it is required that right or the laws not impede the detention of a thing from being judged its true possession, by rendering one incapable of possession. Thus, for example, detention by a layman of a sacred thing which belongs to a church, or detention by a private person of a public thing, cannot even be called possession of fact; because right, by rendering these persons incapable of such possession, impedes such possession. On the contrary, detention of a stolen profane thing by a thief is true possession of fact, although unjust, because right does not impede detention of such a thing from sufficing for possession. L. *Qui universos de acquir. vel amitt. possess.*; Inst. 1. 2. t. 1. sections 1, 3, 4; C. I. 685, 687, 688, 690; C. G. 2134, 2228, 2230-2232; C. H. 430-432, 437-440; C. A. 309-315; C. L. 474.

Possession of right is defined: the right of standing upon a thing as one's own, which is not prohibited to be possessed. "Right," by which it differs from possession of fact, which is the very occupation of a thing or its detention, by which either there is had a right, namely the right of standing upon a thing as one's own, if it is just; or it is not had, if it is unjust. Just, unjust: therefore the right itself of ownership and property does not arise and cannot arise from detention or possession; but on the contrary, just detention or possession arises from the aforesaid right. Hence in judgments there is given a twofold action: action in a possessory cause, and action in a petitory cause; in the former there is question of the right of possession; in the latter of the very ownership of the thing. Possession nevertheless carries with itself a presumption of property in favor of the possessor. C. L. 477. "Of standing upon a thing," that is, of peacefully detaining the thing against disturbers. "As one's own"; for if someone stands upon a thing in the name of another, there will not be true possession. Thus, for example, a tutor cannot be said to possess the goods of a minor, but the minor himself possesses through the tutor, because the tutor does not retain those goods as his own, but in the name of the minor. "Which is not prohibited to be possessed," that is, with no law resisting and impeding, as was said above concerning possession of fact. But for possession to be legitimate, besides this, the formalities prescribed by law must be observed. C. I. 686, 701; C. G. 540, 550, 2229, 2268; C. H. 430-432, 437-441; C. A. 316, 329.

From C. He. 919, 922; C. B. 854-857, possession is acquired by the fact of obtained power over a thing; this power, for retaining possession, can also be exercised through another. But when power over the thing has ended, possession ends; nevertheless it passes over to heirs and successors, and can be continued in them.

If a possessor has handed over a thing to another, so that the latter may exercise some limited real right, or a personal right, both are possessors. The one who possesses as proprietor has original possession; the other has derived possession. C. He. 920.

Acts of mere tolerance and facultative acts, as also violent and clandestine acts, cannot constitute the beginning of legitimate possession. C. I. 688, 689; C. L. 474. Only those things can be possessed which can be the object of property. C. L. 479. Or at least possession of things whose property cannot be acquired has no juridical effect. C. I. 690. Troplong, *On Prescription*, c. 2, *On Possession*, n. 253 ff.

856. What is natural and civil possession? Possession is divided into natural, civil, and most civil. Natural possession is that by which the thing possessed is retained by body and mind as one's own, namely when someone bodily stands upon the detention of a thing as his own; this is done by one who is so near to a thing placed within sight that he can be present to it immediately. Civil possession is that by which a thing apprehended by body and mind is retained by mind alone; thus he

possesses his own house who is absent from the house, as long as he has the intention of retaining it for himself. Likewise the owner of a thing possesses civilly what a thief retains with himself. Finally, most civil possession is that which is retained by the disposition of law alone, without any support of mind and body; this happens, for example, in a little child to whom some inheritance has come; he possesses the inheritance of the deceased without any act of apprehension, indeed even without any cognition of intellect. C. L. 483.

Natural and civil possession are also distinguished insofar as merely natural possession is called the mere detention of some thing, or the mere use of some right, such as is the possession of one who detains a thing in another's name; but civil possession is called this same detention of a thing, or use of a right, but together with the intention of having the thing or right as one's own. Therefore someone possesses not in another's name, but in his own name, namely with the mind of an owner, whether indeed he detains the thing, or uses the right, by himself or through another, through a farmer, tenant, fructuary, etc. And thus a borrower for use, depositary, and lessee possess naturally; the owner possesses civilly. C. I. 685, 687, 688; C. G. 2134, 2228, 2232; C. H. 430-432, 438, 441; C. A. 309, 310, 313, 352; Inst. 1. 4. t. 15.

From C. B. 868 ff., if someone possesses a thing as usufructuary, lessee, depositary, or in another similar way, by force of which he himself has a right or obligation of possession with respect to another, this one also is a possessor, but by indirect possession. This indirect possession can be transferred to another by cession of the right to restitution of the thing to himself. He who possesses a thing as its proprietor is a possessor in his own name. Natural possession by body and mind altogether prevails over civil possession by mind alone. Thus, for example, Titius, lessee of a field, sells the field to Sempronius, who, buying it in good faith, cultivates the field for 10 or 20 years and receives fruits from it in good faith as his own. During that space of 10 or 20 years, Titius, from the interest of the price received, pays to Caius, the owner of the field, the rent owed for the lease. After 10 or 20 years Caius visits his field, and when he finds in it not the farmer Titius but the owner Sempronius, he claims his property, but in vain, because Sempronius opposes prescription, his natural possession in good faith prevailing. C. I. 2117; C. G. 2239.

857. What are the rights of a possessor? The rights and juridical privileges annexed to juridical possession are the following: 1. By taking possession of a thing belonging to no one, its ownership is acquired. C. A. 381. Likewise a possessor in good faith, after a certain time has elapsed, can prescribe against the direct owner of the thing and acquire ownership of it.

Nevertheless it always confers the right of standing upon the thing; and no one can by private authority deprive another of possession of a thing, and possession obtained in this way is defective. C. B. 858. Possession is continued by the law itself in the person of a successor by universal title. A successor by particular title can unite to his own possession the possession of his author, namely so that he may obtain the effect of it. C. I. 693; C. B. 221, 858, 943, 944; C. He. 941.

2. Possession in good faith, if it is immemorial, or if its beginning exceeds the memory of men now living, regularly supplies all defects from which otherwise legitimate ownership would not exist, as is clear from C. *Quibusdam de Verb. signific.* Cf. C. I. 530. From more recent laws a possessor in good faith makes his own the fruits received. Cf. here 1337. But possession itself stands in place of title as regards movable things, C. G. 2279, acquired from one who is not the

owner, by onerous title, C. A. 367, because things by their nature movable, and as regards unnamed bank notes, not as regards a universality of movables, and in relation to third parties, C. I. 707. Movable things; not rights, such as credits, excepting the aforesaid unnamed bank notes from C. I. As regards found and stolen things, cf. here 893. "From one who is not the owner," as regards third parties; and therefore the owner can prove that the possessor possesses the thing in his name, for example a thing leased, deposited, given to him in pledge, etc. From C. He. 930 ff., the possessor of a movable thing is presumed to be the proprietor. But a possessor in good faith is not bound to restore bearer securities and money, although the preceding possessor had been unwillingly deprived of them.

3. A possessor who begins possession of a thing which no one possesses begins possession legitimately, although he doubts whether it belongs to another, but apprehends it with the intention of inquiring about the owner, whether he truly exists. But a possessor who begins possession of a thing which another possesses, while doubting whether it is truly his own, begins to possess illegitimately. A possessor in good faith, when doubt arises whether the thing is his own or another's, if the contrary cannot be shown certainly, can with a safe conscience retain the thing; and the judge, while such doubt stands, ought to adjudge the thing to him. In the external forum good faith is presumed. Likewise, by legitimate possession of a thing, property itself is presumed. But in whatever name, whether another's or his own, he began to possess, in that same name he is now presumed to possess. And thus one who at the beginning possesses a thing deposited with him by an unknown traveler, who left it from forgetfulness and could always return to seek it back for himself, cannot thereafter begin to possess it as though lost or abandoned. C. I. 687, 691, 694, 700, 702; C. G. 2230, 2231, 2268; C. A. 446, 459; C. A. 323, 324, 328; C. B. 1006; C. L. 477, 478.

4. A possessor in good faith can, by the sole title of possession in good faith, use the thing possessed according to his will, and he can even consume and destroy it, without responsibility. Nevertheless, no possessor of another's thing can further retain it by title of another debt. C. A. 329, 471; C. He. 938. But retention of goods belongs to him by reason of improvement made and existing in them, if indemnity is not sought in judgment without proof. C. I. 706.

5. A possessor at the time of contested litigation is to be defended by the judge in possession, unless he drew that possession to himself by force, secretly, or by sufferance; for then he would have to be deprived of possession. C. H. 446; C. I. 694; C. B. 861, 862; C. He. 933.

6. If a possessor has been driven from possession by private violence, before all things restitution of the despoiled person must be made, nor is the occupier first to be heard when he alleges title and wishes to prove the thing to be his own. C. *In litteris de Restit. spoliat.* Cf. C. I. 694, 695, 697, 700; C. A. 339, 346; C. He. 927; C. L. 484 ff.

7. A possessor in good faith can defend the thing possessed even with arms against an invader, provided this is done immediately and with the moderation of blameless defense, that is, defensively and not offensively. And he can immediately retake for himself a thing violently taken from him. L. 3. ff. *de Vi et de vi armata;* C. A. 344; C. B. 859; C. He. 926 ff.; C. L. 486.

8. If someone is successively obligated to donate or hand over the same movable thing to two persons, the one who first obtains possession of that thing also has its property, although his title is later, provided he is in good faith. C. I. 1126; C. G. 1141; C. H. 445, 1473; C. A. 322; L. 1. 3. n. 927, 1. 4. n. 210; Inst. 1. 4. t. 15.

858. Does man have ownership of himself? - Having explained the intrinsic nature of ownership, we now proceed to explain the object and subject of ownership. Man does not have direct ownership of his soul and its faculties, nor of his body and its members, but only useful ownership.

Proof of the first part. For ownership imports a certain superiority; but man is not superior to himself, and to his members, or to another man as regards the very nature of man. Therefore. Besides, direct ownership belongs by natural right over other sublunary creatures because these are ordered by their nature to man, that they may serve him. Therefore, since man by his nature is not ordered to serve himself nor another man, but God, direct ownership of property in man, and in his faculties and members, belongs to God alone. Hence in Wis. 16:13 it is said: *You are, O Lord, who have power of life and death*. And in Deut. 32:39 God says: *I will kill, and I will make alive*.

Proof of the second part. For man can not only freely and licitly use his body and members for very many functions, but also through these, aided by divine grace, can merit eternal life. Therefore. Lugo d. 10. nn. 9, 17; Molina t. 4. d. 1. n. 1.

859. You will resolve: Suicide and mutilation, speaking per se, are not only against charity, but also against justice, or against divine right of property; for a user has the obligation of preserving the substance of the thing granted to him for use. But homicide of another person is not only against charity and divine right of property, but also against human useful right. Cf. 710, 715.

860. Does man have ownership of another man? One man can be under the ownership of another not only by jurisdiction, but also by property, but imperfect, or useful. Imperfect, or useful; for perfect ownership of property belongs to God alone, as is clear from the preceding proposition. The reason is that every man is owner of his own labor; and therefore he can alienate it for his own utility, and hand it over into the ownership of another. For an owner can dispose at will of the object of his ownership. S. Th. 2. 2. q. 57. aa. 3, 4; E. M.

861. From what titles can servitude be introduced? From the four following titles:

1. From pact, or one's own renunciation. For it is not repugnant that someone renounce his liberty in order to relieve his own need, etc.
2. From the right of war. For it is not repugnant that the victor sometimes inflict this penalty. For sometimes he could kill captives for the security of the nation; therefore a fortiori he could reduce them to servitude.
3. From delict, or from condemnation. For if a guilty person can be condemned to death, a fortiori to servitude, since deprivation of life is deservedly judged the greatest of all punishments.
4. From birth in a state of servitude, since by law those are slaves who are born from slaves. Thus from the law of nations, according to the common opinion. Inst. 1. 1. t. 3. sections 3, 4; Lugo d. 6. nn. 10-17; E. M.

862. Is the trade in Black persons lawful? It is altogether unlawful by every law, whenever Black persons are unjustly despoiled of liberty, and in crowds are transported from their regions like cheap cattle and sold, as happens in the nefarious commerce in them. Against so savage a trade various Apostolic Constitutions have come forth, namely of Paul III, Urban VIII, Benedict XIV, Gregory XVI, *In supremo apostolatus*, 3 Dec. 1839. Cf. the Letter of Leo XIII to the Bishops of Brazil, *In pluribus*, 5 May 1888, and the Letter *Catholicae Ecclesiae*, 20 Nov. 1890.

Those who have perpetrated so great a crime are bound at their own expense to vindicate them into liberty; and those who have bought them for a price must, even if they cannot recover the money, freely release them, insofar as this can be done without graver danger; for by retaining them they would continue the injury. But if there is question of Black persons or others existing in legitimate servitude, per se it is not absolutely unlawful, because once servitude has been admitted as legitimate, the master has a true right over slaves, or over their works, and therefore can transfer that right to others. Per se; for circumstances can obstruct, for example if a spouse would have to be separated from a spouse, or if civil laws forbid it, just as in fact servitude is generally forbidden in Europe. But a slave could flee if the master compelled him to unlawful things or treated him cruelly. *Collectan.* S. C. de P. F. nn. 2103, 2104, 2105, 2107; E. M.

863. Note: From C. I. 1628; C. G. 1780, someone cannot obligate his own labor into the service of another except for a determinate time and a determinate object. From C. H. 1583, someone can obligate his own labor without a fixed time, for a certain time, or for a determinate thing. Lease for one's whole life is null. From C. B. 624, lease of service for one's whole life is permitted. Nevertheless it can be rescinded after five years, with notice having been given before the last six months.

The Supreme Pontiff Pius X, in the Encyclical Letter to the Archbishops and Bishops of Latin America, *Lacrimabili statu*, 7 Jun. 1912, exhorts them to undertake paternal care for the miserable condition of the Indians, against whom cruel crimes and evils are committed. "This first," he says, "we earnestly exhort you, that whatever things have been instituted in your dioceses for the good of the Indians you most zealously promote, and likewise that you see to the instituting of those things which seem likely to be useful for the same matter. Then you will diligently admonish your peoples concerning their own most holy duty of assisting the sacred expeditions to the indigenous people who first inhabited that American soil. Therefore let them know that they ought to benefit this matter especially in a twofold way: by contribution of money and by the suffrage of prayers.... We condemn and declare guilty of a savage crime whoever dare or presume to reduce the aforesaid Indians to servitude, sell, buy, exchange, or donate them, separate them from wives and children, despoil them of their things and goods, lead and transport them to other places, or in any way deprive them of liberty, retain them in servitude; and also those who under any pretext and sought color furnish counsel, aid, favor, and assistance to those doing the aforesaid things, or preach or teach that this is lawful, and otherwise cooperate in any way with the foregoing." Therefore we will that the power of absolving penitents from these crimes in the sacramental forum be reserved to the local Ordinaries.

864. What about one's own reputation? Man simply has ownership of his own reputation. For it is something really distinct from the man himself, since it comes to him from without, and man acquires it by labor altogether dependent on his own free will through the exercise of virtue, and therefore through his own acts, which reputation follows as a natural effect. Moreover, it is not

necessary for its own sake, but only for the edification of one's neighbor. L. 1. 3. n. 983; Billuart d. 3. art. 2.

865. You will resolve: Man, from a just cause, and with scandal and the defamation of others set aside, can licitly defame himself, for example to seek counsel, to restrain his own pride, to commend divine mercy, to restore another's reputation, etc. "From a just cause"; for if someone squanders his own reputation without a just cause, he sins venially. But he would sin gravely if the infamy would obstruct the execution of his own office, for example of pastor, teacher, rector, etc. "And with scandal set aside"; for if someone, by revealing some wholly hidden crime of his own, would give scandal to others, he would sin by scandalizing others. "And with defamation of others set aside"; for otherwise man would sin by injuring the reputation of others, for example of an accomplice, family, or community. Thus a religious cannot reveal to outsiders his crimes committed in religion, because in this way he would in some measure injure the reputation of his religion and community. Struggl 9; L. 983; S. Th. Quodl. 10. a. 13.

866. What about things; what is their division? - R. To the first: Man can have useful and direct ownership in external goods of fortune legitimately acquired. For irrational creatures were immediately created for man, so that he might use them for his own advantage and utility, and might serve God. Nor indeed was any restriction placed by God upon this use; indeed, it was granted without limit with respect to the aforesaid end, as is clear from the words of Gen. 1:28: *Have dominion over the fishes of the sea and the birds of heaven*, etc.; and Ps. 8:8: *You have subjected all things under his feet*. Therefore God granted to man useful and direct ownership of these external things. Aristotle, *Politics* 1. 2. c. 2; S. Th. 2. 2. q. 66. aa. 1, 2.

But since all things of this sort necessary for human life were given by God to all in common, property and division of them in particular was made by the first occupation of them, namely of those things which men first apprehended for relieving their own necessities, with others excluded; otherwise sufficient provision would not have been made for their own necessities, and there would be continual discord and strife among men. Hence the maxim and principle of law: a thing belonging to no one becomes the property of the first occupier.

And hence it is clear why, in extreme necessity of life, notwithstanding the division and property of things, all things remain common, so that anyone can relieve his own necessity from the goods of the earth, although already occupied and acquired by another, and the owner of these goods cannot impede one who, being in extreme need, provides for himself from his goods.

Concerning the ocean and the sea, it has been disputed whether they can be subject to the ownership of someone. Moreover, the ocean and great seas are subject to the ownership of no one, since their uses are inexhaustible, by which all can enjoy them without detriment to anyone. But parts of the sea adjoining the continent, as also gulfs and straits, can well be subjected to the ownership of some nation, since this is expedient for the utility of the aforesaid nation, of which otherwise it would be deprived, both because of fishing, and because of the security of commerce, and because of the defense of the fatherland.

R. To the second: A thing, in law, is everything which is not a person, and which can be of use to man. By the name thing is signified both that thing which is in our patrimony, and that which is outside our patrimony, but can be among our goods. L. 5. *de Verbor. significatione*. Goods are called

those things which bless or profit, L. 49. *de Verbor. signific.*, and in law they signify things which can be the object of public or private property.

Corporeal things are those which are subject to the action of the senses, such as houses, fields; incorporeal things are those which are apprehended only by the intellect, such as all rights and all actions. Public goods are those which belong to the people or the city, L. 15. *de Verbor. signific.* Private goods are those which belong to a particular moral body, or moral person, or some individual person.

Goods, whether public or private, are some immovable, others movable, and these latter precious or not. Immovable goods are immovable either by nature, or by destination, or by the object to which they are referred. C. I. 407. By nature: those which cannot be moved from place to place, such as rural and urban estates, surfaces or whatever is planted or built upon the soil, mines or whatever is found beneath the soil as a part of the soil, estimable by price. By destination, namely of the owner, for example rural instruments, animals prepared for cultivating the farm, statues placed in their shrines or bases, mirrors and other things enclosed or built into walls. By object, when they are referred to immovables, as, for example, use, usufruct, and servitude of immovables. But incorporeal rights, for example mortgages, are generally reckoned sometimes among immovables, sometimes among movables, from the object; and those rights are customarily called simply rights.

Movable goods are movable either by nature or by law. By nature: those which are moved from place to place by their own force or by another's, such as animals and inanimate things which are moved by an exterior force. By law: such as ships which are not stationary, mills which are not fixed, censuses, etc. Movable things, if they are consumed by use, are called fungible, such as wheat and money; otherwise, non-fungible, such as books and clothing. Precious things are those which excel by antiquity, art, or value. C. I. 406 ff.; C. G. 516 ff., 1874; C. H. 333 ff.; C. A. 285 ff.; C. B. 90 ff.

867. What is the subject of ownership? - It is certain that every and only intellectual substance is capable of ownership. Ownership is the legitimate faculty of disposing according to one's will of some thing as one's own, for one's own advantage and utility. But every and only intellectual substance can have this faculty, since it alone is endowed with free will.

Indeed, to God alone belongs supreme, absolute, and independent ownership over all created things. But particular ownership, subject to the supreme ownership of God, also belongs to men, even to infidels and sinners; indeed even to little children and the insane. For the use of reason is indeed necessary for disposing of goods, but not for having possession and habitual ownership of them; otherwise those sleeping and drunk would not have true ownership, and would wholly lose it by the act by which they sleep, or by which they are overwhelmed by drunkenness. By the very necessity of natural law and by the disposition of positive law, ownership can be acquired and retained even without any positive act of one's own will. Lugo d. 3. n. 16; S. Th. 2. 2. q. 12. a. 2; q. 66. aa. 1, 2; L. 725.

Capable of ownership are individual physical persons, and also moral persons, whether these consist of several singular persons, such as Colleges, Chapters, etc., and are called moral bodies, or not, such as hospitals and ecclesiastical benefices, and are rather called moral entities. They are called moral because they are persons not in reality, but by fiction of law. But for these moral persons to acquire ownership in reality, it is necessary that they have been legitimately constituted, namely by the due authority of the Prince, civil or ecclesiastical. As regards ecclesiastical moral persons in Italy, cf. Laws

7 Jul. 1886, 15 Aug. 1887, by which some were suppressed and some preserved. To the suppressed only civil rights were taken away. The preserved cannot alienate their goods without approval of the Government, nor can they acquire other goods, C. I. 434; Law 19 Jun. 1873, arts. 27, 28, likewise by civil law.

868. What about ownership of children under paternal power and of wives? - A child under paternal power is one who is still subject to paternal power. But although "the woman is equal to the man in the act of marriage, nevertheless in those things which pertain to the disposition of the house, the husband is the head of the woman, according to the Apostle, 1 Cor. 11." S. Th. 2. 2. q. 32. a. 8 ad 2. Moreover, "he who is constituted under the power of another, insofar as he is such, ought to be regulated according to the power of the superior. For this is the natural order, that lower things be regulated according to higher. And therefore it is necessary that in those things in which an inferior is subject to a superior, he dispense no otherwise than has been permitted to him by the superior." S. Th. ibid. c.

Hence it is clear that although children under paternal power and wives can well have ownership of things, nevertheless this ownership is not independent, speaking per se, from the power of the father of the family and of the husband; but it is subject to their power as regards administration, and also as regards usufruct, for sustaining the expenses of education and the burdens of marriage. Cf. 667 ff., 677 ff.

The ownership of children under paternal power regards things given to them by any title transferring ownership, or acquired by their own industry. For as regards paternal goods, children have no strict right to paternal goods while the father lives. Hence, if children under paternal power take anything from these goods, they are per se bound to restitution. Per se, namely unless there is question of a thing of less importance, and it is prudently presumed that the father remits that obligation.

Likewise ownership of wives is understood in their own goods, not in the goods of the husband. Hence a wife also, if she takes something from the husband from his goods, is per se bound to restitution. Again per se, namely unless there is question of a thing of less importance, and it is prudently presumed that the husband consents. Likewise a wife would be excused if, not having paraphernal goods, she took something from the common goods, or from the fruits of her dowry, to relieve the necessity of parents or children who had been received from a first marriage. For she is bound to this by the law of nature, and the husband ought to consent to it. But since the husband does not have direct ownership of the goods of the wife, if he dissipates them, he is bound to restitution. Cf. 667 ff., 677 ff.; 1 Kings 25; S. Th. 2. 2. q. 57. a. 4; L. 539, 542-544; H. A. 33.

The question is raised here only concerning common goods, whether the husband is bound to restitution if he dissipates them; and it must be affirmed if there is question of the capital and common goods themselves, since if these goods are common and consequently belong to the husband and wife in common, it is clear that the right of the wife is injured in this matter, and therefore is to be repaired. If there is question of the revenues of the same goods, when these are assigned to the husband by the laws, he is excused from restitution as regards those badly spent; but when they enter the common goods and constitute goods of the community, he is bound to restitution, as when the profits themselves enter the community and constitute common goods. And this is had indeed in C. G. 401, 1421, 1422; C. I. 1433, 1435, 1436; C. H. 1392 ff. For although the

husband alone has administration of the goods of the community, nevertheless he does not have usufruct except only for the good of the family, C. G. 1409, and of the community itself, C. I. 1436; C. H. 1401, 1408, 1409, 1413, 1415.

From C. He., in the regime of union of goods, the revenues of the wife and the natural fruits of the goods brought by her are the property of the husband, 195. In the regime of communion of goods, all goods and all revenues belong undividedly to each spouse, 215. From C. B., in the regime of universal community of goods, the goods of the husband and wife are the common goods of each, and among these are also reckoned those things which the husband and wife acquire during the community, 1438. The husband administers them; but he cannot freely dispose of them, 1443 ff., especially to the detriment of the wife, 1456. From them, however, the expenses of marriage are to be made, 1458. And almost the same holds in the regime of community of acquisitions, 1519 ff., and in the regime of community of movables and acquisitions, 1549 ff. Cf. here 677, 1237; L. 539, 542; Lessius 1. 2. c. 25. d. 4. n. 37.

869. What about the ownership of the Church? - The Church has ownership of civil jurisdiction, such as is the temporal ownership of the Roman Pontiff. Besides, the Church has ownership of property in goods, whether movable or immovable. But the right of the Church in this matter is by its nature independent of the power of the civil State; and therefore it cannot be limited or narrowed by this. Direct ownership of these goods belongs to the universal or Catholic Church itself. Hence they are called goods of the Church, and simply ecclesiastical goods.

Hence, when the immediate subject of these goods ceases, for example a pious Institute, Monastery, etc., their goods do not become the goods of no one, but continue to belong to the Church; and consequently the Supreme Pontiff can dispose of them in favor, for example, of another pious Institute, Monastery, etc. For indeed the Supreme Pontiff has plenary and supreme administration and disposition of all ecclesiastical goods. C. *Licet* 2. *de Praeb. et dignit.* in the Sixth; S. Th. 2. 2. q. 100. a. 1 ad 7; Suarez, *Def. Fid.* 1. 4. c. 18. n. 8; L. 1. 3. nn. 591, 615.

But the immediate administration and usufruct of these goods per se respectively belongs, by transfer of right, to those persons, places, etc., to whom they have been donated or left by the faithful. For, since donations of this sort by the faithful are made altogether voluntarily, it must be whole and free to the offerers, just as to make them or not make them, so also, when they make them, to transfer the right of them to whomever they have preferred, while nevertheless the power of the Supreme Pontiff in this matter remains intact for the good of souls and of the Church. Per se, since the Supreme Pontiff could by his power change this administration and usufruct, as also condone due fruits, etc.

Offerings of this sort made to churches or other religious places are customarily destined for certain uses. If the will of the offerers is certain, it must altogether be obeyed. The immediate administration of these offerings belongs to the Bishop, pastor, or rector of the church, under dependence on the Bishop, but by no means to laypersons, unless the works are works of merely lay beneficence. Nevertheless laypersons can be employed in the administration of ecclesiastical goods as pure ministers. For since the right of administration of this sort is something spiritual, laypersons cannot possess it. Clem. *Quia contingit de Religios. dom.*; Trid. sess. 25. C. 8. *de R.*; Ithur. Cas. 45. n. 47; A. S. S. v. 8. p. 174. "Administrators, both ecclesiastical and lay, of the fabric of any church, even a cathedral, of a hospital, confraternity, alms, mount of piety, and of whatever pious places, are bound each year to render an account of administration to the Ordinary, with any customs and privileges whatsoever

to the contrary removed, unless perhaps otherwise had been expressly provided in the institution and ordering of such church or fabric." Council of Trent, sess. 22. C. 9. *de R*.

Hence it is easily understood why ecclesiastical goods cannot be alienated without Apostolic beneplacit. Extravagant *Ambitiosae de Reb. Eccl. non alienand.*; S. Th. 2. 2. q. 86; *Collectan.* S. C. de P. F. nn. 1622-1626; E. M.

870. What about the ownership of clerics? The goods of clerics are distinguished into four kinds:

1. Patrimonial goods, which come from paternal inheritance, or from any other profane cause, for example from donation, succession, etc. To these patrimonial goods are to be equated pensions which are allotted by the Government to infirm priests, or to religious formerly ejected from monasteries, as aids given for their support and in compensation.
2. Quasi-patrimonial goods, which are acquired on the occasion and in view of sacred functions, for example by celebrating Mass, preaching, etc. They are also called quasi-ecclesiastical, or casual. To this class also belong the uncertain revenues of pastors, which are called stole-fees, and the daily distributions of canons because of service of choir, as though a stipend of the person.
3. Ecclesiastical goods, which are received from benefices of the Church, that is, from the revenues of benefices. To this class also belong goods which are paid by the Government to pastors and canons by title of supplement, S. Poenit., 19 Jan. 1819, and also tithes. Therefore, by the name ecclesiastical goods, there are not understood here farms, which clerics certainly cannot alienate, since ownership of them is with the Church and clerics are simple usufructuaries, but only the revenues proceeding from them are understood.
4. Parcimonial goods, which a cleric sets aside by living sparingly from the fruits of a benefice, and which he could consume by living honorably. L. 490, 491.

A cleric has perfect ownership of patrimonial goods. The reason is that a cleric is per se truly capable of ownership, nor is he prohibited by any law from freely disposing of the aforesaid goods. Indeed that right is supposed in six hundred places of canon and civil law. L. 491.

A cleric has perfect ownership of quasi-patrimonial goods, or quasi-ecclesiastical or casual goods. The reason is that these goods are not fruits of a benefice, nor the price of a sacred office, but a certain stipend, as it were, of his own labor, to which the cleric is not bound, or also a certain largess given by the faithful for the support of the cleric. It is also clear from the response of the Sacred Penitentiary, 9 Aug. 1824, by which it declared offerings of the faithful not to be ecclesiastical goods. L. 491; Lugo d. 4. n. 23; Gousset 694.

A cleric can use the fruits of a benefice for honorable support; but he is bound to expend all that is superfluous on the poor, or on other pious works. The first reason is because one ministering to the church can live honorably from the goods of the church, since benefices were established especially for this end. The second reason is drawn from the precept of the Church, which is manifest from innumerable decrees of Councils and Sacred Canons. For the canons of the Church impose this obligation upon clerics, or suppose it imposed, says Benedict XIV, *de Syn.* 1. 7. c. 2. n. 4. Trent, sess. 25. C. 1. *de R*.; L. 491.

Under the name of pious use comes whatever pertains to divine worship. Under the name of the poor, however, come not only those begging door to door, but also those who otherwise cannot preserve their own state. Blood relatives also come under this name, if they are truly poor, so that otherwise they cannot sustain their own state. And this is clear from Trent, sess. 25. C. 1. *de R*. But a cleric can prefer these needy blood relatives to other poor persons, even those more gravely in need, because assistance of needy relatives also pertains to preserving the proper state of the cleric, since their poverty redounds to his disgrace. Although it is more fitting, nevertheless it is not necessary in an equal case that the poor who are in the place of the benefice be assisted, because the canons indistinctly prescribe that alms be given whether to citizens or to outsiders. L. 491.

Although this special and grave obligation radically and occasionally proceeds from the virtue of charity and religion, nevertheless formally it arises only from the precept of the Church, and from positive law and the virtue of obedience, with every obligation from justice excluded. Thus with Lessius 1. 2. c. 4. dub. 6, commonly others. The reason as to the first part is: because nowhere is a special precept imposed on clerics from charity of expending superfluous revenues on the poor; but they are bound only by the general precept of giving alms, although somewhat more strictly than laypersons. Nor likewise is a special precept imposed on clerics from religion of expending the superfluous on pious causes. But the reason as to the second part is: because founders did not assign ample revenues to clerics under this formal obligation, but only by hope and intention. But the Church simply commands that the superfluous from the fruits which they make simply their own be expended on pious causes or for relieving the poor. Therefore. Thus Struggl 27. St. Alphonsus 491, 492, although he admits at least probably that this obligation does not arise from justice, nevertheless admits that it arises from a precept of the Church from the motive of the virtue of religion, but more probably from justice. Schmalz. 1. 3. t. 25. n. 35. "It has been dispensed with clerics living in the City and its district to 10 miles, that they might dispose freely of benefice goods, just as of their own and patrimonial goods, as is had in the Constitution of Sixtus IV, *Etsi diversis*, Kal. Jan. 1474, the Constitution of Julius III, *Capientes*, Ides of May 1549, and the Constitution of Paul V, *In eminenti*, 18 Apr. 1608." Schmalz. l. c. n. 36. The privilege, besides clerics of the City, was also granted to conclavists from the Constitution of Gregory XV, *Romanus Pontifex*, 15 Mar. 1621, section 14.

A cleric enjoys perfect ownership of parcimonial goods, and therefore can dispose of them as a true owner. The reason is that a cleric has a strict right to honorable support; therefore whatever he takes from it by living more sparingly belongs to him, and remains in his free power, since that right is altogether absolute. Trent, sess. 24. C. 12. *de R*.; C. *Consuetudinem de Cler. non resid.* in the Sixth; L. 491; S. Th. 2. 2. q. 185. a. 7; Quodl. 6. a. 12 ad 3; Lessius c. 4; Benedict XIV, *de Syn.* 1. 7. c. 2. n. 12.

It is lawful for secular clerics to make a testament concerning their patrimonial, quasi-patrimonial, and parcimonial goods; but concerning superfluous benefice goods they themselves cannot by common law make any testament, even for pious causes. C. *Ut unusquisque* 3. *de Pec. cler.*; C. *Si quis* 5. ib.; C. 7, 8, 9, 12 *de Testam.* By common law; for a special case of privilege or custom must be excepted. Struggl 28; Schmalz. l. c. n. 33; S. Th. Quodl. 6. a. 12; Kenrick tr. 10. n. 35 ff.; E. M.

871. Are clerics badly spending the superfluous goods of ecclesiastical goods bound to restitution? R. Negatively, probably, because although the precept of the Church is certain, nevertheless the obligation from justice is not certain. Indeed, from Trent, sess. 24. C. 12. *de R.*, it is gathered that

they make the fruits their own, although with the obligation of expending the superfluous on alms or other pious works. For the Council says concerning non-resident clerics: Let them not make the fruits their own.

Nevertheless others probably affirm, because clerics are only administrators and stewards of ecclesiastical goods; or at least because the Church does not grant them ownership of those goods except limited, with this burden imposed from justice. The first opinion, that is, the negative, says St. Liguori in *Retract*. qu. X, seems no less probable in practice, notably because of the authority and reason of S. Th. 2. 2. q. 185. a. 7. But as regards the fault of violating the precept of the Church, for grave matter there is required a quantity much greater than in theft. L. 491. IV. 492; S. Th. Quodl. 6. a. 12. Since each opinion is probable, heirs also of these goods can probably retain them without injustice and sin.

But whether one who receives these goods sins by cooperating with the sin of the donor, many affirm; but it must more probably be said that "the receiver does not sin, neither against religion nor against charity, unless he asks, or induces to donating." L. 492.

872. What is understood by superfluous? - That is judged superfluous which remains over after honorable support. Moreover, honorable support of a cleric is that which befits a cleric by reason of his state, dignity, etc. Therefore it does not exclude honorable recreations, moderate donations, and other expenses of this kind; but these can be determined by the judgment of a prudent and timid conscience rather than by a general rule.

Honorable or congruous support cannot be defined equally with respect to all clerics; for more, as is clear in itself, is owed to a Bishop than to a canon, more to a canon in a cathedral church than to a simple priest, more in one place than in another. Therefore attention must rather be given to the practice of others of timid conscience in the same grade and in the same circumstances of places and things.

But whether account can be had of nobility, authors dispute. He who would affirm this does not seem to be condemnable; for each one can live according to his own state. Likewise someone can licitly pay from these goods debts legitimately contracted after the benefice, since this also pertains to the notion of one's own state; just as also he can exercise moderate hospitality, since this is owed by virtue; likewise support nephews in studies, if the parents are poor and other poor persons are not gravely in need, and he himself does not have other goods; for then this becomes a work of charity and mercy.

L. 491; Schmalz. l. c. nn. 24, 25.

873. Can clerics keep the superfluous for the future? - R. Affirmatively, because per se there is no obligation of immediately distributing the superfluous; indeed, it can laudably be kept for a pious foundation, provided that one proceeds in good faith, and that there be no danger lest afterward it be converted to profane uses. S. Th. 2. 2. q. 185. art. 7; L. 491.

874. Can a cleric who has enough from patrimony to live on sustain himself from the fruits of a benefice? - R. Affirmatively. The reason is that it is just that he who labors in the Church should be sustained by the same, and it is altogether accidental whether he is rich or poor. Therefore the cleric has a right to support not by reason of poverty, but by reason of labor. Hence a cleric can spare his

patrimony while using the fruits of the benefice for support suited to his dignity. It is also clear from the words of the Apostle, 1 Cor. 9:7, 13: Who ever serves as a soldier at his own charges? ... Do you not know that those who work in the sanctuary eat the things that are of the sanctuary, and those who serve the altar share with the altar? L. 491; S. Th. 2. 2. q. 185. a. 7; Billuart D. 3. a. 5.

875. What about the ownership of authors? "It is certain," says Fr. Gury, *Comp.* V. 1. n. 566, "that every man by natural law has a right to the fruit of his industry and of his intellect. For if a thing bears fruit for its owner, this ought *a fortiori* to be true of internal faculties, since nothing can be more proper to man. Therefore anyone can use for his own advantage those things which he has devised by his intellect in the sciences. Therefore the inventor of some art has a strict right that his secret not be stolen, and that it not be divulged publicly against his will.

But if this happens, the one causing the damage is altogether bound to restitution according to the measure of the injury inflicted. - The difficulty, however, is whether an author, once his works have been issued into the light, can keep them as proper to himself and exclude others from their use." This use, of which there is question, is that by which others themselves commit to the press works once published and sell them for their own profit. If the author, in his work already issued into the public light, retains for himself a right of property absolutely and without limit, he certainly can prevent others from publishing and selling his works; or, as it is commonly said, the author can reserve for himself the right of property as to this use. But if the author no longer retains for himself any right of property in those works, he cannot reserve to himself the aforesaid use, namely, of publishing and selling the book.

The print's appendix has more on this paragraph: [On the Dominion of Authors](/manuals/bucceroni/on-the-dominion-of-authors). (ed.)

876. What is the state of the question? This question can be treated according to natural law and according to positive law. - If first natural law is considered, there are those who hold that the aforesaid right of property, by natural law, strictly and altogether belongs to the author. The reason is that if the law of nature itself demands that each one's right to the fruit of his industry and intellect be preserved, but no fruit of industry in our matter can be obtained unless the work, as they say, is handed over to the community, then certainly the same law of nature demands that this handing over or publication of the work to the community not deprive the author of the fruit of his industry. On the contrary there are those who hold that an author does not have by natural law a right in his work once it has been published and made public, because a thing once handed over to the community thereby becomes of common right; and therefore natural law cannot require that the author be able to reserve the use of the work to himself and exclude others from publishing it.

877. What does natural equity require in the case? - In order that the question be rightly resolved, the strict exigency of right must be distinguished from fittingness or congruity and equity. Moreover, a book considered formally, namely, as to that sequence of doctrine and its exposition and explanation which it contains, must be distinguished from a book considered materially, that is, as to that material edition which the author has made. Now the question is not about mere congruity of right, nor about mere equity; nor is a question raised about the material edition made by the author himself. It is an evident thing that it is altogether fitting and equitable that the author be permitted to enjoy the advantage and profit which comes from the book composed by him, which advantage and profit he will perhaps be able to receive only in small part unless the right is reserved to him of

excluding anyone else from the aforesaid use of his book. Therefore a positive law acceding to and defining a right of this kind is certainly an altogether just law and one binding in conscience; and, while that law stands, the author has a strict right of property in his book. Likewise it is evident that the author by natural law itself has a strict right of property in that edition of his book which he himself has taken care to have made in his own name. Gousset 835.

From C. L. 593, there is not recognized the property of writings prohibited by law or sentence. From the same C. L. 615, an invention relating to an illicit object is not capable of authentication.

878. What about commutative justice in the case? If there is speech about the strict exigency of commutative justice, from natural law, and about another edition of the book, to be made and sold by another in his own name, it seems far more probable that this is not opposed to natural law. And indeed a right of property is either a right in the very substance of the thing and its utility, or in only one or the other. If there is question of the very substance of the thing, since truth is the proper object of the human intellect, as soon as truth and a complex of truths has been published in the public light, it becomes the property of each one. Therefore, just as, as soon as an astronomer has manifested the existence of some star in the heavens, all can see it, nor can the astronomer retain for himself the right that he alone see the star to the exclusion of others, or at least that they pay him some tribute if others wish to see the star in the heavens with their own eyes, so the author of a book, as soon as he has publicly set forth some truth or sequence of truths, certainly cannot prevent others, with no tribute paid to him, from understanding the truth and perhaps even persuading themselves of it better than he. And this is confirmed from the very intention and end of the writer or professor: for all intend this, that readers and hearers be persuaded and make the doctrines handed down their own. And this is their greatest praise, if they attain it. Hence another thing is shown: once the work has been issued into the public light, the author does not preserve ownership in the use of his work, formally considered. Cf. 877. For indeed, if the author does not preserve ownership in the substance of the thing as soon as the work has been made public, how, when ownership in the substance has been transferred, will he himself preserve ownership in the use? If this could be done, someone could also by loan transfer to another the ownership in the substance of money, while reserving to himself ownership of the use of the money, which he would then sell.

Besides, if an author reserved to himself ownership of the use of the truths which he perhaps discovered, explained, and arranged, one could not use them by study and meditation; and from them by reasoning proceed to other truths perhaps also to be found and communicated to others, as can easily happen in the chemical, physical, mathematical arts and sciences, etc., proceeding even to the practical application of those truths, which indeed is of the greatest utility and also of the greatest profit. Likewise one could not publish another's book with notes added for explaining matters; one could not quote texts from another's book in one's own book; one could not thoroughly refute another's book and, as erroneous and scandalous, take away all authority from it, which imports ownership not only in the use, but even in the very substance of the thing, which one destroys by his own right; nor could one copy out a book by his own hand. And if he can do that, can he not do the same also by the more recent machine of writing, lithography, or type? And if afterward he sells it, does he not sell his own thing? - But does this not impede the author's profit? It certainly impedes it, but without any injustice; otherwise no merchant could sell the same wares which a neighboring

merchant would sell. - Why are an author's rights not freely transmitted to heirs? S. R. C. 24 Mar. 1909; C. A. 1169; C. L. 579 ff.

879. Does one violate another's right who publishes in print a manuscript work without the author's consent? R. Affirmatively. The reason is that the work, as long as it has not been issued into the light, remains entirely under the ownership of the author. Therefore such a usurper is bound to restitution of the manuscript and to compensation for damages. C. L. 574, 575.

880. Likewise, does one violate another's right who publishes in print the lecture of some professor, or the sermon of an orator? There are those who generally affirm this, even about a public lecture or sermon. The reason is that to teach or preach publicly is not to hand one's work over to another for publishing or selling. Nevertheless a distinction seems to have to be made. For if there is question of a private lecture, of a private sermon, it is clear that the professor or preacher retains his whole right in his lecture or sermon. But if there is question of a public lecture or sermon, the argument already made holds, namely, that the thing has already been handed over to the community, and thereby has been made of common right unless it is prohibited by positive law.

And this is confirmed by the fact itself; for there is no one who condemns as injurious to others those who publish in newspapers the public speeches of Deputies or Senators in Parliaments, or of others in public assemblies. The very words of the Supreme Pontiff in public receptions of the Christian faithful are publicly published, nor is there anyone who imputes this as a grave sin against justice. C. L. 572, 573, 576. Cardinal Manning, in the letter prefixed to the Conferences of Fr. Augustine of Montefeltro, London 1890, says in substance that a sermon, once preached, becomes public property, and that those who hear it may reproduce it in translation or alteration; but they must not publish it to the world as the preacher's sermon unless they faithfully reproduce what he said.

881. Can a book recently published be committed to type in another place without the author's permission? If there is question of a very distant place, those very doctors who contend that by the law of nature an author retains a right of property in his book for repeated publication, so that others are excluded from such a right, concede that in such a case a right of this sort seems to be less urgently pressed; since an edition in very distant regions does not prevent the author from receiving the fitting fruit of his industry. And this reason shows still more clearly that the author in truth does not retain a right of property in his work; since if he retained that right, it would matter little whether the book were published in a neighboring or distant region without permission and contrary to the author's will. It certainly matters little, as to injustice, whether someone occupies another's house, another's field, and uses and enjoys them against the owner's will, in a neighboring or a most remote region. Nor is it valid to say that someone in such a most remote region could not defend and protect his right of property; otherwise, as the same doctors themselves skillfully observe, it would be lawful for anyone to take for himself crops or grapes at will when the owner of the fields or vines could not guard them.

But if there is question of a neighboring place, and treaties exist among various dominions, by virtue of which an author can enjoy the same right elsewhere as in his own country, commutative justice is certainly injured, and the violator of another's right is bound to compensate damages according to the norm of the laws. But if there is no convention among the various regions, since law outside the territory of the legislator has no force, although perhaps such a law exists in the author's place, nevertheless in another place the publisher of the book is not bound by it; and therefore the matter

must be defined only by natural law. But by natural law a right of property of this sort does not exist, or is very uncertain. Therefore he cannot be accused as a violator of another's right and as one causing damage, who uses his own right and publishes another's book. And this holds much more if someone did not merely publish another's book, but first translated it into another language. For then his own industry and his own labor enter in still more.

II. On the Modes of Acquiring Ownership by Natural Law

882. What are the various modes of acquiring ownership? - To an exact knowledge of ownership and of the rights and obligations which derive from it, there pertains not only knowing its essence and its various species, but also the various modes by which it is acquired. - A mode of acquiring ownership is any title, or cause of itself suited to confer ownership. Now some modes arise from natural law or the law of nations, others from civil law, others from private will. The natural modes of acquiring ownership of goods of fortune can be reduced to occupation and accession. C. I. 710; C. H. 609; C. A. 317, 381, 404, 423, 424; C. G. 712, 714; Inst. 1. 2. t. 1. § 11; Gousset, *Cod. Comm.* in a. 712; S. Th. 2. 2. q. 57. a. 2, 3.

883. What is occupation? 1. Occupation is: the real apprehension of a corporeal thing with the intention of having it as one's own. Apprehension, namely, in that way which the thing permits and usage bears, for example by hand, feet, snare, net, inflicted wound; and not only by sight or view. Corporeal, for incorporeal things, such as rights, cannot be apprehended corporally.

2. It is a legitimate mode of acquiring ownership, provided that: 1. The thing is capable of private ownership and is no one's; or if it belongs to someone, the owner willingly yields his right, for instance by contract; or if he is unwilling, he is legitimately despoiled of his right, for instance by military occupation. 2. The occupier wills to make the thing his own when in fact he apprehends it. 3. That the thing has not already been occupied, as it were, by some law which has reserved it to a certain owner, for example to the state.

The reason is that man is master of things in first act from the very nature of external things and from divine institution. But in second act he does not become master of things except by some fact; and the most original fact of all is occupation. It is impossible to assign another. Hence all men and all laws hold this fact of occupation as a legitimate title of ownership. Occupation of this kind by man contains in itself industry and labor, which naturally bears fruit for the industrious and laborious man himself. A thing bears fruit for its owner.

3. The species of occupation are: finding, hunting, fishing, concerning which something particular must soon be said. C. I. 711, 758; C. H. 610, 956; C. G. 539, 713, 714, 768; C. A. 382, 760; C. B. 958; C. He. 658, 659; L. 493; S. Th. 2. 2. q. 66. a. 5 ad 2.

884. You will resolve: A soldier can keep all movable things if he has stripped an enemy killed by himself; for this is the general custom. He also seems to be excused if he has stripped other prostrate enemies. But if he has taken things from fallen comrades, he must restore them to the known parents or heirs of the dead, insofar as this can be done and the value of the thing requires. Gur. Cas. 512; Struggl, *de V. Praec. dec.* art. 5. nn. 49, 50; Reiffenst. tr. 7. d. 5. q. 1. n. 4; S. Th. 2. 2. q. 66. a. 8 ad 1; C. A. 402; Inst. 1. 2. t. 1. § 17.

885. What is finding? - To find and to acquire by finding is not only to see the thing, but also physically or morally, as the thing requires, to apprehend it. Things found are of three kinds. Some are those which have never been under the ownership of any man, and are called things belonging to no one, such as a gem found on the shore of the sea. Others are those which were under the ownership of man, but in fact lack an owner; either because the owner cast them away with the intention of possessing them no longer, and they are called abandoned goods; or because the owner dies without a testament and without heirs, and they are called vacant goods; or because the owner, who hid or deposited money or other precious things, has been dead for a long time, so that no memory of them any longer existed, and they are called treasures. Finally others are those which have an actual owner, but he is unknown, because they were lost by him, he not knowing with whom or where they may be found, and they are called things recently lost.

886. What about a thing belonging to no one? - Things belonging to no one, which have never had an owner, become the finder's. It is proved 1. from the common opinion of theologians. 2. From positive law itself. 3. Because that which belongs to no one, by the fact of occupation, legitimately becomes one's own. Meanwhile, however, as to the right of digging for metals, etc., particular laws of places must be attended to. For although the things belong to no one, nevertheless in order that they be occupied the rights of others can easily be harmed. Things belonging to no one, namely, per se; for by law the ownership of the soil carries with it the ownership of those things which are under it and above it. C. I. 440; C. G. 552; C. H. 350; C. B. 905; C. He. 667, 718; C. L. 465 ff., 2288, 2321 ff. - C. I. 711; C. H. 610; C. A. 317, 382; Inst. 1. 2. t. 1. § 18; S. Th. 2. 2. q. 66. a. 5 ad 2.

887. What about an abandoned and vacant thing? - By natural law, abandoned and vacant goods become those of the first occupier. The reason is that they no longer have any owner; therefore they yield to the first occupier, no differently than those things which have never had an owner. But by positive law they are commonly assigned to the state. C. G. 713, 768; C. I. 425, 758; C. A. 760; C. B. 928. Nevertheless this seems, from custom, to have to be restricted to immovables alone, at least before the sentence of a judge. Thus it is expressly drawn from C. A. 386, 387, 388; C. B. 928, 958, 959; C. He. 664, 718; C. L. 411. - Inst. 1. 2. t. 1. § 47; Carrière 285, 343; S. Th. l. c.

888. Note: To the title of occupation can be reduced the mode by which the poor occupy dry branches of a forest, ears of grain or chestnuts after their harvest, clusters after the vintage, etc., which are held as abandoned and generally conceded by owners to the poor. The same must be said of wood which the flooding of a river has carried far elsewhere and which can no longer be recovered without expenses which far exceed the value of the thing.

From the Constitution of Benedict XIV, *Ex commissio Nobis*, 17 May 1751, it is prescribed that, "the harvest having been made, the gleaning be altogether freely permitted to the poor by the owners of estates, so that without any impediment they may gather ears either scattered on the ground or passed over by the reapers, and may bring them home to their families." Goods lost by shipwreck, even if on the occasion of a storm they are voluntarily thrown into the sea, are not considered abandoned, because they are not thrown away with the intention that the owner, as it were, does not wish to have them, but so that he may escape that danger of shipwreck with the ship. Inst. l. c. § 48. Nor likewise are those things held as abandoned which are freed from fire, flood, or the hands of robbers, even if otherwise they would have perished, and someone saves them not without danger to his own life. Hence all these things must be restored to their owners, with expenses made and the

price of the labor and danger which he underwent being repaid to him. From C. A. 403, he who preserves another's thing from certain danger can, besides compensation for expenses, demand a proportionate reward. - Cf. C. He. 725. Abandoned goods are not those which, although they have ceased to be in our power, can still probably be recovered. But when every hope of recovering them has vanished, they cease already to be ours, and begin to belong to no one. For ownerships of things exist so that we may use things. And, because intention is required for ownership, if it is prudently judged that the owner, when he knows his thing is in danger of perishing, is no longer solicitous about it, it can be held as abandoned; for example, if the thing is of slight value, and great expenses would be necessary to recover it.

As to vacant goods, Struggl, *Theol. univ.* P. 2. tr. 8. d. 2. q. 2. a. 2. VII, has this: "It is sufficiently probable that one sharing in vacant goods, or their possessor, is not bound before the sentence of a judge to hand over the same goods to the treasury... I judge this *a fortiori* if someone had diligently served such a deceased person, or had been his friend in such a way that he would have had a prudent hope of inheritance or legacy, if that man had made a testament."

889. What about treasure? Treasure, from C. I. 714; C. G. 716; C. H. 352, is any precious movable object which has been hidden by the hand of man or deposited under the earth, and therefore lies hidden there, whose owner no one can prove himself to be, whether the deposit is old or recent; but from C. A. 398 and from C. B. 984, it is an old deposit. Cf. C. L. 442 ff. By the hand of man, thus indeed L. un. C. *de Thesauris*: Treasure, that is, movable things hidden by unknown owners in a more ancient time. As to the various modern Codes, it is not sufficiently clear whether the thing must have been deposited by the hand of man; or whether by some other cause also it is held as treasure, and not as a thing belonging to no one, so that it simply becomes that of the first occupier.

Treasure, wherever it is found, by the law of nature belongs wholly to the finder. The reason is that treasure is reckoned among abandoned goods, and is not part of the land, or a fruit of the land. But to find treasure is not to apprehend it by hand, but first to see it, and to perceive, uncover, or know that it is treasure, and to apprehend it. L. 602; S. Th. 2. 2. q. 66. a. 5 ad 2. Treasure belongs, from C. I. 714; C. G. 716; C. H. 351, to the owner of the land. From C. A. 399, a third part is owed to the treasury. If someone by chance finds treasure in another's land, whether rural or urban, the treasure is to be divided by halves between the finder and the owner of the land.

If someone purposely sought treasure in another's land, the owner being unaware, by force of law the whole treasure belongs to the owner of the land. To the owner of the land, whether the owner is a private man, or the treasury, or a city, or a church. But if it is found in a place destined for public uses, as in a public road, square, or market-place, even if intentionally sought, by the common opinion it belongs wholly to the finder. C. I. 714; C. G. 716; C. H. 351. To the owner of the land, for it does not yield to the usufructuary, C. I. 494; C. G. 598; C. H. 471; C. B. 1040; C. L. 2216. But treasure found in emphyteutic land, from C. I. 1561; C. H. 1632, yields not to the direct owner, but to the useful owner; from C. A. 399, it yields to both.

From C. He. 723, treasure belongs to the owner of the thing in which it is found. The finder has a right only to equitable compensation, never, however, beyond half the value of the treasure. From C. B. 984, treasure belongs by half to the finder, in whatever way it is found, even purposely, and by the other half to the owner of the thing in which it was hidden. - L. 602; S. Th. 2. 2. q. 66. a. 5 ad 2; Lugo d. 6. nn. 114, 117; Inst. 1. 2. t. 1. § 39; C. A. 399-401. Ownership of treasure by force of law is

acquired immediately by the owner of the land and by the finder. But the law which extorts half the part from the finder, when he purposely seeks treasure in another's land, seems penal. L. 602; Lugo d. 6. n. 131; Gur.

Cas. 526; C. A. 400; C. I. 714; C. G. 716; Gousset, *Cod. Comm.* in this article; C. H. 351, 614. Someone can buy an estate at the common price, although he knows certainly that a treasure has been hidden there. The reason is that neither is the treasure a fruit of the land, on account of which he ought to pay a greater price for the land; nor does the certainty of the thing which he has bring any injury to the seller. For since that treasure has not yet been found by the owner of the land, it is not yet his, but the thing continues to belong to no one. Therefore the fact that the buyer certainly knows that treasure is hidden in that land, while buying the field at the common price, injures no right of the seller. Lugo d. 6. n. 126; S. Th. 2. 2. q. 66. a. 5 ad 2.

890. What about a lost thing? - Concerning a thing lost by someone, if someone takes a thing found by chance, he must take it with the intention of restoring it and of asking about the owner; and to this he is bound from quasi-contract. The reason is that the finder in this way freely receives another's thing into his custody; and therefore he is considered to bind himself by quasi-contract to restoring it, and consequently to asking about the owner of the thing. Moreover, the owner of the thing ordinarily wills that the lost thing be the finder's after the latter cannot discover the owner; and therefore, on account of this favor, he is considered to bind the finder by quasi-contract to the burden of asking. Hence if the finder culpably neglects to inquire after the owner, those goods are due from delict. Add that, as often happens, when the finder apprehends the thing, he is the cause why the owner, commonly remembering the place in which he lost it, seeks the same thing in vain in that place. Lugo d. 6. n. 132; Struggl l. c. III; L. 603. D'Annibale, ed. 4. p. 2. n. 132, thinks that the finder "must seek the owner, but not from justice, unless he himself, by taking it away, made it so that the owner could find it with more difficulty. But to hide it is almost theft." But if he takes it away, and does not inquire, how will the owner find his thing? And if he takes it away and does not inquire, does he not hide it?

The finder in bad faith, who has hidden the lost thing and neglected to search for the owner at the due time, is bound in conscience to distribute the found thing to the poor, or to apply it to pious causes, even if afterward he cannot discover the owner of the found thing. The reason for this is: 1. because by the very fact that someone hides a thing lost by another, or neglects to search out the owner, he sins against justice by detaining another's thing. Therefore no less than a thief, from unjust detention, he is bound to restitution. Since then he can no longer discover the owner, he is bound to distribute it to the poor, or apply it to pious causes. 2. Because it cannot prudently be presumed that the owner of the lost thing wills that such a finder have an advantage from his own delict; but rather that, after he has neglected due inquiry, he have the burden of expending the found thing in alms or other pious causes, so that the owner may at least receive a spiritual advantage. S. Th. 2. 2. q. 62. a. 5 ad 3; L. 603; Struggl l. c. XIV. The finder who has employed due diligence in inquiring after the owner, and could not discover him, more probably can licitly retain the lost thing, without an obligation of justice of giving anything to the poor, or of expending it on other pious causes. The reason for this is that the owner of the lost thing is prudently presumed to will that the thing found, after diligent and sufficient search for him has been employed, be the finder's. Therefore, by reason of the title of finding, and of the similar will of the owner prudently presumed, the finder can prudently

and licitly appropriate the found thing to himself. The consequence is clear, because, with these things supposed, nothing prevents the finder from being able to appropriate the thing to himself. The antecedent is proved: 1. The owner of the lost thing wills the finder to be bound to inquire diligently and sufficiently who the owner of the lost thing may be. Therefore by this very fact he is prudently presumed to will that the finder, after he could not discover the owner, be able to appropriate the lost thing to himself as a reward of his industry, because no one is presumed to will to oblige another to burdens without remuneration, especially if this can be done without his own damage. 2. The owner of the lost thing is prudently presumed to will that the lost thing be preserved in that way by which he can recover the same more easily and more securely. Therefore. The major is clear; for owners of lost things ordinarily have such an intention. The minor is also established, because the thing is more easily recovered from one finder than from many poor persons or from pious causes. Cf. 893. Struggl l. c.; Lugo d. 6. n. 100 ff.; L. 603; S. Th. 2. 2. q. 66. a. 5 ad 2; C. I. 715; C. G. 2279; C. H. 615; C. A. 388.

891. Is one who finds another's thing able to leave it in the place where it is, or is he bound to collect it? He is certainly not bound from justice to collect that thing; and the reason is that by no special office and by no contract is anyone bound to collect another's found thing. - Nevertheless he is bound from charity to collect that thing for the owner, if otherwise it would perish, or the owner would no longer be able to recover it. The reason is that from charity we are bound to avert a neighbor's damage which we can easily prevent. Hence, generally speaking, if the thing found is of great price, and there is a great probability of discovering the owner, and no damage is to be feared on the part of the finder, that obligation is grave.

892. Does he sin who first takes another's found thing, but afterward puts it back in the same place? - He sins not only against charity, but also against justice, if there was probability of discovering the owner, by retaining the thing. The reason is that he exposes another's thing, already existing in a safe place, to the danger that it perish for the owner, just as he who throws into the fire a cloth rescued by himself from a fire. Moreover, by collecting another's thing he undertakes an obligation from justice of restoring it to the owner, if he can. Except, however, if you foresee that you will suffer damage from it; for then "you can put it back in the same place and permit another to carry it off, although by doing this you put the thing into a worse state; for then the taking by the thief comes about from his own malice, and your cooperation is only permissive of another's loss, which you are not bound to avoid with your own damage." L. 569. D'Annib. ed. 4. p. 2. n. 199 holds that this is against charity, not against justice, because there is a certain quasi-compensation of both acts. And he affirms this generally for a thing rescued from any danger and put back in the same. But this is mere caviling. The second act, once the condition of the thing exposed to danger has already been changed, and once the obligation of restoring that thing has already been undertaken, no longer compensates the first.

893. Can one who has found another's thing, and after sufficient diligence, the owner not having been found, has made that thing his own, nevertheless keep the thing as his own by title of prescription, when the owner becomes known after a time sufficient for prescription? - R. Affirmatively, probably. The reason can be taken from St. Alphonsus, l. 3. n. 590; for he says: "When, after all circumstances have been considered, it is no longer possible" (understand morally speaking) "that the owner be found," if the thing, after due diligence has been employed to find the owner, has been handed over to a poor person, and afterward the owner appears, the poor person is not bound

to restore it, because "then the poor person acquires absolute ownership of the thing without any burden of restitution." Therefore, by parity, the same must be said of the finder himself, if, as he can, he himself keeps the thing with himself. And the reason *a priori* is because, as the same holy Doctor says, l. c. n. 603: "When a thing, considering the circumstances of length of time, or distance of place, or the fact that the thing can no longer be recognized by the owner as his, as happens in ordinary coins, does not seem possible to return to the owner; then it becomes the thing of no one, and therefore is acquired by the first occupier, who is not bound to give it according to the will of the prior owner, since he, through the impossibility of recovering it, has entirely lost its ownership...; because the law of nations attributes to private persons ownership of things for no other end than that they may use them; hence, when it is impossible for the thing to come to their use, it becomes, as abandoned, the thing of no one, and returns to the primeval natural law, and therefore becomes that of the first occupier without any obligation." - S. Th. 2. 2. q. 66. a. 5 ad 2.

From C. I. 715-718; C. H. 615, 616, the finder of a movable object which is not treasure must restore it to the preceding possessor; if he is ignorant of him, he must without delay hand it over to the Syndic of the place where the object was found. The Syndic makes the thing known by publication, to be repeated according to the accustomed forms on two successive Sundays. After two years have passed from the day of the second publication, without the owner appearing, the thing, or its price, if circumstances required that it be sold, belongs to the finder. But if the owner of the lost thing appears at the opportune time, he owes a reward to the finder. The same as to substance is had from C. A. 388-392, from C. B. 965-982, and from C. L. 415 ff. - The finder of a lost thing makes it his own after three years have passed, from C. A. 392, 1466; after a year from C. B. 973. If in the meantime the owner appears, he owes a reward to the finder.

From C. G. 2279, the owner of a lost thing can reclaim it within the space of three years. From C. He. 720 ff., the finder of a lost thing is bound either to notify the police, or to make due inquiries for the owner. If the owner does not appear, he acquires ownership of it only after five years have elapsed. - C. L. 419 establishes a varied space of time according to the varied value of the thing.

894. How are the various animals distinguished? As regards hunting and fishing, animals are of four kinds. Some are tame or domestic, which from their disposition enjoy human association, such as horses, sheep, hens, etc. Some are wild, or beasts, which from their disposition flee human association, such as wolves, deer, hares, birds, fish, etc. These sometimes exist in their natural liberty, as a deer in a forest open on every side, a fish in the sea; sometimes, with such full liberty removed, they are enclosed by some custody, as a deer in a grove surrounded by high hedges, etc. Some are tamed, and these are wild animals or beasts which are made tame by human industry, and are cared for in such a way that they have the custom of going away and returning, as doves in a dovecote, rabbits in a warren. Finally some are become wild, and these are animals which, after putting off a prior custom, either assume their former wild nature or contract it. C. B. 960.

895. What about tame animals? Tame or domestic animals remain those of the prior owner, however much they wander off; hence they cannot be occupied by another. The reason is that animals of this kind are subject to the ownership of a particular man, and are morally recoverable; and therefore, since the owner does not put away the intention of recovering them as his own, he always retains ownership of them. For the same reason, if someone has snatched your sheep from the jaws of a wolf, he preserves it not for himself but for you. Meanwhile, however, in this and a similar case, the

one preserving another's animal can ask the price of his work at least from equity, but the price of necessary fodder even from justice. Inst. 1. 2. t. 1. § 16; C. B. 960; C. L. 404 ff.; Lugo d. 6. n. 41.

896. What about tamed animals? Wild animals that have been tamed, as long as they have the custom of returning, or are enclosed by certain custody, do not become those of the first occupier; but they do become so after they have lost such a custom, or after they have escaped custody. The first reason is that animals of this kind belong to the possessor both by reason of occupation and also by reason of training and detention. Moreover, all laws so establish. The second reason is that, if they have lost the custom of returning, or if they have escaped the custody of the owner, they cease to belong to the prior owner; for they have recovered their first nature and liberty. - Inst. 1. 2. t. 1. §§ 12, 15; C. B. 960; C. L. 400 ff.; C. He. 719; Lugo d. 6. n. 41.

897. You will resolve: When an entire swarm of bees flies away from a hive, and the owner loses probable hope of recovering it, the swarm of bees becomes that of the first occupier. From C. G., Law of 6 Oct. 1791; C. He. 725, it belongs to the owner of the land in which it settles. From C. I. 713; C. H. 612, unless the owner has pursued bees flying from his own land into another within the next two days, and likewise unless someone has vindicated for himself, within twenty days, tamed wild animals which another has caught, the former become those of the owner of the land, the latter those of the one catching and retaining them. Doves, as long as they have the custom of returning home, are not those of the first occupier; just as neither are other tamed animals. Hence it is not lawful by specially prepared food, or by other enticements, to attract another's doves to one's own dovecote. If, however, doves, rabbits, or fish have betaken themselves of their own accord into another dovecote, enclosure, or fishpond, they belong to the owners of these. C. I. 462; C. G. 564; C. H. 613. Fish in a large lake and wild animals in vast forests, even enclosed ones, become those of the first occupier; for they are left in their natural liberty. Inst. 1. 2. t. 1. §§ 14, 15; C. A. 384, 3121; C. B. 961 ff.; C. L. 400 ff.

898. What about wild animals? - Wild animals which lack an actual owner and enjoy natural liberty become those of the first occupier. The reason is that, as is said in Inst. 1. 2. t. 1. § 12, "that which previously belongs to no one is granted by natural reason to the occupier." Hence a wild animal wounded by one person and captured by another, if it is established that it can no longer escape the hand of the one wounding, belongs to the one wounding, not to the one capturing. The same must be said of a bird for which one person has set a snare, but another has nevertheless taken it. Inst. 1. 2. t. 1. § 13.

C. I. 711; C. H. 610; C. A. 383; C. B. 960; L. 604.

899. How do laws which prohibit hunting and fishing bind? - Laws which prohibit hunting and fishing at some determined time, or with some determined instruments, or without payment of the tax for the due faculty, according to the common and probable opinion, are merely penal laws; and therefore they do not oblige except to undergoing the fine and penalty, if someone is caught. The reason is that laws of this kind regard only a material and external good, and indeed one not of great moment: the due procreation and multiplication of fish or birds. L. 1. 1. n. 145.

In Germany, however, they seem preceptive from C. B. 958, which invalidates occupation of a thing legally prohibited, or when by apprehension of possession another's right is harmed; unless, namely, some other custom at least obtains as to hunting, or unless it is said that the law in the case does not

really prohibit occupation of such a thing, but only in such a mode, time, etc. Laws which prohibit hunting or fishing in a closed private estate are prohibitive laws in conscience. For these laws confirm the natural law, lest anyone use another's thing against the owner's will and cause him damage. Therefore those transgressing these laws sin against commutative justice and are bound to compensation for damage. L. 604; C. I. 712; Inst. 1. 2. t. 1. § 12. Laws which prohibit hunting or fishing in some public place, by force of a contract entered, for example of lease, are prohibitive laws in conscience, by force of commutative justice.

Therefore, if someone in that place were to take so great a multitude of fish or other animals that another's right would be notably harmed, he would sin gravely against commutative justice and would be bound to compensation for damage. L. 605, 614, 617; H. A. tr. 10. n. 71; Lugo d. 6. n. 189. Laws prohibiting hunting and fishing in a determined place, from an exclusive privilege conceded to others, are likewise prohibitive in conscience; for they prohibit violation of a conceded right. But if there is a simple reservation, "Diana with Dic. etc. excuse the hunter from restitution and from grave sin, if the places are not enclosed.

Lessius also admits this, if the damage was not notable, since the wild animals are not of great price, or are not many; for then he says that the prohibition, from the common judgment, is understood as made only under venial sin. Indeed he adds that hunters can always be excused from restitution when a penalty has been enjoined, because Princes then seem to intend that alone." L. 605. Likewise, if there is a simple license, even though it is obtained only by money, others hunting or fishing without that license do not injure commutative justice; nor do they regularly injure legal justice, because the law is then commonly held as penal; and therefore one is bound only to undergo the penalty, if he is caught.

As to animals captured contrary to the aforesaid laws prohibiting hunting and fishing: if they were under the ownership of the owner of the place, or of the one having the right either from contract or from privilege of hunting or fishing, they must be restored, since someone by capturing them cannot make them his own. But if those animals were not under the aforesaid ownership; since, for example, although fish are in some large lake, or wild animals in some large enclosed forest from which they cannot go out, nevertheless they can still escape the nets of him who wishes to catch the fish, or wander and escape the hunter; then no restitution of them is to be made, since the one catching them makes them his own. Lugo d. 6. n. 72. A wild animal becomes that of the first occupier, even if it is caught on another's land.

The reason is that although the wild animal exists on another's land, and therefore passing over there is illicit, nevertheless it does not exist under another's ownership; unless the land is closed, so that the wild animals cannot go out from it and can easily be caught there; for these are then considered to have lost liberty and to belong to the owner of the land. Likewise, although the owner of a territory can appropriate to himself the right of hunting in his own territory, nevertheless he cannot appropriate a free wild animal, since he has title of property only to that territory, not to the animal. But the owner who has his own right of hunting in some territory can not only release a wild animal caught in a snare, but also take away the snare or other instrument, without being bound to its restitution, as theologians commonly teach.

The reason is that such taking away is considered by common custom as a penalty for the right of hunting having been injured. Hence, since by this title he can release the wild animal, by the same

title he can also retain it for himself. Inst. 1. 2. t. 1. § 12; C. L. 384 ff. If the owner of the land from his magnificence thinks little either of the captured wild animal to be restored, or of the damage inflicted to be repaired, and is content with the fine or penalty alone, so that the wild animals may be safe, neither restitution nor reparation of damage is to be urged, even if perhaps the fine also was not paid, because the crime remained hidden. - But where damage must be repaired, an estimate is to be made according to the judgment of a prudent man, with attention to all the circumstances.

For this, if the wild animal was not under another's ownership, does not depend on the price of the captured wild animal, but on how much it mattered to the owner, or to the one having the right of fishing or hunting, that the animals not be captured, because more animals would have been captured by him or by his men, unless someone had unjustly taken them. Therefore, if that act, with attention to the multitude of wild animals, did not prevent him from capturing as many as he wished, nor caused their price to decrease, reparation of damage is not to be urged. L. 604, 605.

900. What is accession, and of how many kinds is it? Accession can be taken in two ways, generically and specifically. Considered generically, it is an addition made to some thing, either on account of the production of a thing, or on account of the union of a thing with another, or on account of the alteration of the same thing. C. I. 443; C. G. 546; C. H. 353; C. A. 404; C. L. 2284. Cf. here 902, 905.

901. Is ownership acquired by production of a thing? - By reason of production of a thing there is distinguished generally the production of fruits, and specifically birth.

By production of fruits, whether natural or by fiction of law, the proprietor of a fruitful or lucrative thing makes its fruits his own, whether natural or civil, such as the fruits of fields and the rents from lease of houses or revenues. Hence the common saying: A thing bears fruit for its owner. C. I. 444; C. G. 547; C. H. 354; C. A. 405; C. B. 953; C. L. 2290. - From C. B. 954, 956, ownership of fruits is not acquired by others than by the owner himself of the fruitful thing, except by their separation. But birth is the offspring of animals, by which ownership is acquired of the animal generated from one's own animal. For this title it makes no difference whether the offspring was conceived from one's own or from another's male animal. Hence the legal saying: The offspring follows the womb. C. I. 443, 444; C. G. 546, 547; C. A. 406; C. H. 357; L. 494, 609, 610. He who receives the fruits of a thing has the obligation of compensating third parties on account of expenses made for cultivation, seeds, and works. C. I. 445; C. G. 548. Inst. 1. 2. t. 1. §§ 19, 35.

902. Is ownership acquired by union of a thing? - The union of a thing with another also comes under the name of accession, and accession taken in this way, although more determined, is still taken generically. And thus accession, taken generically but more strictly, is a union by which something accidental is joined to the principal. But this union can be made by nature or by art; hence there are various species, concerning which we shall speak immediately. Since the accessory follows the principal, the property of the principal thing generally grants a right in the accessory thing united to it. - R. I. 42 in the Sixth; C. I. 443; C. G. 546; C. H. 353; C. A. 404; C. L. 2289, 2299.

903. Is ownership acquired by alluvion? - Alluvion is a species of accession in a matter of soil, not by man's industry, but by nature alone. Four things are to be distinguished here: alluvion, avulsion, change of riverbed, and an island born. Alluvion is a hidden increase which is gradually added by a river to some estate. By alluvion, ownership is immediately acquired of that increase which, by the force or even by the recession of water, is insensibly and successively added to an estate. C. I. 453,

454; C. G. 556, 557; C. H. 366; C. A. 411; C. L. 2290, 2291; L. 494. Except, however, places left by the sea, which are of the domain, and lakes or ponds of private persons, which, whether they increase or decrease, grant or confer no new right. C. I. 454, 455; C. G. 558. Avulsion occurs when a whole part of land, torn away by the force of a river, is joined to another estate. Ownership of this is not acquired immediately, but, possession of it having been taken, after a year, unless the owner has vindicated it for himself. C. I. 456; C. G. 559; C. A. 412. Cf. C. H. 368, 369; C. He. 659; C. L. 2292. Change of riverbed. If a river gradually recedes from one bank and invades the other, the place left belongs to the proprietors of the fields along the bank, with no damage repaid. C. I. 454; C. G. 557; C. H. 370. If a river, having left its whole natural bed, forms a new bed for itself, the former bed left behind is divided among the proprietors of the fields of both old banks. C. I. 461; C. L. 2293. Cf. C. G. 563; C. A. 409, 410. A new island born in the middle of a river likewise belongs to the proprietors of the fields of both opposite banks, provided that the river is not suited to navigation or to carrying goods; otherwise the island belongs to the State, unless a contrary title or prescription is present. C. I. 457, 458; C. G. 560; C. H. 371, 373; C. A. 407 ff.; C. L. 2294, 2295. Born; for if it was made from a river flowing around a field, it remains his whose it was. C. I. 460; C. G. 562; C. A. 408; C. H. 374; C. L. 2296.

Inst. 1. 2. t. 1. §§ 20-24.

904. Is ownership acquired by building, planting, sowing? Building, planting, and sowing are likewise certain species of accession in a matter of soil, made, however, through man's industry. Whatever is built, planted, or sown in the soil yields to the soil. For ownership of the land generally draws with itself whatever is placed above or below. C. I. 447, 448; C. G. 552, 553; C. H. 350, 358, 359; C. Ps. 946; C. He. 671, 673. Now he who has built, planted, or made other works on his own land from another's material must repay the price of the material to its owner, and if he acted in bad faith he must repair damages to the same owner. C. I. 449; C. G. 554; C. H. 360; C. A. 416, 417. But the owner of the material cannot vindicate it for himself if the built work would be destroyed or the planting would perish, from C. I. 440; and from C. G. 554, he simply cannot vindicate it for himself.

But if someone from his own material has built, planted, or made other works on another's land, C. I. 450; C. G. 555, the proprietor of the land has the right of retaining the works, or of obliging the other to remove them at his own expense and with damages repaid; but if the proprietor of the land prefers to retain these works, he must, according to C. G., pay their price, or, according to C. I., the increased value of the land. - But the proprietor cannot compel the removal of works made by a third party who has suffered eviction and who by reason of his good faith has been exempted from restitution of fruits; rather, he is bound to pay for them in one or the other way. C. I. 450; C. G. 555.

Cf. C. H. 361-364; C. A. 418; C. B. 946, 951. If finally some third party builds, plants, etc., on another's land from another's material, the owner of the material cannot vindicate it for himself, but can seek from that third party compensation for damages, and from the owner of the land the price of the material not yet paid, if he retains the building. C. I. 451. Cf. C. A. 419, 420; C. H. 365. From C. B. 946, 951, when a movable thing is so united to land that it becomes an essential part of it, the ownership of the land extends to that thing, with damage repaid to the owner of that thing; who, on the contrary, must make good the damage inflicted on the proprietor of the land, if he acted by an illicit act. L. 500, 501; Inst. 1. 2. t. 1. §§ 29, 30, 31, 32; C. L. 2304 ff.

905. What is adjunction, and is ownership acquired through it? - Adjunction or accession, specification, mixture or confusion, are species of accession in a movable thing. Accession here is not taken generically, for any union of thing to thing, but specifically, for a certain special union of things. Now adjunction, or accession specifically so called, occurs when two things are so joined together that from both one integral body is formed, namely because one thing is completed from the other, while nevertheless the substance of each thing remains distinct.

And thus adjunction or accession occurs by weaving, as if another's purple is woven into your garment; by insertion, as if another's gem is inserted into your gold; by writing, painting, etc. Adjunction or accession is governed by natural equity. C. I. 463; C. G. 565. But in whatever way the union is made, if the thing united belongs to another, and can be separated from the other without grave detriment, the owner of the accessory thing has the right of seeking separation, and each thing is to be returned to its owner, from C. I. 464; C. A. 414, 415; C. H. 378, as, for example, stakes joined to vines, tiles joined to buildings, etc.; but from C. G. 566 the whole belongs to the owner of the principal thing, with the price of the accessory thing paid.

But if the accessory cannot be separated from the principal, it yields by force of accession to the principal thing, but the owner of the latter is bound to pay the price of the former. C. I. 464; C. H. 375; C. B. 947, 948, 949, 951; C. He. 727. Cf. C. A. 415; L. 487. But accessory is that which is applied for the sake of adorning a thing, that which cannot stand per se without the other, that which is cheaper, that which is smaller. C. I. 465, 467; C. H. 376, 377; C. G. 567, 569.

But if the accessory surpasses the principal, it is in the power of the owner of the accessory thing either to vindicate the whole for himself, by paying to the owner of the principal thing the value which it has, or to take out his own thing, even though this cannot be done without detriment to the other thing. C. I. 466; C. H. 378; C. G. 368. Cf. C. A. 415; C. H. 379. And if the accessory altogether far surpasses the principal, then the accessory is held as principal and the craftsman can retain the whole, with the price of another's material repaid. C. I. 470; C. G. 561. - Finally, if neither thing surpasses the other, and one cannot be separated from the other, neither yields to the other, but to each owner his own thing remains, and the whole remains common to the owners.

C. I. 469; C. G. 572. From C. B. 947, 951, when two movable things are so united together that they become essential parts of a new thing, the prior proprietors become co-proprietors of this thing in proportion to the value of their own thing at the time of the union. If one of those things is to be considered as principal, its owner exclusively acquires ownership of the new thing, with damage repaid to the owner of the other thing; who, on the contrary, must repair damage to the other, if he acted by an illicit act. - Inst. 1. 2. t. 1. § 26; C. L. 2299 ff.

906. What is specification, and is ownership acquired through it? Specification is the introduction of a new form into matter. To have specification, although a substantial change of the thing is not physically required, nevertheless a substantial change is required morally; for example, if someone makes cloth from another's wool, a ring from gold, a ship from boards, wine, oil, or grain from grapes, olives, or ears. Whether the matter can be reduced to its prior form, or cannot be, the new species yields to another's material, with the price of the art employed being repaid. C. I. 408; C. G. 570.

If, however, the price of the industry far exceeds the price of the material, the craftsman can retain the species made by him, with the price of the material paid; and, if he acted in bad faith, he is bound besides to repair damages. C. I. 470, 475; C. G. 571, 577. - Therefore if a craftsman made a vessel from another's silver, the owner of the silver vindicates the vessel for himself, with the price of the workmanship repaid. If a sculptor made a statue from another's marble, he retains it for himself, with the price of the marble repaid. Gousset in C. G. 570, 571. From C. H. 383, the matter yields to the form, with the price of the matter paid, unless the value of the matter is more precious, or bad faith intervened.

From C. He. 726, the new thing belongs to the craftsman, if the labor is of greater value than the value of the material; otherwise it belongs to the owner of the material. From C. B. 950, 951, he who by his own industry so transforms several movable things that a new movable thing is produced acquires ownership of it, unless the value of the industry is notably lower than the value of the material; and then the rights in the preexisting material are extinguished. Nevertheless its owner must be rendered indemnified. Writing, drawing, painting, printing, and any other work performed on the surface of a thing are recalled to industry. L. 496; Inst. 1. 2. t. 1. §§ 25, 33, 34; C. A. 414, 415; C. L. 2302, 2303.

907. What are mixture and confusion, and is ownership acquired through them? - Mixture is the union of several solid things. But confusion is the union of several liquid things. - If the mixture or confusion is of several things of diverse kind, and a new species has been made from both, for example if mead has been made from honey and wine, to whom it ought to yield must be sought from the law of specification. If no new species has been made, and the things can be separated, he who did not provide assent to the mixture or confusion can seek separation.

If the things can in no way be separated, as the grain of Titius mixed with the grain of Caius, or cannot be separated without detriment to the things, the whole mass becomes common, in proportion to each one's portion and price. C. I. 471; C. G. 573; C. He. 727. Nevertheless, if the portion of one can be regarded as principal, or as much more precious, and the things cannot be separated, or not without detriment, for example if grain of the best quality has been mixed with grain of the lowest quality, or with rye, the owner of the former can retain the whole for himself, with the price of the other portion repaid. C. I. 472; C. G. 574; C. He. 727. Cf. C. H. 381, 382; L. 498, 499, 607, 608, 611, 612, 686.

And this Lugo, relying on Roman Law, L. *Si alieni nummi* 78. ff. *de Solut.*, understands both as to coins and as to other things, whenever that which is added is less than the preceding thing to which it is added, and the admixture is made with the intention of acquiring ownership. D. 6. nn. 164-166. - Inst. 1. 2. t. 1. §§ 27, 28; C. A. 414, 415; L. 498. From C. B. 948, when two movable things are inseparably mixed or confused, the preceding dispositions of a. 947 are applied with due analogy. To the impossibility of separation is equated the case in which mixed or confused things would be separated only with excessive expenses. Cf. here 905.

III. On the Mode of Acquiring Ownership by Civil Law

908. What is usucapion or prescription? The chief mode of acquiring ownership by civil law is usucapion or prescription, which is defined: the acquisition of ownership, or liberation from some

obligation, and the extinction of another's right through continuation of possession, for the time and in the manner defined by the laws. C. I. 2105; C. G. 2219; C. H. 1930; C. A. 1451, 1452. Acquisition of ownership; for through legitimate usucapion or prescription, from the disposition of civil and canon law, the possessor acquires ownership of another's thing, or is freed from some obligation.

For usucapion or prescription is twofold: one acquisitive of right, the other liberative from servitude or another burden. The former is properly called usucapion, the latter properly prescription; but these names are often used promiscuously, and in reality they cannot be separated, for what is acquisitive with respect to one is extinctive with respect to another. C. A. 1451, 1478; C. B. 194, 937, 945; C. L. 505. And the extinction of another's right; for after the possessor by legitimate prescription has acquired ownership of another's thing, or has freed himself from some obligation, on the part of the prior owner not only is ownership extinguished, but also every right to the thing; hence one who legitimately prescribes some thing is not bound by any obligation toward another.

C. I. 1236; C. G. 1234; C. A. 1449. Through continuation of possession for the time, etc.; for continuation of legitimate possession for the time and in the manner defined by the laws is the proximate reason on account of which civil and canon law attributes ownership of another's thing to the possessor. Civil and canon law, since usucapion or prescription is governed by that law to which the thing to be acquired by usucapion or prescription is subject. - C. 4, 6, 8 *de Praescr.*; Inst. 1. 2. t. 6. Cf. on this whole matter Troplong, *della Prescrizione*.

909. For what causes was usucapion or prescription introduced? - The causes on account of which usucapion or prescription was introduced by civil and canon law are four: 1. That the uncertainty and confusion of ownerships might be removed. 2. Lest lawsuits be multiplied. 3. Lest possessors live in continual fear of losing the thing possessed. 4. Lest men be negligent in preserving their things and rights. - Therefore usucapions or prescriptions were introduced on account of the public good; and therefore creditors and debtors cannot stipulate that no usucapion or prescription proceed between them. C. I. 2107; C. G. 2229; C. A. 1935; C. A. 1502. Nor consequently can someone renounce the right of prescription. C. L. 508 ff. - Inst. 1. 2. t. 6.

Prescription, however, in a civil cause, cannot be proposed ex officio. C. A. 1501; C. G. 2223; C. I. 2109; C. L. 514, 515. In a civil cause; for prescription of a penal action and of condemnation is applied ex officio, and it cannot be renounced. C. I. pen. 99. But in criminal causes of clerics a penal action is extinguished, "if indeed prescription has been expressly opposed in judgment by the accused or investigated person, or by his procurator. From this it is easy to perceive that the right both of accusing and of investigating remains entire until prescription is expressly opposed, and that the judgment altogether holds if the same has by no means been opposed." S. C. EE. et RR. 21 Mar. 1898. E. M. *de stat*. Partic. 7, 8 at the end, ed. 4, p. 172.

910. Is prescription a legitimate mode of acquiring ownership?

R. Affirmatively, both in the external forum and also in the internal forum, as the very common opinion of doctors has it, and it is approved by canon law itself. C. 3, 20 *de Praescr.*; C. 1 e. t. in the Sixth. The reason is that, with so great negligence of the owner standing, namely of not reclaiming his thing within the established time, it is legitimately presumed either that the thing is truly the possessor's, or that its true owner renounces it to the same. - Therefore the possessor, although after legitimate prescription he learns that another was the owner of the prescribed thing, nevertheless is

not bound to restore it to him, since through legitimate prescription he himself has been made owner. But once prescription has been completed, the thing is his as if it had always been his, nor does he owe fruits of the past time. And even if the possessor is ignorant that he has acquired ownership of the thing by prescription, nevertheless he prescribes legitimately; and if from such ignorance he returns the thing thus legitimately prescribed to the prior owner, afterward, conscious of the right, he can demand it back. C. I. 2105; C. G. 2219; C. H. 1930; C. A. 1451, 1452; Inst. 1. 2. t. 6; S. Th. Quodl. 12. a. 24; L. 513, 517; Lugo, *de Iust. et Iur.* d. 7. s. 1; Cf. C. B. 222, 390, 479.

911. What conditions are required for prescription? - For legitimate and consequently valid prescription by both laws, canon and civil, the following conditions are required: capacity to prescribe, a thing apt for prescription, possession, title, legitimate time, good faith. Inst. 1. 2. t. 6; L. 504.

912. Who can prescribe? - All those can prescribe who are capable of acquiring ownership. Therefore both private persons and Communities and Churches can prescribe, as they are also subject to prescription. C. L. 507, 516; C. I. 2114; C. G. 2227, 2251; C. A. 1453, 1454; C. H. 1931, 1932; C. 3, 8, 9 *de Praescr.*

913. What things can be prescribed? - Generally, all and only those things can be prescribed which come under ownership and private commerce, and for whose acquisition a legitimate title can be given. For since the end of prescription is to transfer ownership by authority of law, such transfer cannot be made concerning a thing which from its own nature, or from the disposition of the laws, cannot come into private ownership. Those things which can be alienated can regularly be prescribed. For those things which cannot be alienated cannot be acquired by another. C. I. 2113, 2135; C. G. 2226, 2262; C. H. 1936; C. A. 1455-1459, 1480, 1490; C. B. 194; C. L. 506; Inst. 1. 2. t. 6.

Likewise all rights and all obligations are subject to prescription. Rights, obligations, namely those which do not pertain to oneself, but to others; for prescription is not made against oneself, but against another; and thus the right of building or planting in one's own soil is not prescribed against oneself. To others, namely private persons; for those things which are of public order and public right, such as the power of a superior of making laws, obedience owed to superiors, are by no means subject to prescription. To others, that is, those things which can come to others from our concession, as, for example, the faculty given to another of building on your soil, if he has not used this faculty for thirty years; from our concession, not from mere toleration; from our concession, not those things which flow from natural law, such as, for example, the faculty which anyone has of alienating his own thing, nor those which flow from civil law, such as a change of domicile, restitution in full granted to a minor, a married woman, or one interdicted. Therefore acts merely facultative and of simple toleration cannot be the foundation of prescription. For the natural and civil faculty of each one cannot legitimately be possessed by another; and toleration excludes concession of one's own right, on the presumption of which prescription is founded. Facultative acts, namely acts which are merely acts of the power of acting or doing, in oneself or in one's own thing, not merely acts of exacting something from others, with an obligation imposed on them. C. I. 688; C. G. 2232; Troplong, *della Prescrizione* c. 1, *Dispos. Gener.* n. 112; c. 2, *del Possesso* n. 381 ff.; L. 9 *de Usurp. et usuc.*; E. M. From C. He. 789, land burdens cannot be prescribed. Individual prestations can be prescribed, from the moment when they become the personal debt of the one obligated. And from art. 807, credits secured by an enrolled immovable pledge are not subject to prescription. Likewise perpetual

census is imprescriptible; that is, the right to the payment of the prestation, although this can be prescribed, namely as to the various annual payments. Pothier, *Trattato dei Censi* s. 1. a. 1. § 3. Cf. L. C. *de Praescr. 30 vel 40 annor.* C. From C. L. 537, inalienable rights, and those which are perpetual, cannot be prescribed. From the same C. L. 592, literary property is imprescriptible.

914. You will resolve: Public sacred and religious things, such as churches, cemeteries, ecclesiastical rights, and also profane things which are of public ownership strictly taken, such as squares, roads, etc., the former cannot be prescribed by laypersons, the latter by private persons. For they cannot acquire ownership of these things. Schmalz. 1. 2. t. 26. n. 24 ff. "For public places indeed serve the uses of private persons, namely by the right of the city, not as if proper to each one... things which are destined for public use." L. 2. § 2, 5. D. *Ne quid de loco publico.* The right of conferring benefices cannot be prescribed by laypersons. C. 7 *de Praescr.* - Nor can the boundaries of parishes or dioceses be prescribed, provided that it is established that they were constituted by legitimate authority. C. *Super eo* 4 *de Paroch.* More truly also burdens of Masses cannot be prescribed. Cf. Ferrar. v. *Usucapio* n. 17; S. C. C. 18 Feb. 1702, 18 Aug. 1843. Although the Pontiffs did not wish ecclesiastical benefices to be transferred to laypersons by prescription, nevertheless an ecclesiastical benefice can be prescribed by a cleric by three years' possession, as is had in Reg. 36 of the Chancery, concerning three years' possession. Here, however, it must be noted that for a similar prescription these conditions are required: 1. good faith; 2. peaceful possession for three years; 3. colored title; 4. non-simoniacal entry; 5. that the beneficed person has not intruded himself into a benefice reserved to the Apostolic See in the Body of Law. L. 507, 515; Lugo d. 7. s. 7; Haunold. t. 1. tr. 5. c. 2. n. 273. C. I. 177, 427, 430; Inst. 1. 2. t. 6; C. 11, 12, 16 *de Praescr.*; Troplong, *della Prescrizione* c. 1.

915. Note: In order that prescription proceed against someone, that is, that it can begin and, once begun, be continued, it is necessary that he be able to defend his rights in court, and that he already have a complete right in the thing. Prescription does not run against one unable to act. Hence prescription does not proceed if someone has fallen into insanity; likewise against conditional rights while the condition is still pending; against rights for a determined day, while the day has not yet elapsed; against an action for eviction until controversy has been moved.

Cf. C. I. 2120, 2121; C. G. 2257, 2258; C. H. 1932, 1934; C. A. 1494, 1497; C. B. 198 ff.; C. L. 545, 550; C. *Placuit* 1 *de Praescr.*, C. *De quarta* 4 ib., C. *transmissa* 10 ib.; L. 1 *de Annali exceptione* C.; L. 7 *de Praescr. 30 vel 40 annor.* C. But prescription simply does not proceed, that is, it can neither begin nor be continued, among those who are considered as one person, that is, between spouses, between a son under paternal power and him under whose paternal power he is, between those administered and administrators given by law, between an heir who enters upon an inheritance with the benefit of inventory and the creditors of the inheritance entered upon by him, as to credits which he himself has against the succession. C. I. 2119; C. G. 2252, 2253, 2258; C. A. 1495; C. B. 204; C. L. 551; Troplong, *della Prescrizione* c. 4. n. 804.

916. Is possession required for prescription? - It is certain that legitimate possession is required for prescription. This is clear both from civil law and from canon law: "Without possession prescription does not proceed." R. I. 3 in the Sixth. Possession as to things, quasi-possession as to rights, which consists in the use of a right, or in cessation from fulfilling an obligation, as if someone uses a servitude of passage or of aqueduct, if someone prohibits another from going through his land, or

obstructs an aqueduct. Inst. 1. 2. t. 6; C. I. 2106; C. G. 2229; C. H. 1940; C. A. 1460; Laymann 1. 3. tr. 1. c. 8. n. 4; Struggl, *Theol. univ.* p. 2. tr. 8. d. 2. q. 3, a. 4. II; Troplong, *della Prescrizione* c. 2; E. M.

917. What are the conditions of legitimate possession? In order that possession be legitimate, it must be:

1. Dominative, that is, one must hold the thing by himself or through another in his own name as owner, with the intention of owner.

2. Peaceful, without any force, with respect to the owner; therefore, if someone by force has prohibited the owner or his tenant from possession of the estate, usucapion of the estate does not proceed for him. - 3. Manifest, not secretly, again with respect to the owner; for example, if the tenant of Titius sells the land to Caius, and remains in possession of the land as tenant of Caius, usucapion does not proceed for Caius. - 4. Not equivocal, so that it appears openly that you possess the thing as your own, that you use a right as though your own; and thus usucapion is not had if a lessee from an estate leased to him diverts water into his own estate, or if someone draws water from a neighbor's well, which is generally done by right of neighborhood, friendship, and familiarity.

5. Continuous, as to its acts and signs. But this continuity is not absolute, but relative to the thing possessed. And thus a right of repeating a prestation on the occasion of the birth of a son, marriage, or death, is not exercised except when that occasion presents itself; and therefore even a few acts suffice for the continuity of possession through many years. Once the beginning of possession has been proved, continuation during the intervening time is presumed.

6. Not interrupted by another's act, neither naturally nor civilly, if the thing, for example, in the intervening time had been stolen, had been taken away by force, or if there had been a judicial citation, or a petition for the thing in court, etc. Cf. 923, 924. - 7. Complete; but for fulfilling the time of usucapion established by law, the successor, or the one having a cause, that is, he to whom the thing has been transmitted, if he is singular, can use the accession of possession of his author, that is, of him from whom he received the thing; for example, the buyer can use the possession of the seller. But if the successor is universal, that is, an heir, he must use it. An heir; but he who succeeds someone in an office is in the manner of a particular successor, not of an heir. Cf. 927 ff. - C. I. 685, 686, 693, 2106, 2115 ff.; C. G. 2228, 2229, 2232-2235 ff.; C. H. 444, 1941, 1942, 1944 ff., 1960; C. L. 510, 517, 518, 521 ff.; C. A. 1460-1462, 1464, 1493; C. B. 857, 858, 943, 944; Inst. 1. 2. t. 6; L. 506; Troplong, *della Prescrizione* c. 2, *del Possesso* n. 452.

918. You will resolve: "Hence it happens that a tenant farmer, lessee, depositary, borrower for use, slave, and similar persons do not possess sufficiently for prescribing; for these do not possess in their own name, but in the name of the owner, who through them possesses with possession useful for prescription, namely both civil and also natural. But a usufructuary and an emphyteuta indeed possess sufficiently that they may prescribe in order to the right of the land, not as to ownership; because they do not possess this civilly. Likewise a tutor, curator, procurator, and similar persons possess not in their own name, but in the name of others; for whom also their slave, son under

paternal power, and religious can prescribe. Finally, he who is not capable of acquiring ownership does not possess with possession useful for prescribing. Hence a layperson, who is not capable of a spiritual right, to tithes or to anything else, cannot prescribe it, as Molina commonly teaches with others, d. 62 toward the end." Lugo d. 7. n. 13; C. I. 685, 2115; Inst. 1. 2. t. 1. §§ 1-10.

919. What is the title required for prescription? The title required of possession in general is the cause from which we hold or possess a thing. One title is translative of ownership, which per se is ordered to transferring ownership, such as sale; another is non-translative, which per se is not ordered to transferring ownership, such as lease. The latter is defective, for of itself it is insufficient for prescription. Indeed, it perpetually obstructs prescription, for it always shows another owner. And thus it is better to have no title than to have a defective title. But the former, if not true and existing in reality, at least apparent, thought to exist, or presumed, is necessarily required for prescription. For, with every title lacking, one cannot prudently judge the thing to be his; and therefore without every title, he cannot be a possessor in good faith. C. I. 701, 2115 ff.; C. G. 550, 2228 ff.; C. A. 1461; C. H. 433, 1434, 1940, 1952, 1953, 1954, 1955, 1959.

Now concerning this title it must briefly be said that it is not absolutely required to be true, but generally a title thought to exist, apparent, or presumed suffices. "For if there had been a true purchase, or donation, etc., prescription would not be required; therefore an apparent title is required, such as purchase, for example, from him who was thought by the buyer to be the owner, although he was not the owner. But the reason is that without title there could not have been good faith at the beginning of possession. Yet because the title could have been present at the very beginning, and afterward be lost through forgetfulness, it was therefore established that a presumed title suffices. But to presume title, possession for that ordinary time required for prescription does not suffice; rather possession for 30 or 40 or more years is required, which is customarily called possession of the longest time: and this indeed when the law does not resist, nor from elsewhere is there presumption of bad faith in the possessor. But if the law resists, or there were a presumption of bad faith in the possessor, possession for immemorial time would be required, as is clear from C. I. *de Praescr.* in the Sixth.

But if there were not only presumption, but it were established concerning the bad faith of the possessor, or concerning ignorance of a law not doubtful, which ignorance, even if it were invincible, is equivalent to bad faith in this matter; then even possession for immemorial time would not suffice; because a possessor in bad faith prescribes at no time. But the law is said to resist possession not because it is made in some way to the contrary, but because it positively prohibits such possession." Lugo d. 7. n. 15; L. 505. Cf. here n. 855.

920. What sort of title is required for prescription according to more recent laws? - For ordinary usucapions a special title is required, capable of transferring ownership, for example purchase; colored or apparent, and not only thought to exist or putative, for example if someone thinks, although in good faith, that he bought, because he sent a servant to buy the thing, and he did not buy the thing, but received it on loan for use: for a title translative of ownership is not a title merely thought to exist. Moreover, a just title is required, that is, the title must stand in its legal form. C. I. 701, 2137; C. G. 550, 2265, 2267; C. H. 1940, 1952-1954; C. A. 1461, 1467, for example, if an immovable is donated, but by private instrument, C. I. 1056; C. G. 931. Form; not solemnity, for example if a minor or wife alienates without the decree of a judge, without the consent of the

husband. It needs besides, except in a legacy, transcription, and from the completion of this usucapion begins to proceed from C. I. 2137; C. A. 1467; C. H. 1949. But a title thought to exist or presumed suffices for usucapions of the longest time, or 30 years. C. I. 2135; C. G. 2262; C. A. 1477; C. H. 1955, 1959. L. 27 *de Usurp. et Usucap.*; L. 1 *Pro haer.*; L. 1 *Pro donato*; L. 11 *Pro empt.*; L. 3 *de Usucap. pro haer.* C.; C. L. 518; Troplong, *della Prescrizione* c. 5. n. 893 ff.

921. How much time is required for prescription according to Roman and Canon law? - Movable things, if a special title is present, both among present persons and absent persons, are prescribed by a completed three years. L. un. C. *de Usuc. transf.* And this still holds as before as to the goods of churches. Auth., received by the Church, *Quas actiones de Sacrosanctis ecclesiis*; Extr. *Ambitiosae de Reb. Eccl. non alien.*; Lugo d. 7. n. 69; L. 506, 507, 510. - Immovable things according to the same Law, if a special title is present, are prescribed against a private owner among present persons by ten years, and among absent persons, namely those who are under a different provincial government, by twenty years.

Inst. 1. 2. t. 6; L. 509. Things both movable and immovable, if no special title is present, are first prescribed after the completed time of thirty years. L. 500. But immovable goods of churches, monasteries, hospitals, or those belonging to other pious causes are not prescribed except by a space of 40 years; indeed immovable goods of the Roman Church only by a space of 100 years. C. 4, 6, 8, 9, 13, 14, 17 *de Praescr.* The Lateran Church also has the privilege of hundred-year prescription, and many religious Orders have it. - Nov. 131. Cap. 6; Schmalz. 1. 2. t. 26. n. 100 ff.; Struggl l. c. q. 3. a. 5; L. 510; Anacletus, *Decr.* lib. 2. tit. 26. nn. 151, 171. "Since custom tends not only to abrogate law, but also to take away and diminish rights belonging to the Roman Pontiff alone, besides the other conditions it is necessary that it have persevered without any interruption for a space of at least a hundred years." Benedict XIV, *de Syn.* 1. 9. c. 2. n. 6. - E. M. "Annual revenues are considered among immovables by law." Clem. *Exivi § Proinde de Verbor. signific.*

922. How much time is required for prescription according to more recent Law? From C. A. the right of property is acquired in a movable thing by legitimate possession of three years, 1466. But ownership of movable things is acquired by a possessor in good faith when he proves that he acquired it under public auction, or from a person capable of such commerce, or by onerous title from someone who had it, by whatever title, from the plaintiff, 367. The right of property in an immovable thing is acquired by the passage of three years by him in whose name the thing is inscribed in the public books; otherwise, however, only by the passage of thirty years, even without a special title, 1467-1469, 1477; in which time all rights against a third party are extinguished, 1479, 1480. The time of ordinary prescription is doubled among those absent from the Province; and when someone has acquired a movable thing from a defective possessor, or when he cannot indicate its author, 1475, 1476. Rights of impugning a last will, of exacting a legitimate portion, of revoking a donation, of rescinding contracts, of impugning division, are prescribed by a space of three years, 1487. From C. He. 661, 662, 714, 728, land is prescribed by peaceful possession, and without interruption, of ten years, if it was unduly inscribed in the register, and of thirty years, if it was not inscribed in the register. Movables are acquired by transfer of possession, which endures for five years. From the same C. He. 934, a possessor from whom a movable thing has been taken by theft, or which he has lost, or of which unwillingly he has been deprived for any other reason, can vindicate it for himself from the acquirer within a space of five years. If the thing was acquired under public

auction, or in the market, or from a dealer of such things, it can likewise be vindicated from the first and from every other successive acquirer in good faith, but with the price paid to him being repaid. From C. B. 195 ff., 900, 927, 932 ff., regular prescription is of thirty years; then there is prescription of two years and of four years. - By a space of thirty years from inscription in the land register, ownership of immovables is acquired. Ownership of movables is had by the very delivery from the one acquiring it, in good faith. Nevertheless stolen and found things are excepted, unless the things have been sold by public sale, or there is question of money and bearer instruments. By possession of ten years under title of proprietor and in good faith, ownership of a movable thing is acquired. From C. H., ownership of movable things is prescribed by possession of three years with a special title, otherwise by six years. Possession itself of movable goods, in good faith, is for title. But as to found things and things taken by theft, the owner can vindicate them for himself; with the price repaid, however, if the present possessor acquired them by public sale, 464, 1955. The right of property in an immovable thing is prescribed by possession of ten years among present persons, twenty among absent persons, and with a special title. An absent person is one who is either overseas or in a foreign nation, 1957, 1958. Likewise a real right over an immovable is prescribed by thirty years without any special title, 1959. - By five years is prescribed the action of revoking a donation because of offspring supervening, 646; by four years the action of nullity of contracts, 1391; by a year the action of revoking a donation on account of ingratitude, 652. C. L. 532, 533, 534: for movable things three years are required with just title and good faith; ten years with possession alone, independently of just title and good faith. Stolen and found things are prescribed by six years. For movable things lost, or obtained by some delict, which have come into a third possessor in good faith, prescription is completed by six years. But if someone in the legitimate time reclaims his own thing which another bought in a market, or public place, or from a merchant carrying on the business of such things, he is bound to repay the price paid. Immovables from the same C. L. 526 ff. are prescribed by five years, if mere possession was registered; by ten years, if the title of acquisition was registered. But if in both cases possession has endured for ten years, prescription is had by ten years, without bad faith or defect of title being able to be alleged. If registration is lacking, prescription is completed by possession of fifteen years. But when possession has endured for thirty years, prescription is had, without bad faith or defect of title being able to be brought against it. From C. I. and G. these things are disposed as to acquisitive prescription of ownership. As to immovable goods, as to things and rights, both real and personal, possessed without special title, thirty years are required for prescribing. C. I. 2135; C. G. 2266. But with a special title, as to immovable goods, ten years are required and suffice, if the owner is present, that is, if he dwells in a place subject to the same superior Court of appeal in whose territory the land is; for if the true owner is absent, that is, if he has domicile outside the said place, then the years of absence are doubled, from C. G. 2265, 2266. But immovable goods and also real rights over an immovable, from C. I. 2137, with every distinction between present and absent persons removed, are acquired by usucapion of ten years from the transcription of the title. As to movable goods, with the exceptions made concerning which we shall soon speak, generally no time is prescribed, but possession alone suffices, which produces the same effect as title, from C. G. 2279. But as to individual movable things, and not as to the universality of movables, and likewise as to unnamed bank notes (bearer instruments), from C. I. 707, 1126, 1513 possession is for title, but as to third parties who are in good faith, not also as to those having cause. The aforesaid art. C. G. 2279 is to be understood with the same limitation as to third parties, as is

drawn from its other part and from the following article as to found and stolen things. Therefore a possessor sued could not oppose prescription of a movable thing to the plaintiff from whom he himself obtained it by loan for use, lease, or another precarious title. From both the French and Italian Codes, possession indeed produces the same effect as title by presumption of law, and therefore unless it ought to yield to stronger proof, and not without good faith. Exceptions: As to stolen and found things, he who lost some thing, or from whom it was taken by theft, can vindicate it for himself within a space of three years, which is to be computed from the day of loss or theft, from him with whom he finds the thing, with action preserved to this one against him from whom he received it. If the present possessor of a thing taken by theft or lost bought it at fairs or market, or on the occasion of public bidding, or from a merchant who sells goods of this sort, the original proprietor, that is, the owner, cannot vindicate it for himself unless he pays to the possessor the price by which he acquired it. Thus from C. G. 2279, 2780, with which C. I. 708, 709, 2146 agree; but in this Code two years are established for vindicating one's own thing. L. 590, 592, 610; Troplong, *della Prescrizione* c. 5. n. 1043 ff.; *Monit. Eccles.* vol. 18. p. 76 ff.

But the dispositions of the same Italian and French Codes as to liberative prescription from some servitude, or from some burden, are the following:

1. All personal and real actions are prescribed through thirty years without title. C. I. 2135; C. G. 2262. - 2. After ten years, an architect and contractors of works are freed from the burden of furnishing damage for greater works. C. G. 2270; C. I. 1639. Likewise the action against one who administered guardianship is prescribed. C. I. 309; C. G. 475. Similarly there is prescribed the action *in solidum* of a creditor against his debtors, if for ten years his portion is paid separately and without any reservation by one of the debtors. C. I. 1197. Also prescribed is the right against him who, in ceding a perpetual census, gives surety for the debtor who bought the census. C. I. 1544.

3. Five years suffice for prescribing pensions due from censuses, whether perpetual or life censuses, alimentary pensions, the price of lease of houses, estates, money received on loan, and generally whatever is to be paid periodically each year or after a shorter time. C. I. 2144; C. G. 2277. The same time is also required for prescribing the action of rescinding a division because of lesion in a succession, or of seeking restitution in full. C. I. 309, 1038, 1300; but from C. G. 475, 887, 1304 ten years are required.

4. Two years suffice for prescribing the action of rescinding a sale on account of lesion. C. I. 1531; C. G. 1676.

5. Besides these, there are other prescriptions on account of acts of the family council, on account of things furnished by pharmacists, innkeepers, lodging-house keepers, merchants; on account of stipends of advocates, procurators, apparitors, notaries, physicians, surgeons, teachers, those having boarding houses or houses of education, architects, workers, servants, etc. These, however, do not hold in conscience, since an oath can be required concerning the true extinction of the debt. Therefore prescriptions of this sort in reality are only certain presumptions of law in the external forum, which in the internal forum yield to the truth. C. I. 256, 2138-2143; C. G. 2271-2275. Cf. ib. 2276; Lugo d. 7. n. 56; L. 347, 516. - C. H. 1962-1968; C. L. 535 ff., 560 ff.; C. A. 1432; C. B. 222. As to criminal causes of clerics, "the general

rule is that the action of injuries is prescribed by a space of one year, the crime of embezzlement and delicts of the flesh by a space of five continuous years from the day of the committed delict." And if they are continued delicts, prescription has place from the day of the ceasing delict, and if the delict was totally occult, prescription is had from the day of knowledge of the accuser or investigator. Besides, in crimes of abduction, rape inflicted by force, and adultery joined with incest, prescription is only by the lapse of twenty years. And no prescription is had in crimes of supposititious birth, parricide, assassination, high treason, duel, false coinage, apostasy, heresy, simony, extortion, abortion, and sodomy. S. C. EE. et RR. 21 Mar. 1898. E. M. *de Stat. Part.* 7, 8 at the end.

923. What is interruption of prescription, and when is it had? - Prescription is interrupted when, on account of an impediment interposed, it ceases in such a way that it no longer has force unless legitimate possession is begun anew. Now prescription is interrupted in two ways:

1. Naturally, if the one prescribing loses, by the act of a man, possession for a time greater than a whole year, or if bad faith supervenes. C. I. 2124; C. G. 2243; C. H. 1944; C. L. 552; C. B. 940, 942; C. *Quoniam* 20 *de Praescr.*

2. Civilly, if a lawsuit is juridically moved concerning possession, and the interpellation has not been rejected by the judge, "unless the other," adds St. Alphonsus 511, "does this unjustly to interrupt prescription," C. I. 2125, 2128; C. G. 2244, 2246, 2247; C. H. 1945, 1946, 1947; C. L. 552; C. B. 940; or if he who began to prescribe, prescription not yet completed, recognizes the other's right in any way. C. I. 2129; C. G. 2248; C. H. 1948; C. L. 552; C. A. 1497. Natural interruption interrupts possession for all as to prescription, but a civil act, since it is a thing done among others, benefits only him who exercises it, and therefore does not interrupt possession as to prescription with respect to others. Troplong, *della Prescrizione* c. 3. n. 542. Cf. C. L. 553, Wirceburg. 431.

924. What is suspension of prescription, and when is it had? Prescription is suspended when it, having first been begun, ceases because of some legitimate impediment interposed, so that the time during which the impediment lasts cannot be computed; nevertheless, once the impediment ceases, the prior years, with the intervening time of the impediment omitted, can be joined with the following years, and from all of them prescription be completed. - Now prescription is generally suspended against those unable to act, namely in cases determined by the law itself, C. G. 2251; but specifically: 1. against married women, during marriage, as to dotal goods, C. I. 2120; C. G. 1561, 2255. 2. Against minors and interdicted persons, C. I. 2120; C. G. 2252. 3. Against soldiers in time of war, C. I. 2120.

4. Against a church as long as it lacks a rector, C. 4, 15 *de Praescr.* 5. Against those absent because of civil or military service, and while courts cannot be exercised, in time of plague, war, etc. C. A. 1496. The stated causes of impediment in the first three cases from C. I. 2121 do not have place in usucapion of 30 years as to a third possessor of an immovable, or of a real right over an immovable. C. B. 202 ff., 939; C. H. 1932; C. L. 548 ff. Even when the time of prescription has been completed, the benefit of restitution in full is conceded to the Church, which, as is had in C. *Auditis de In integr. restit.*, enjoys the right of a minor.

925. What is the good faith required for prescription? Good faith, required in this matter, is the firm persuasion by which someone prudently judges that the thing possessed by him is his; and therefore he is ignorant that the thing was acquired not from the owner, or from one not able to alienate, or from fraud or another defect. C. I. 701; C. G. 550; C. H. 1950; C. A. 326.

This good faith is altogether necessary for beginning and continuing acquisitive prescription of ownership. The reason is that whoever notices that he possesses another's goods, by that very fact immediately contracts the obligation of restitution, since another's thing, both by natural law and also by positive law, whether divine or human, can knowingly neither be taken away nor retained. This is also clear from the Fourth Lateran Council and also from the second Rule of Law in the Sixth: "A possessor in bad faith prescribes at no time." Hence the dispositions of Civil Law, insofar as they do not require good faith, or require it only at the beginning of possession, or only in ordinary prescriptions, do not hold for the internal forum, and are to be held as mere denial of recourse, that is, of action against another.

C. I. 702, 2135, 2137; C. G. 2262, 2265, 2269; C. H. 1955, 1959; C. A. 1493; C. 5, 20 *de Praescr.* But good faith is required not only for acquisitive prescription, but also for liberative prescription, because the same reasons and authorities press equally for both. But good faith in this prescription consists in this: 1. That someone not be in delay in fulfilling an obligation, for example of paying a debt; for then he is already in fault, and prescription ceases. For if he himself is the one who ought to fulfill the contracted obligation, even if the creditor omits to warn him, the omission of the contracted obligation is certainly not without fault. 2. That no obstacle be placed by which the other is impeded from the use of his right, if someone is bound to do nothing, but only to tolerate and permit.

The reason is that the one prescribing is then bound by no debt toward him against whom he prescribes; nor is he bound, while the time of prescription is running, to warn the other, so that against himself, for example, he may use the right of servitude. C. I. 1236, 2105; C. G. 1234, 2219; C. A. 472, 482, 1478 ff.; C. L. 535, 536. - L. 504, 513; S. Th. 4. D. 41. q. 1. a. 5, q. 1. 2; Quodl. 12. a. 24, 25; Troplong, *della Prescrizione* c. 5. n. 915 ff.; E. M.

926. Can someone prescribe if from culpable ignorance he thinks the thing is his? R. Negatively, if it is gravely culpable, because no one ought to receive advantage from his own fault. L. 6. § 1 *Pro Emptore.* - R. Affirmatively, if it is lightly culpable; for in Lateran IV only faith with mortal sin is condemned. L. 511.

927. Does good faith theologically taken always suffice for prescription, namely by which someone inculpably does not know that the thing belongs to another? - R. Affirmatively, as to prescription of the longest time, or thirty years. The reason is that the obligation of restitution, while good faith stands, if nothing else obstructs, cannot then arise from natural law, as is clear in itself, for someone inculpably thinks the thing is his. Nor can it arise from positive law; since that law expressly has that in this case the defect of good faith cannot be opposed, nor does it require a colored and determined title, but is content with some presumed and indeterminate title. C. I. 2135; C. G. 2262; C. H. 1959; C. A. 1477, 1493. From C. H. 1955, this holds also as to movable things in prescription of six years.

R. Negatively, probably, as to prescription of long time, or twenty or ten years, and of a shorter time, when good faith theologically taken is founded on ignorance of clear and certain law; but otherwise if

it is founded only on ignorance of fact. This ignorance of law is given when someone knows, for example, that Antonia is married, and that the land constitutes her dowry, but nevertheless does not know that the husband cannot validly alienate her dowry; it would be ignorance of fact if someone knew that dotal goods cannot be alienated, but nevertheless did not know that Antonia is married, and that the good is dotal. The reason for the response is that the law of prescription is from positive law. Therefore prescription cannot have place when the conditions required by that law are lacking. Italian Law 701, 2137; French 550, 2265, 2267; Spanish 1957; Austrian 1467 require good faith and just title for immovables: moreover, nullity of title from defect of form cannot, by the same law, found prescription of long time, or twenty or ten years. "In usucapions, an error of law never benefits the possessor." L. 31 *de Usurp. et Usucap.* But in fact even the most prudent are deceived. L. 2. § 15, 16 *Pro Emptore.* C. H. 1952, 1953; C. A. 1461; Troplong, *della Prescrizione* c. 5. n. 923 ff.; Struggl l. c. VI. - But others, both as to the dispositions of Roman Law and as to the dispositions of more recent Law, also probably affirm that prescription can occur with invincible ignorance, whether it is of law or of fact.

The reason is that the laws say one does not prescribe with ignorance of law, or they require a just legal title, namely according to the laws, only insofar as that ignorance of law is difficultly admitted, and with that defect of juridically just title good faith is not presumed. Therefore in the forum of conscience, in which the truth and good faith would be established, prescription should not be denied. And also a just title in the case would not be lacking; for there would be a just title thought to exist. And Cardinal de Lugo says this opinion is positively probable, d. 7. nn. 29, 32; Struggl l. c. a. 3. 11. - C. I. 701-703; C. G. 549, 550; C. A. 326, 1460; C. H. 433, 434, 442, 1952, 1953; L. 511.

928. Does the good faith of the author benefit the successor for completing prescription? - The good faith of the author beginning possession benefits a successor in good faith for continuing possession and completing legitimate prescription through accession of both times. Therefore the possessor is bound to nothing further if he knows that the thing belongs to another after the time of prescription, begun by the predecessor and completed by himself, has been fulfilled, by whatever title, whether universal or particular, onerous or gratuitous, he has succeeded him. Thus from Roman Law, Inst. 1. 2. t. 6. §§ 12, 13, and from Italian Law 653; French 2235; Austrian 1943; Spanish 1960; cf. ib. 442; German 221, 943, 944.

929. Does an heir prescribe who doubts about the good faith of predecessors? R. Affirmatively, because bad faith per se and ordinarily ought not be presumed, since no one is presumed bad unless it is proved. Thus commonly. - And thus also if someone at the beginning and end possessed a thing as proprietor, he is presumed to have done so also for the intervening time. - L. 511; C. I. 687, 702; C. G. 2230; C. H. 434; C. A. 328; C. B. 930, 1006.

930. Does the bad faith of a predecessor impede a successor from prescription? - R. Negatively, if he succeeds by particular title, because he neither is, nor by fiction of law is considered to be, one person with the predecessor. The same must be said of things acquired by purchase or another contract. L. 516. R. Affirmatively, if an heir succeeds from universal title as to ordinary prescription of 10 or 20 years; the reason is that "a universal successor, that is, an heir, so represents the person of the deceased that he succeeds into all his obligations and burdens.

Therefore, since the predecessor on account of bad faith and unjust taking and retention of the thing contracted the obligation of restoring and of impeding prescription of that thing, and of repairing all

damages, the heir succeeds in this very obligation, and therefore he cannot cooperate with prescription which he himself is bound to impede, for which he ought to restore."

Lugo l. c. n. 60; L. 512; C. I. 693; C. G. 2237; C. A. 1462; C. B. 858. It is otherwise from C. H. 442, if the successor was in good faith. If the heir succeeds from universal title, but there is question of extraordinary prescription of 30 years, Lugo affirms on account of the same reason, because the heir always represents the deceased with all his defects; therefore just as the deceased with his bad faith could never prescribe, so the heir, who represents him as he died with that bad faith, can never prescribe.

Lugo l. c. Indeed the same Lugo extends this also to mediate heirs, n. 61, which nevertheless many others deny. Struggl l. c. IX. But from French Law, and the same is true as to Italian and Spanish Law, Fr. Gury and others hold as more probable that the bad faith of the predecessor does not harm the universal successor as to this prescription of 30 years, if the heir enters upon the inheritance in good faith and then possesses for 30 years, because French Law 2262, as also Italian 2135 and Spanish 1959, 1963, with no distinction made, says that all obligations, both real and personal, can be prescribed through 30 years; nor does it admit any exception on the part of title or good faith. The same is also had from C. A. 1463, 1477, 1479, 1493, unless the bad faith of the possessor himself is proved. Cf. also C. H. 442, from which it seems it must be said that a universal heir can prescribe in the aforesaid case even by ordinary prescription. And the same author likewise denies, as to a mediate heir, that the bad faith of the predecessor harms him, because he is not considered by any fiction of law to constitute one person with the mediate predecessor. And indeed a mediate heir is not the heir of the first deceased, or of the author in bad faith, but only is the heir of the prior heir, who did not have bad faith. L. 512, 516; C. B. 858, 900.

IV. On the Modes of Acquiring Ownership by Private Will

931. What are a contract and a pact? - A contract is: an agreement by which one or more oblige themselves to one or more to give or to do something. Agreement, namely by determination and consent in the same thing. To give or to do, and therefore also not to give, not to do. Hence ownership is acquired by private will through various contracts. C. I. 1998; C. G. 1101; C. H. 1254; C. A. 861; L. 707; Lugo d. 22. s. 1. A pact, taken broadly, as it is commonly accepted, is the same as a contract. Taken strictly, it is distinguished from a contract. For a pact is the consent of two or more in the same determination; but a contract is a reciprocal or mutual pact, which on both sides of those making the pact gives birth to an obligation. L. 1, 7 *de Pactis* D.

932. Of how many kinds is contract? - A contract is manifold: 1. Unilateral, or giving birth to an obligation in only one contracting party; and bilateral or synallagmatic, giving birth to an obligation in both contracting parties. C. I. 1099, 1100; C. G. 1102, 1103; C. A. 864. A unilateral contract commonly comes under the name of act; and thus it is called an act of donation, act of succession, etc.

2. A contract is gratuitous if it yields to the utility of only one party; it is onerous if the utility of both parties is intended. A gratuitous contract can be unilateral, as donation, or bilateral, as loan for use. An onerous contract is always bilateral. C. I. 1101; C. G. 1105, 1106. - Those things which are acquired from a gratuitous act are said to be acquired from a lucrative cause,

for example by donation, legacy, inheritance; but those which are acquired from an onerous act are said to be acquired from an onerous cause, for example by purchase.

3. An onerous contract is either commutative, when each contracting party is obligated to give or do an equivalent; or aleatory, when an equivalent of this kind depends on an uncertain event of gain or loss for each party. Therefore in the former there is contracting about some thing; in the latter there is contracting about the probable hope of acquiring a thing. C. I. 1102; C. G. 1104, 1964.

4. A contract, whether onerous or gratuitous, is either solemn, which is perfected by the formalities prescribed by law, as the contract of marriage before the pastor and witnesses, or a donation performed by a public act; or simple, which is subjected to no peculiar form of law, as sale, lease, mandate, perfected by the private consent of the contracting parties.

5. It is likewise either clothed, which besides the agreement of the parties has some other support, by reason of which an action arises in the external court, for example if delivery of the thing has been made, if a writing of the contract has been made; or naked, which besides the pure pact has nothing else, whence from it regularly no action is granted in the external forum. L. 708; Lugo d. 22. nn. 12-14.

6. It is besides either named, which has its own proper name, as sale, or unnamed, which lacks its own proper name. All unnamed contracts are reduced to one of these four: I give that you may give; I do that you may do; I give that you may do; I do that you may give. Therefore an unnamed contract is real, not merely consensual. Cf. 942. L. 707; Lugo d. 22. s. 2; C. A. 921. From C. I. 1103 and C. G. 1107, all contracts, whether named or unnamed, are subjected to the general rules of contracts.

7. Finally, a contract is either explicit or formal, "which is made with the formal and express agreement and obligation of the parties, as purchase, sale," or implicit or virtual, "which is made only with virtual and tacit agreement and obligation; as, for example, when someone undertakes guardianship or another office, he tacitly obliges himself to furnish those things which by law or custom are annexed to such office. Hence such an undertaking is called a quasi-contract." Struggl 2; C. I. 1140; C. G. 1371. - Cf. here 933, 942.

933. Note: In Roman Law contracts were divided into contracts of good faith and contracts of strict right. A contract of strict right is one in which that alone is to be considered concerning which express agreement has been made. A contract of good faith is one which is taken not according to the rigor of words, but according to a benign interpretation. Gratuitous contracts are recalled to the former, which received a strict interpretation according to the letter; onerous contracts to the latter, which received interpretation from what is good and equitable. From C. I. 1124, 1131, 1134; C. G. 1135, 1156, 1159, all contracts are of good faith, and must be executed with due equity.

In Roman Law there were contracts which, although for their perfection they did not need things or delivery, nevertheless by disposition of Law needed words; that is, beyond consent explained in whatever way, they needed a certain formula of words, without which there was no such contract as was signified in Law by such a name. This especially proceeded in stipulation, which had to be made in the formulated words of Law, one asking: do you promise that you will give or do this? and the

other responding: I promise. Inst. 1. 3. t. 16 *de Verbor. oblig.* in princ.; L. 5 § *Stipulatio* ff. e. t. But he who asked was customarily called the promissor. By more recent Law this obligation of words has been altogether removed, and by Roman Law itself that "superstitious formula of Law received moderation." Lugo d. 22. nn. 20-22. At present stipulation is a common name for all pacts or contracts.

Therefore to stipulate today is almost the same as to make a pact, and he is said to stipulate toward whom another contracts an obligation. Regularly no one can stipulate in his own name except for himself, but he can also stipulate for another in his own name, namely for the advantage of another, for example: I give you 100,000 lire on this condition, however, that you give Caius one thousand lire annually during his life. C. I. 1128, 1134, 1137; C. G. 1119 ff., 1165, 1973; C. B. 328 ff.

934. What about the transfer of ownership through contracts? - To acquire ownership of another's thing, there is need of a title transferring ownership, such as inheritance, legacy, donation, purchase and sale, and other similar contracts.

But from positive law there is sometimes need of public instruments which have a determinate form from positive law itself, as in donation of immovable things and in dotal pacts. C. I. 1056, 1382; C. G. 931, 1394. Sometimes, however, private instruments suffice, as in alienations of immovable things, or of rights cohering with these. C. I. 1314. And these instruments do not hold unless furnished with the signatures of the parties. C. 1316, 1321; C. G. 1318, 1323; C. H. 1226, 1228, 1229. Nor indeed are these same instruments required for the validity of the act itself, but only for proof, unless otherwise at times has been provided by the law itself, or it has been agreed among the parties that the act not be valid as long as it has not been consigned and signed in writing. L. 708. Cf. C. I. 1. 3. t. 4. c. 5. rubr.; C. H. 1278-1280; C. A. 883-887. Likewise, per se, delivery is not needed for the transfer of ownership, but the consent alone of the owner transferring to another and the latter's acceptance suffice. Thus from C. I. 1225, 1448, 1538; C. G. 1138, 1583, 1689. But it is needed from Common Law, L. 20. C. *de Pact.*; C. A. 425; C. H. 609, 1095. Nevertheless, in order that alienation of movable things be valid as to third parties wishing to vindicate the thing for themselves, delivery is needed. C. I. 707, 1539; C. G. 1689, 2279. But in order that alienation of immovable things be valid as to third parties, in the cases determined by laws transcription is needed. C. I. 1932, 1933; C. G. 939, 941; cf. C. A. 440, 444. And in private instruments, as to third parties, a date legitimately inscribed in the public register is needed. C. I. 1327; C. G. 1328. Hence if the same thing has been sold or leased to several persons, he prevails who first transcribed or registered. Therefore he who sells to another a thing sold to one, and who first inscribes or registers it, is liable for damage, because he injures the acquired right of the first buyer. And the other buyer, who knowingly and prudently buys and transcribes, likewise injuring the acquired right of another, is liable for damage. From C. He. 656, 657, 714, for acquiring ownership of lands inscription in the land register is required. A contract transferring ownership requires for validity a public act. Dispositions *mortis causa* and matrimonial agreements must be made in the forms prescribed from succession and matrimonial law. For the transmission of movable property, transfer of possession to the acquirer is necessary. From C. B. 313, 873, 925, 929, for transfer of ownership of immovables there is need of inscription in the land register; for transfer of ownership of movables delivery is required.

935. Note: Delivery is "the transfer of a thing, right, or possession from person to person." Through delivery ownership of a thing can be acquired; this nevertheless is not to be understood as if delivery

alone without any other prior disposition of the owner transferred ownership, but "if sale or another just cause has preceded." L. *Numquam* 31. ff. *de Acquirendo rerum dominio*. - Now delivery for the transfer of ownership is indeed not necessary by natural law; but if it is necessary, this is because it is required by positive human law, namely so that contracts may thus be completed and uncertainty of ownership avoided.

But physical delivery of the thing is not necessarily required; moral delivery suffices, and it can be done in diverse ways, just like possession. Cf. C. I. 1463-1466; C. G. 1604-1607. In Roman Law delivery is ordinarily necessary for acquiring ownership of things. Ordinarily; for 1. delivery is not required precisely for a right to a thing, as is clear in mortgage and other naked contracts; indeed, of things which belong to no one, even a right in the thing, or ownership, is acquired without delivery, or by mere apprehension and occupation. 2. There are certain cases excepted by law, in which ownership is transferred before delivery. Such cases from the same Roman Law are chiefly six: 1. In ecclesiastical benefices, C. *Si tibi absenti de Praeb.* in the Sixth. 2.

In inheritance, L. 23 Dig. *de Acquir. vel amitt. possessione*. 3. In legacy as to a thing determined individually, L. 64 Dig. *de Furtis*; L. 86 Dig. *de Legatis et fideicommissis*. 4. In those things which are sold, donated, or left to Churches, Monasteries, Hospitals, or for the Redemption of captives, L. ult. C. *de Sacrosanctis Ecclesiis*. 5. In a donation made from a pact that the donee give food to the donor; for, if these are denied, ownership returns by the fact itself to the donor. L. 1. C. *de Trad. quae sub modo*. 6. In those things which by delict are by the fact itself adjudged to the treasury. - Inst. 1. 2. t. 1. §§ 40, 44.

936. Is a contract valid as to the forum of conscience if it is destitute of the solemnities prescribed by positive civil law? Solemnities are certain forms of making a contract from the prescription of law, for example that it be made before so many witnesses, in writing, etc. Some are accidental, which pertain only to a certain greater completion, for example that a testament be made on sealed paper, and therefore, if omitted, they do not invalidate the act; others are substantial, which are considered to pertain to the substance, namely when they have an invalidating clause joined to them, as, for example, that a holographic testament be signed by one's own hand. The question is raised about these. There is question about civil law. For as to canon law, the prescribed solemnities of law are altogether to be observed; among these, in alienations, the Apostolic Beneplacit holds the chief place, without which alienations of things of the Church are null. But cf. V. 2. n. 1209. The same is to be said about the form formerly established by Trent, sess. 24. C. I. *de R. M.*, and now by the Decree *Ne temere*, as to the validity of marriage. Cf. V. 2. n. 1206. But there is question about the contracts themselves, or about the obligations and rights arising from them. There is not question about the acts of contracts, or about the instruments by which contracts are consigned; for acts of this kind rather regard the external forum. Now acts must be done, in order to be valid, according to the forms prescribed by law. If done otherwise they are invalid; nevertheless they can hold as private writings, if they are furnished with the signatures of all the contracting parties. C. I. 1310, 1311, 1316; C. G. 1318, 1339. "A threefold probable opinion is given. The first denies; because laws invalidating such contracts are founded on a presumption not only of deceit, but also of danger; and therefore human law can altogether take away the natural obligation of a contract entered upon... The second affirms... because in those contracts human law, although it denies a civil action, nevertheless does not take away the natural obligation, for which consent alone indeed suffices. The third teaches that in these contracts the possessor is to be preferred until by sentence of a judge he is condemned to restore...

This opinion I think not only more probable, but altogether to be held in practice, because... since possession grants a certain right, the possessor cannot be despoiled of the thing unless the right of another is established." L. 711, 927-929.

The first opinion in itself seems more conformable to reason. For not only as to Roman Law, but also as to more recent Laws, what Lugo observes holds, d. 22. n. 252: "The words of the law seem to sound this, nor does Trent, sess. 24. C. I., use almost other words when it invalidates clandestine marriages; nor can words more apt to signify this be used than to declare antecedently the contract null and invalid... If only invalidation of the contract in the external forum were posited, the law would be considered of little utility, since it would serve only to foster the iniquity of him who, conscious of the value and obligation of the contract, would still attempt to despoil a just possessor, taking away because of defect of solemnity what in the forum of conscience could not be taken away from him. And indeed it would be hard to compel judges to favor this unjust petition, when it is established for them that the contract before God held, and that the adversary cannot without sin ask what he asks."

The second opinion seems more conformable to the context of more recent laws. For C. I. 1104; C. G. 1108; C. B. 305, 313; C. H. 1258, 1261, 1278, 1279, 1300; C. L. 643 did not enumerate the forms of contracts among the conditions essential for the validity of a contract. Therefore by these forms they seem to intend only this, namely to determine the instruments or means by which the will of the contracting party can be established before judges. Gousset in the cited article and in art. 1101. Indeed public instruments do not seem to be required explicitly for the validity of the act, but only for proof. C. I. 1. 3. t. 4. c. 5. s. I. rub., 1313, 1314, 1932. 8; C. G. 1315 ff., 1335, 1338; C. H. 1278-1280. From C. A. 883, except for cases determined by law, contracts can be made in whatever form, without diversity of obligation arising from this. From C. H. 1258, contracts are perfected by consent alone.

The third opinion in reality is not distinguished from the first and second, but, admitting both, draws the corollary of both. For the possessor can be both he whom a testament favors, although destitute of legal forms, and he whom the defect of legal forms favors. Then in reality this third opinion would be distinct from the first and second if it were said that the aforesaid laws do not render the act invalid by the law itself, but liable to invalidation by the sentence of a judge, which someone will be able to invoke at his own discretion; and then, as the same St. Alphonsus says, l. c., "without doubt the possessor is bound to stand by the sentence of the judge, if he is condemned to restore." Thus many interpret more recent invalidating civil laws. And it cannot be denied that many such laws in truth do not render an act null in fact, but only rescindable and to be invalidated by the sentence of a judge.

937. Is someone bound to restitution if, following a probable opinion, he prevents the other party from approaching the judge, who would condemn him and oblige him to restitution? R. "Affirmatively, if he impedes by force or fraud; otherwise, if in another way." L. 888. The first reason is that he injures the right of another; the second, however, that then he legitimately pursues his own right.

938. What are the essential conditions of contracts? - There are four essential conditions for validly contracting: consent of the party who is obligated; capacity for contracting; a certain object which is the matter of the contract; a licit cause of obligation. C. I. 1104; C. G. 1108; C. H. 1261.

939. What is consent of the contracting party, and what sort must it be? R. To the first: Consent here is not a simple counsel or purpose of the mind, but a promise of a thing to be given or done, and on each side it must concern the same contract and the same thing. There must be a promise on one side, acceptance on the other, in a unilateral contract; and besides a repromise, in a bilateral contract. When the contract is of itself bilateral, the repromise is tacitly present in the very acceptance, as in sale and purchase. But, if the contract is not of itself bilateral, repromise is not included in the acceptance, as, for example, in betrothals; for someone can accept a promise without repromising. Indeed even in the bilateral contract itself there is not always repromise, and the contract is perfected by its very execution, for example if you write to a merchant that for such a determined price he should send you ten candles, and he immediately sends them.

R. To the second: Consent must be: 1. Internal, for the obligation of contract arises from the will alone of the contracting party. 2. Free and fully deliberate; otherwise the will would be imperfect, and could not give birth to a perfect obligation. 3. External, for it must be manifested to the other party; otherwise one cannot oblige himself to another. But the offer must be manifested to the other accepting party by the same offerer, or by another, but in his name or by his mandate. It need not, however, necessarily be express; tacit consent suffices; and contracts are everywhere made tacitly. 4. Mutual, for in order that someone oblige himself to another by his own will, it is required that this other accept that will. 5. Nor indeed is it necessary that the consent of each party be elicited at the same time. For the consent of one, once given and not revoked, morally perseveres; hence, when the consent of the other accedes, the contract is immediately perfected. - C. I. 1108; C. H. 1262, 1265; C. A. 862, 863, 869; C. B. 116, 117, 130, 147-149, 153; C. L. 647 ff.

940. You will resolve: He who fictitiously consents to a contract does not contract, and therefore no ownership is transferred. But the deceiver is bound in conscience to make the deceived party indemnified, if the other suffers damage from this, or has already furnished his own part, where the contract is onerous; and therefore, if no other means is present, he must provide internal consent and stand by the contract. L. 709, 711; C. A. 877; C. B. 122. But he will be able to supply consent as long as the other has not retracted his own, although this one is ignorant of the defect of consent of the other party. H. A. 93.

Interpretative consent does not suffice for contracting, because it is consent which is not yet present, and therefore cannot give birth to the obligation of contract. In gratuitous contracts, by natural law it is not required that acceptance become known to the one promising. For, when a thing is offered to another, by this other's acceptance it immediately becomes his as though a thing belonging to no one. - When there is question of onerous contracts, the contract is regularly not perfected until the acceptance of each party also becomes known to each party; and therefore someone can withdraw before this.

The reason is that, just as my will of obliging myself to you, not yet manifested to you, does not oblige me to you, so your will of obliging yourself to me, not yet manifested to me, does not oblige you to me, and consequently neither you nor me. Nor indeed is it presumed that I wish to be obligated to you before it becomes known to me that you wish to be obligated to me. Regularly, namely unless someone truly wills himself to be obligated, and the contract to be perfected before the acceptance of the other party has been manifested; for example, if someone asks from you by

letter for money on loan, with such interest to be paid, and you immediately send it to him, the contract of loan will be perfected, and he will be able immediately to dispose of the accepted money.

For the very offer of paying interest is a certain hypothetical acceptance of the consent of the other contracting party; by which consent that acceptance becomes absolute. Lugo d. 22. nn. 26, 27, 33, 34; d. 23. n. 70 ff. From C. B. 145, 151, 153, the offerer of a contract is obligated by his very offer. But the contract is perfected by acceptance of the offer, without this acceptance first having to be declared to the offerer, and although meanwhile the offerer has died. - C. H. 1262: acceptance by letter does not oblige the offerer except after it has come to his knowledge. C. L. 653: the proposer is obligated to keep the promise.

941. Does a contract entered upon with the intention of contracting, but without the intention of obliging oneself, or of fulfilling it, hold? - R. To the first: "The first opinion affirms with Lessius, Soto, Dic., Pont., etc. among the Salmanticenses... But the second and more probable opinion denies... The reason is that a condition added contrary to the substance of the contract invalidates the contract." L. 710. For what is it to contract, unless to oblige oneself to another? R. To the second: Affirmatively. The reason is that the will of obliging oneself and the will of not fulfilling the contract can stand together. L. 1. 6. nn. 832, 833.

942. Is every contract intrinsically perfected by mutual consent alone, externally manifested and accepted, without delivery of the thing? - Some contracts are those which, speaking per se, are perfected by mutual consent alone, manifested outwardly either by words, or writings, or another sign, and therefore are called consensual. The reason is that they import nothing else than the mutual agreement of the parties, such as lease, sale, mandate. But some contracts are those which, speaking per se, are perfected only by delivery of the thing, and are therefore called real.

The reason is that, besides that mutual agreement of the parties, they import the very delivery of the thing, such as loan for consumption, loan for use, deposit. C. I. 1837; C. G. 1919. To this second class of contracts, which are perfected by the thing itself, belong all unnamed contracts, which are not completed unless delivery of the thing follows on the part of one. And indeed without delivery there is not a loan for consumption, but rather a promise of a loan for consumption, etc. Speaking per se; for "in the forum of conscience one must stand by the intention of those contracting." L. 708; Lugo d. 22. s. 3.

From C. G. 1138, "The obligation of delivering the thing is perfected by the consent alone of the contracting parties. It makes the creditor proprietor, and constitutes the thing at his risk from the very instant when the thing ought to have been delivered." Thus also from C. I. 1125. - From C. H. 1095, 1258, contracts are perfected by mere consent, and immediately oblige to execution. As soon as the obligation of delivering the thing arises, the creditor has a right to the fruits of the thing. But a right in the thing is not acquired except by delivery of the thing. - Inst. 1. 3. tt. 14, 15, 16, 22, 23.

943. Do error and fraud invalidate a contract? A twofold fraud is distinguished: good fraud and bad fraud. Good fraud is nothing other than a certain skillfulness in acting, and in this sense Ulpian said that it is lawful for contracting parties in the price of purchase and sale naturally to circumvent one another, namely within the limits of the just price. Bad fraud, of which there is question at present, is: shrewdness, fallacy, contrivance, employed for circumventing, misleading, deceiving another. Shrewdness is found in keeping silent, fallacy in lying, contrivance in doing. C. H. 1269; C. L. 663. "A

contract is null if fraud or error concerns the substance of the contract, because actual consent is lacking."

L. 714; C. I. 1108, 1110; C. H. 1266; C. L. 659, 660; C. A. 871; C. G. 1110; C. B. 119. If error or fraud concerns the quality of the thing, and has not given cause to the contract, the contract is valid; for consent is not lacking concerning the object itself of the agreement. C. I. 1110; C. H. 1270. If error or fraud concerns the quality of the thing, but has given cause to the contract, it is disputed. The first opinion affirms. "The reason is that although quality in physical being is something accidental, nevertheless in moral being it has the character of substance. Yet the opposite is commonly handed down by doctors and is more probable...

The reason is that this contract is not invalid either by positive law (whether Roman, or Italian 1110, 1115, 1300, or French 1116, 1117, or Spanish 1266, and Austrian 872), or by natural law... for to validate a contract a voluntary intention as to the substance suffices, although it is involuntary as to the accidents; unless... the contracting party expressly consents under the condition, if such a circumstance is present, because then the quality passes into the substance. But doctors commonly teach that such a contract can always be invalidated by the deceived person, by reason of the injury and defect of consent, and that the deceiver is bound to damages arising from the deception." And although the error was invincible, nevertheless someone can still invalidate the contract in conscience and not fulfill it, if the matter is of great moment, to which he is deservedly not considered to have wished to consent, at least altogether absolutely.

L. 714, 715; l. 6. n. 835; C. A. 874; C. I. 1108, 1115; C. B. 123, 853; C. H. 1270, 1101, 1102, 1107, 1726. - But "if fraud is employed by some third party, without any fault of the other contracting party, the contract is certainly valid; but some with Lessius, Sanchez, Bonacina wish it still to be rescindable; others say that it cannot be rescinded, but that an action is given to the deceived person against the deceiver for obtaining reparation of damages." Gur. 777; C. A. 875; C. B. 123. Error or fraud concerning the motive cause of the contract invalidates the contract, for then consent is lacking concerning the very substance of the contract. C. I. 1109; C. H. 1266.

Hence "it is not surprising if a fiction of poverty impedes the transfer of ownership, since the motive for giving alms to this poor person is his poverty, which that man wickedly and deceitfully feigns in order to extort alms." Lugo, *Resp. Mor.* d. 17. n. 1. But restitution in that case can probably be made either to the owner himself, or to other poor persons from the presumed will of the owner. L. 622. Error or fraud concerning the merely impulsive cause of the contract, for example if you lavish alms on a poor man because you consider him very upright, though he is less upright, does not invalidate the contract, since consent in the substance of the thing is not lacking; nevertheless someone can in conscience rescind the contract if the matter is of great moment, to which he is deservedly not considered to have wished to consent, at least altogether absolutely, as was said about a quality giving cause to the contract.

And this has place especially in gratuitous contracts, which require a full voluntary act and spontaneity. L. 737; C. I. 1109, 1110; C. H. 1266. Error or fraud concerning the person of the contract, speaking per se, does not invalidate the contract in onerous contracts; for the person is altogether extrinsic and indifferent in such contracts. Except, however, marriage, in which the contracting person is at the same time the object of the contract itself.

But it invalidates the contract in gratuitous contracts, speaking per se; for in these, on the contrary, the person of the donee is customarily specially intended by the donor. It is said speaking per se, for the circumstances of the matter must be considered, from which the will of the contracting party may be better known. C. I. 1110; C. G. 1110; C. H. 1266; C. A. 873. Lessius 1. 2. c. 17. D. 5; Rogron and Gousset in a. 1110; Molina tr. 2. d. 352. nn. 7, 8. From C. He., title on Dispositions *mortis causa*, art. 462, dispositions made under the influence of error, bad fraud, violence, threats are null. Nevertheless they become valid if the disposer has not revoked them within a year from the moment at which he knew the error or fraud, or at which the effects of violence and threats ceased.

944. Does grave fear invalidate a contract, or at least render it rescindable? - R. Negatively, if there is question of fear from within, or from a necessary or natural cause; or of fear indeed from without, but justly induced. The reason is that fear does not simply take away voluntariness, unless it is so grave that it disturbs reason. Nor indeed does such fear inflict any injury on the contracting party.

If there is question of grave fear from without, and unjustly induced, and not for extorting consent, it is disputed, but a distinction seems to have to be made. "For if it was induced by the other contracting party... the contract is voidable, because he who unjustly induces fear is bound to remove all disadvantages which arise from the injury, among which is the obligation arising from such a contract. Thus more probably Lugo.

But if fear is induced by an irrelevant third party, and the contract is used as a means for declining the imminent evil, then an onerous contract holds irrevocably... for neither of the contracting parties inflicted injury; but the third party inflicting fear cannot take away the obligation by consenting to rescission of the contract, because the contract was not made with him; although he is bound to induce rescission, so that he may avert injury from the innocent person, if this one wishes... And who would say that a contract can be rescinded if, from fear of your enemy plotting against you, you bought a sword to defend yourself?... Lugo excepts 1. the contract of marriage, which he thinks to be invalid if entered upon from such fear. He excepts 2. probably with Palau, gratuitous contracts, because thus better provision is made for the innocent person, and the other cannot complain, because he is deprived only of gain, remaining in the state in which he was before; and just as he would not wish to be obligated in such a state, so neither ought he wish to oblige the other." Reuter 127. S. Th. Quodl. 5. a. 17. Cf. V. 2. n. 1022. If there is question of grave fear from without, unjustly induced for extorting consent by someone other than the fellow contracting party, it is again disputed. The first probable opinion teaches that the contract "cannot be rescinded by natural law, because since neither party has inflicted injury, there is no reason from the nature of the thing why it could be rescinded at the will of one rather than preserved at the will of the other." Reuter 126. C. A. 875 favors this opinion. The second probable opinion holds the opposite, "because by reason of the injury, even if inflicted by a third party, the thing remains obligated to the prior owner, and consequently passes to anyone with that burden; but it is not fitting that someone through another's injury should lose every right in his own thing. Billuart, etc." Gur. 782.

Both Roman Law, Reuter l. c., and Italian Law 1111, French Law 1111, and Spanish Law 1268 are consonant with this latter opinion. Cod. Lusit. 666: the contract is null. If fear from without is unjustly induced for extorting consent by the other of the contracting parties, whether the contract thus entered upon is invalid by the fact itself is disputed. There is a threefold probable opinion. The first affirms. The reason is that if a contract of this kind were naturally valid, justice would arise from

injustice, since from a contract extorted by injury there would arise an obligation, which is an act of justice. The second holds that gratuitous contracts are invalid, but not onerous ones. The reason is that for gratuitous contracts, unlike other contracts, an altogether free will is required; for it is a beneficence. But the third, more probable and very common opinion teaches that such a contract is indeed rescindable, but not invalid, neither by natural nor by positive law. Not by natural law, because fear does not simply take away voluntariness. Not by positive law, whether Roman, by which judges are commanded to rescind such contracts, therefore per se the law has them as valid; or French, as is openly had in art. 1117; or Italian 1111, 1113; or Spanish 1267, 1268; or Austrian 870, 874, 875; or German 123; L. 715, 716. - Cod. Lusit. 666: the contract is null.

945. Note: From Canon Law, contracts elicited from grave fear are invalid where there is question: 1. of marriage, and probably also of betrothals; 2. of handing over things of the Church and of renunciation of a benefice; 3. of religious profession, and of any other vows whatsoever; 4. of election of a Prelate; 5. of absolution from censures, and probably also of ecclesiastical jurisdiction. L. 715, 716.

946. You will resolve: "If, after someone has been caught in theft or homicide, you threaten that you will denounce him to the judge unless he gives or promises you a certain gift, the promise holds, nor are you bound to return what was received... This is true even if you did not have the intention of denouncing him, but only of frightening him; because you would at least yield your right of doing this, which is estimable by price... For he gave it so that you would resign your right of accusing; this you truly do, even if you had not intended to accuse." Reuter 120. And St. Alphonsus 894 says this more probably.

947. Whether a contract entered upon from slight fear is rescindable at the discretion of the one who suffered the fear? - "The first opinion affirms in the internal forum; for in the external forum an action is not given. The reason is that any fear whatsoever inflicts injury, from which the one inducing it ought not to receive advantage... Thus probably Lessius, etc. Yet they rightly except marriage according to our opinion, l. 6. n. 1056, and religious profession. Whether also a vow, see *de Voto*, 197. But the second opinion, which seems more probable to me, which Pont., Tamb., Viva, etc., hold, says that a contract entered upon from slight fear can be rescinded neither in the external nor in the internal forum. The reason is that he is not presumed to have consented from fear, but truly spontaneously, who knew it to be slight and, when he could easily have done so, did not reject it. Nevertheless the Salmanticenses judge that betrothals are altogether to be excepted, which, even when contracted through slight fear, can be rescinded by sentence of a judge, from the greatest liberty which betrothals require." L. 718. Gury-Ballerini 780 likewise judges that gratuitous contracts are to be excepted. C. I. 1114; C. G. 1112, 1114; C. H. 1267 favor this opinion.

948. Note: What has been said about grave and slight fear, understand also about reverential fear, insofar as this is grave or slight. L. 717; C. I. 1114; C. G. 1114; C. H. 1267.

949. Whether, if there has intervened grave unjust fear giving cause to the contract, and the thing has come to a third possessor in good faith, the one who suffered the fear can revoke the thing from him, and whether he is bound to restore? - Laymann denies it. But the Salmanticenses, Lugo, etc., more commonly and rightly affirm it; because the thing always passes with its own defect, even if the fear was not induced by that third party. "In this action it is not asked whether he who is sued, or

another, caused the fear; for it suffices to say this: that fear was brought to bear." L. 14. § 3. *Quod metus causa gestum erit*. L. 719.

950. Note: Restitution in full is given to those harmed, by civil law, unless, namely, someone has approved the matter as duly and rightly done. C. I. 1309; C. G. 1311, 1338. It is given only in the cases expressed in law, C. G. 1118, even if there is question of minors, C. I. 1308; C. G. 1313, that is, in divisions, sales, and exchanges from C. I. 1038, 1529, 1554; in divisions and sales, but not in exchanges, from C. G. 887, 1674, 1706; in all contracts except aleatory contracts and compromises from C. A. 934, 1060, 1268, 1386; only in contracts celebrated by tutors or by representatives of absentees from C. H. 1291, 1293. Restitution in full, that is, replacement into the former state, and therefore each one is restored in his prior right. Therefore the harmed person recovers his thing, and the one harming, if he acted in good faith, ought to lose nothing of his own.

It must be sought from the judge; it has place even if injury was absent; and from C. I. 1300, the action of nullity or rescission is prescribed by five years; from C. G. 1304, by ten years; from C. H. 1299, by four years. Prescription of this sort holds also in the forum of conscience, because restitution belongs only by civil law. Action; for the exception of nullity or rescission is perpetual in favor of him who is compelled to execute the contract. C. I. 1302.

This benefit likewise belongs to churches and pious places within four years, from C. 1, 2 *de Restit. in integr.* in the Sixth. But restitution in full which belongs by natural law to those harmed, from injury inflicted because of fraud or fear, does not need the office of a judge, and it is verified in all contracts, and is perpetual. L. 717; Gousset 739; S. Th. 2. 2. q. 89 ad 3. From C. B. 853, payment of a credit obtained by an illicit act can always be denied.

951. Who have, by natural law, capacity for contracting? - By natural law all and only those who have the free use of reason can validly contract. The reason is that all and only these can transfer ownership and undertake obligations. Hence infants, not yet having the use of reason, the insane, the furious, and the perfectly drunk cannot validly contract. They cannot contract, namely per se; for since they can have ownership of property, tutors and curators can contract for them. - Likewise by natural law, all and only those who have free administration of goods can contract firmly.

The reason is that, by the very fact that ownership or administration of goods depends on the ownership or jurisdiction of another, a contract has from the nature of the thing this implicit condition: unless the other, whose right it is to contradict, shall have contradicted. Hence, although religious licitly contract from the presumed will of the superior, nevertheless the contract is revocable by the superior. Although religious Prelates, or administrators of common goods constituted by them, can contract irrevocably in ordinary causes in which the Constitutions concede administration to them without the concurrence of others, nevertheless in those in which they depend on the consent of the Chapter, or Community, or their own Council, they cannot contract firmly and irrevocably without such consent. Struggl 12; Reuter 141. Cf. Instruction of the S. C. of Religious, 30 July 1909.

952. Who have, by positive law, capacity for contracting? By positive law, in order that someone validly, or at least firmly, contract, it is required that he not be declared by law incapable of making a contract. From Roman Law a wife cannot contract or dispose concerning her dowry and its fruits; nor concerning goods common to the family, when the husband reasonably contradicts. But she can

dispose at will concerning paraphernal goods, even against the husband's will. L. 489. A son under paternal power who is below puberty, even if he contracts with the father's consent and concerning military goods, is not obligated. But, if he is of puberty, he is obligated, provided that there is no question of alienating immovables and precious movables.

But he can by no means dispose concerning profectitious and adventitious goods. - A person below puberty deprived of a father contracts validly by authority of a tutor, and a minor with the consent of a curator, unless there is question of immovables and precious movables. But a ward can oblige another for his own advantage, for example by accepting a donation, even without the authority of a tutor. Inst. § 9 *Pupillus de Inutil. stipul.* - Those civilly dead can neither receive nor donate goods in any way; and their goods pass to the heirs. Those civilly dead are those condemned to death, to perpetual galleys, to deportation.

From C. I. 324 ff., 1105, 1106; C. G. 489 ff., 1123, 1124; C. H. 200, 1263, 1264; C. A. 21, 865, there are some to whom almost all contracts are prohibited, and others to whom only certain contracts are prohibited, or in certain cases. - Almost all contracts are generally prohibited to wives, minors, and interdicted persons. Among interdicted persons are to be counted the incapacitated, the deaf-mute, and those blind from birth. Someone is interdicted because of infirmity of mind. C. I. 324; C. G. 489. - He is declared incapable who indeed is of his own mind, but senseless, or inept, or prodigal. C. I. 324, 339; C. G. 513; Cf. C. A. 21, 269. - The deaf and mute, in civil law, are equated as to contracts with those under incapacity.

Those blind from birth are equated as to contracts with the deaf and mute. C. I. 340; C. A. 275. - Interdicted persons are equated to minors; therefore they are under tutelage. C. I. 329; C. G. 509. - A curator of incapacity is customarily given; with him they do all things legitimately, without him only those things which pertain to administration of goods. C. I. 339; C. G. 513. - Cf. C. H. 32, 170, 200, 221-220. From C. B. 104, one incapable of contracting is he who has not yet attained the seventh year, who labors under a mental disease excluding liberty, who is interdicted because of mental disease. From the same Code 105, the declaration of will of one incapable is null.

953. What about the contracts of wives, minors, and interdicted persons in more recent law? - A wife generally cannot contract firmly without the special consent of the husband, or, in his absence, without the authority of the judge. C. I. 135, 136; C. G. 217, 219; C. H. 61, 62, 65. Nevertheless she can buy necessaries for the family. In C. H. 62, a wife can contract without the special consent of the man when she makes ordinary expenses of the family. Likewise in C. He. 163, the wife represents the conjugal union for occurring necessities of domestic economy, and obliges also the husband, unless her acts have been excessive. From C. I. Comm. 14 § 2, a wife engaged in commerce is permitted even the alienation of her own immovable goods (not dotal goods). From C. B. 1365-1371, 1395-1400, 1405-1407, a wife can freely dispose of goods reserved to herself; but as to goods subject to the husband's administration and usufruct, she needs the husband's approval. Cf. C. A. 1237 ff. - Non-emancipated minors cannot contract firmly without the assistance of a tutor. C. I. 277; C. G. 450; C. H. 262, 1263; C. A. 152; C. B. 106 ff. But emancipated minors are capable of making acts of administration and contracts determined by law. But for the rest the assistance of a curator is required. C. I. 317-319; C. G. 480, 484, 487; C. H. 317. But in a matter of greater moment, the tutor and curator depend on the authority of the family council. C. I. 277, 301, 314 ff.; C. G. 450, 468, 483; C. H. 269. From C. I. Comm. 9 ff., emancipated minors, whether males or females, legitimately

exercising commerce, are considered majors and can alienate their own goods, even immovable goods. Interdicted persons, namely those who by sentence of a judge are declared incapable of exercising civil acts because of a state of weakness, or dementia, or fury, as also prodigals juridically declared, cannot contract firmly without the assistance of a tutor or curator, or of a juridically constituted counselor. C. I. 329, 335, 339, 340; C. G. 502, 509, 513; C. H. 200; C. B. 114 ff. If the prescriptions of law are not observed, the contracts of these, namely of wives, minors, and interdicted persons:

1. Are valid, unless they are invalidated by the sentence of a judge. C. I. 1300, 1899; C. G. 1304, 2012; C. H. 1302; C. B. 106-113. - 2. Are rescindable at their discretion, but by no means at the discretion of the fellow contracting party. C. I. 341, 1107, 1300; C. G. 1125, 1304; C. H. 1302; C. B. 108, 111, 135, 144; except interdicted persons by way of penalty, against whom incapacity can be opposed by anyone having an interest. C. I. 1107. But where there is question of wives, the husband or their heirs also can oppose the nullity of the contract. C. I. 137; C. G. 225; C. H. 65.

3. Minors can invoke rescission because they are minors from C. I. 1300, 1303; C. H. 1300; because they are harmed from C. G. 1305, 1306. But wives and interdicted persons can invoke rescission even if they were not harmed. C. G. 1305, Rogron in this article; with the case excepted, however, for a minor, if, exercising commerce or an art, he contracted for matters of commerce or art, C. G. 1308; but for a wife, when she is occupied with public and separate commerce, C. G. 220, Rogron in this article; C. I. 135; or buys those things which are necessary for the support of the family, C. H. 62.
4. But they could not invoke this rescission in conscience whenever they acted by fraud and deceived the fellow party, and when the obligation arose from delict or quasi-delict. For no one ought to receive advantage from fraud; nor does the legislator intend to favor fraud and delicts, but the weakness of these persons. C. I. 1305, 1306; C. G. 1307, 1310; C. A. 865, 866; C. B. 109, 828.
5. Once rescission of the contract has been made, they must restore what they received, if they received advantage from the contract. C. I. 1307; C. G. 1312; C. H. 1303, 1304. If no utility came to them, they can use in conscience the benefit of the law, so that they not pay what they received, since such a law is just on account of the common good, for defending persons of this kind against the frauds of the wicked. C. I. 1307; C. G. 1312; C. H. 1163, 1304; Gousset 744-749; L. 918. Cf. here 667, 678, 1085. L. ult. C. *de Temp. in integr. restit.* grants four years for seeking restitution in full; C. I. 1300, five years. Cf. here 950.

954. To whom are only certain contracts prohibited by more recent law? - Only certain contracts, or contracts only in certain cases, are prohibited: 1. To tutors, who are forbidden to contract with those administered by them. C. I. 300, 1457; C. G. 450, 472; C. H. 275. 2. To spouses among themselves, C. I. 1054, 1433; C. G. 1525, or with respect to others, C. I. 1405; C. G. 1554. Cf. C. I. 1405, 1407, 1433 ff. Cf. also C. H. 1458, 1541; C. L. 1564. - 3. To certain private and public persons having care and protection of another's goods, namely as to these goods. C. I. 1457, 1458; C. G. 1596, 1597; C. A. 879. - But although contracts of this kind are prohibited by civil law, nevertheless not all are declared invalid by the fact itself before the sentence of a judge. From Trent, sess. 25. C. 16 *de Reg.*, no

renunciation or obligation is valid if made before the two months nearest to Profession. - Concerning absentees, cf. C. I. 21 ff., 26 ff.; L. 723, 724.

955. What sort must the object of a contract be? The object of a contract must be:

1. Possible, both physically and morally, because no one can be obligated to the impossible. Morally possible; therefore if the matter is very difficult, bringing graver inconveniences, unless there is certainty about an explicit will of obliging oneself, this, speaking per se, cannot be presumed. C. H. 1272; C. A. 878, 882; C. B. 306.

2. Existing either in reality or in a certain hope, or likely to exist; otherwise no right could be had in it, as being estimable at no price. From C. I. 1118; C. G. 1130; C. H. 1271; C. L. 1556; C. A. 879, an inheritance succession not yet opened is regularly excepted. Regularly; for this exception does not hold if there is question of a donation because of marriage, or of a contract of marriage, namely so that future successions be included in or excluded from the conjugal community. C. G. 1082-1084, 1091-1093; Gousset in a. 1130; cf. C. H. 826. Or if there is question of division of a future inheritance. C. H. 1056, 1271; C. I. 1044, 1045; C. G. 1075, 1076. Cf. 1010, 1069, 1235. Nor does it hold, according to many from ancient law, if the disposition is made in favor of a religious Community; because the end of the law is only to impede the danger of death being inflicted on the possessor. But where there is question of a monastery there is no such danger. Gur. Cas. v. 2. nn. 111, 112. Cf. C. A. 944, 1177, 1178, 1180; C. G. 943, 947, 1837; C. B. 310, 312; L. 30 *de Pactis* C.; *Monit. Eccl.* v. 15. p. 37. In Canon Law, provision of a benefice not yet vacant is invalid. Third Lateran Council C. 8.

3. Honest and licit in itself, that is, prohibited by no law, because no obligation can be given to a dishonest and prohibited thing. S. Th. 2. 2. q. 110. a. 3 ad 5; C. H. 1271; C. A. 878; C. B. 134, 138, 309. "Public law cannot be changed by private pacts." L. 38 *de Pactis* ff. - But for the validity of the contract it is enough that the object be substantially honest, although some accidental circumstance is illicit.

4. Proper to the contracting party; for no one can transfer to another a right which he himself does not have.

5. Certain and determined as to species, although it be uncertain as to quantity, provided nevertheless that that quantity can be determined in some way. C. I. 1117; C. G. 1129; C. H. 1273. For there can be no obligation of a thing altogether uncertain and indeterminate.

6. That it be in commerce. C. I. 1116; C. G. 1128; C. H. 1271; C. A. 878, 880. - Inst. 1. 3. t. 19. §§ 1, 2, 3.

956. Can the object of an onerous contract be an action otherwise owed, and consequently can someone licitly receive a price for it? - R. Negatively, if it is owed from justice to the other contracting party. The reason is that otherwise you would sell another his own thing. Therefore neither a judge for issuing a just sentence, nor a robber in order not to kill you, etc., can receive a price either licitly or validly. R. Affirmatively, if it is owed from justice to a third person, with this person's right nevertheless uninjured. The reason is that you do not injure the right of the first, and you make a useful thing for the latter. Thus, for example, if someone hired you to go to a certain place for handling a business, you can also be hired by another to make that journey for another business,

provided that the later mandate does not harm the prior. - "He who is not bound to something from justice, but from charity or another virtue, can well receive a price for it, since what he promises is estimable by price." L. 1. 4. n. 216; l. 3. n. 537, 713.

Hence you can indeed receive money so that you may keep the fast of the Church; but you are bound to restitution if you exact money for showing the way to a man passing by, which you can do immediately and without any labor of yours. For the price of a work is taken both from the labor and inconvenience necessary for it, and from the utility furnished to another from that work, according to common estimation, as well as from the obligation undertaken from justice of doing or not doing, and from the right which the other therefore acquires; but by no means from some singular necessity or utility of someone, which is only by accident.

957. Can a spiritual thing be the object of a contract, whether gratuitous or onerous? - R. Affirmatively, with all simony nevertheless excluded. The reason is that nothing disordered is present in such a contract, nor is it prohibited by positive law. Hence, whether from fidelity or from justice, you can promise Masses, etc.

958. What about the cause of a contract? - An extrinsic and impulsive cause of a contract is not necessary for the contract to hold. For neither is what proximately determines the contract. Thus the purchase of oxen holds, which I thought necessary for cultivating a field, falsely thinking that my own had perished. - But an intrinsic and motive cause of a contract is altogether necessary for the contract to hold. For this itself is what proximately determines to the contract. In onerous contracts this cause is the utility of the thing at least for one of the contracting parties; in gratuitous contracts, the will of benefiting some person. Utility of the thing, which consequently is almost convertible with the very object of the contract.

Will of benefiting, which is convertible with the very consent of the will. Utility of the thing, that is, the thing in itself which one party gives to the other, or is obligated to give, or the danger which he assumes upon himself. Utility of the thing, and therefore the will of acquiring that thing, or of freeing myself from some obligation. Hence the obligation which I undertook of paying you 1000 francs, as owed to you from the legacy of my father, which afterward I found out had been revoked by him, does not hold. C. I. 1101, 1119; C. G. 1105, 1106, 1131; C. H. 1274, 1276; C. A. 922 ff.; Gousset in a. 1110, 1131; Pothier, tr. *delle Obbligazioni* p. 1. c. 1. n. 42.

The print's appendix has more on this paragraph: [Power of the Sacred College](/manuals/bucceroni/power-of-the-sacred-college). (ed.)

959. If a base thing has been furnished by another, is someone bound to furnish what he had promised? The first probable opinion denies. The reason is that what from the beginning is null cannot have value, even after the placing of the work on the other side. For when the work is fulfilled, that prior will has no force because of the law invalidating such a contract. For not only natural law itself, but also positive law, both canon and civil, C. I. 1119; C. G. 1131; C. H. 1275; C. L. 669, 671; C. B. 138, invalidates such a contract from the beginning. Since therefore that will has no moral value at the beginning of the contract, it persists as such even after the placing of the work. But just as sin is not estimable by price, so also the labor or inconvenience intrinsic to that sin is not estimable by price.

The second probable opinion affirms. For there are two contracts. The first is the promise of a base thing to be furnished, which certainly is invalid. But the other is an unnamed contract. Now an

unnamed contract, I give that you may give, etc., is perfected when delivery of the thing or furnishing of the work is made; and then, as is clear, the reason and force of the laws which invalidate base pacts cease; for the obligation which is then placed on the other side is not base, nor does it oblige to a base thing. But the inconvenience and danger which the other party underwent is truly estimable by price, although the sin itself cannot be estimated by price. S. Th. 2. 2. q. 32. a. 7; q. 62. a. 5 ad 2; 4. D. 15. q. 2. a. 4. q. 2, 3; D. 33. q. 1. a. 3. q. 2 ad 1; Lugo d. 18. n. 45 ff.; L. 642, 712; Struggl art. 6. VI; Reuter 109, 339; Tambur., *Explicat. decal.* 1. 7. c. 5. nn. 19, 21; Ithur. Cas. 5; Gousset 753.

960. You will resolve: "When someone gives to a prostitute because of fornication, the woman can retain for herself what was given to her. But if she had extorted something excessive by fraud or deceit, she would be bound to restore it to the same man." S. Th. 2. 2. q. 62. a. 5 ad 2; q. 87. a. 2 ad 2; S. Poenit. 22 Apr. 1822; L. 4 *de Condict. ob turp. caus.* ff. If, on the contrary, a judge, from a contract, were to issue an unjust sentence for Peter, so that Peter would kill that judge's enemy, Peter after the unjust sentence has been pronounced would not be bound and could not kill the judge's enemy. From C. B. 817, he who has received a prestation contrary to law or good morals is bound to restore it. Restitution does not have place if the author of the prestation is guilty of the same illicit matter, unless the prestation consisted in contracting an obligation. What has been furnished for fulfilling an obligation of this sort cannot be sought back. From C. A. 1174, what was given for the execution of an illicit thing cannot be sought back. But what was given to impede an illicit deed can be sought back. From C. H. 1275 also and C. I. 692, the price knowingly paid for a base thing cannot be sought back.

961. Is one promising something prodigally to a woman for intercourse bound after the intercourse to give it? "Lugo, Filiucius, Sanchez affirm, because, once the promise has been placed, the giving is then owed, not prodigal. But Soto, Bannez, Trullench, etc., more probably deny, even if there has been an oath, because the promise does not take away that the prodigal giving is illicit; therefore the illicit matter must be reduced to equality according to common estimation." L. 735.

962. "If a man gives to a woman to extort intercourse, can she retain it when intercourse has not been granted? - If there was a pact concerning intercourse, explicit or implicit, then certainly she is bound to restore; but otherwise, if the gift was given to entice the mind, because that giving was altogether liberal... Yet the Salmanticenses rightly note that a woman receiving such a gift is with difficulty excused from the sin of scandal, because once the gift is accepted the man is rendered more ardent and more audacious for lusting after her." L. 712, 734, 736.

963. What is the force of obligation in contracts? Each person is presumed to enter into a contract for himself and his own, unless the contrary is established by the contracting party himself, or from the nature of the thing. Any contract duly entered upon gives birth to an obligation in the forum of conscience, at least on the part of one of the contracting parties, because in a contract some right is given to one or to both parties; but to every right there corresponds its own obligation. - An obligation of this kind regards the contracting parties themselves, not third parties, to whom per se they neither benefit nor harm, as a thing done among others, except in cases determined by law. But it extends itself not only to that which is expressed in the pact, but to all consequences which equity, law, and custom demand according to the nature of the agreement. The reason is that all these things are implicitly understood in any agreement, unless one of these has explicitly been derogated from by special pact. And these are customarily called the naturalia of a contract, so that they may be

distinguished from the essentialia, cf. 938, and the accidentalia, cf. 936, 943. C. I. 1123, 1124, 1127, 1130, 1131 ff.; C. G. 1119, 1123, 1134, 1135, 1165, 1156 ff.; C. H. 1097, 1255-1258, 1278, 1281 ff.; C. A. 904 ff., 914 ff., 1017, 1019; C. B. 314 ff., 328 ff.; L. 734. If the obligation is in not doing, C. B. 241, and someone has done it, he must repair the damage and is compelled to remove the work at his own expenses. C. I. 1222; C. G. 1143. - But if the obligation is in doing, it is in the creditor's power to do it at the expense of the debtor, C. I. 1220, or certainly the debtor is bound to pay as much as it interests the creditor, if he does not wish to do it. C. G. 1142. Nor indeed can that which is owed be furnished through another, if it matters to the creditor that it be done by the debtor himself. C. I. 1239; C. G. 1237. But it suffices to do it with moderate or common skill; but if he has done it unskillfully, he will be bound also in the forum of conscience. - If the obligation is in giving, what is owed must be given, not another thing. C. I. 1245; C. G. 1243. If the quality of the thing to be given has not been determined, neither the worst nor the best is to be given. C. I. 870, 1248; C. G. 1022, 1046; C. B. 243. If the very thing to be given cannot be given, its valuation is given, according to the value of the time at which it ought to have been given. C. I. 1223. But if money is to be given, it is estimated from its present value. C. I. 1821; C. G. 1895; C. B. 244. The thing is to be given in the place concerning which agreement was made; otherwise in the place in which the thing existed at the time of the contract; outside these cases, in the place in which the debtor now dwells. C. I. 1249; C. G. 1247; cf. C. B. 269, 270. - It is likewise to be given in one payment, although the thing is divisible. C. I. 1204, 1246; C. G. 1220, 1244; C. A. 1415; C. B. 266. - The obligation of giving a thing imports the obligation of preserving it, with the diligence of a good father of a family applied to his own things. C. I. 1219, 1224, 1817; C. G. 1136, 1890.

The contracted obligation is to be furnished in its own time. If no time has been established, it is to be furnished immediately, unless the thing itself induces delay. C. I. 1173; C. G. 1146. Cf. C. A. 1417; C. B. 250, 271. He who in his own time does not furnish the thing owed, or does not receive it, is said to make delay; and each one's own delay harms him, namely if it was not without civil fault in the external forum, or theological fault in the forum of conscience. Hence he who is in delay furnishes the damage which arises from it; but if grave damage is absent, in this a moderate delay which does not exceed the twentieth day excuses in the forum of conscience. C. I. 1219, 1223, 1225; C. G. 1139, 1146, 1147; C. A. 904, 1334; L. 680.

964. You will resolve: Contracts cannot be revoked except by mutual consent, or by causes approved by natural equity, law, or custom. C. I. 1123; C. G. 1134, 1135; C. H. 1300. - The intention of the contracting parties is to be carefully investigated, if it can be clearly and expressly established. But if it remains obscure and ambiguous, it is to be interpreted in good faith, both from the matter of the agreement, and from the various clauses of the agreement, and from the usage of places, and from the character of the persons, etc. L. 219 *de Verbor. signif.*; C. I. 1131-1139; C. G. 1156-1164; C. H. 1281-1289; C. A. 914-916; C. B. 133-157, 242, 315 ff.

965. Note: In all contracts obligatory back and forth, the condition is tacitly present that, if one of the contracting parties has not fulfilled his obligation, it is lawful for the other to withdraw from the contract. But this tacit condition does not dissolve the contract except by the office of a judge, according to more recent laws; but if expressly added, it dissolves the contract by the law itself. C. I. 1123, 1165; C. G. 1134, 1184; C. B. 320 ff., 346 ff.

966. How does the obligation of contracts cease? - The obligation of contracts ceases:

1. Through payment, or through the furnishing of any thing owed, or also through the execution of the object promised or otherwise owed. C. I. 1236 ff.; C. G. 1134 ff.; C. H. 1157 ff.; C. B. 362 ff., 372 ff. Payment is to be made by him who can alienate. C. I. 1240; C. G. 1238; and from C. A. 1421, although he is incapable of administering his own things. If there are several debts, the debtor can impute the payment to whichever he wishes. C. I. 1255 ff.; C. G. 1253 ff.; C. A. 1415 ff. - Cf. Vinnius on Inst. 1. 3. t. 30. nn. 1, 4. - But payment does not hold if the creditor is incapable of receiving, unless it is proved that the payment made yielded to his utility. C. I. 1143; C. H. 1163; C. G. 1241; C. A. 2414. But if the creditor unjustly refuses to receive payment, the debtor is freed by making a deposit of the thing owed in the modes prescribed by law. C. I. 1259 ff. "Nor does it matter who pays, whether he himself who owes, or another for him; for he is freed even when another pays, whether the payment is made with the debtor knowing, or ignorant, or unwilling." Inst. 1. 3. t. 30; C. I. 1238; C. G. 1236.

C. B. 244, 267, 268; C. A. 1423.

2. Through novation, or a new obligation, which is not presumed, but must be expressly established. It has place in three ways: 1. Through substitution of a new debt for an old debt, which is thus extinguished; for example, I promised to give you ten casks of wine each year; now I agree with you that I am no longer bound to give wine, but a thousand francs: the obligation of giving wine is then extinguished. Likewise, money is owed from purchase; it is agreed that it be retained as though from a loan for consumption. The effect of novation of this kind is that, once the prior obligation has been removed, its inconveniences also are taken away, and the advantages of the later obligation are received. 2. When a new debtor is substituted for the old, who is therefore freed by the creditor; namely if the debtor substitutes another debtor for himself, whom his creditor accepts, or if another freely promises that he will pay in place of the debtor. 3. When a new creditor is substituted for the old, toward whom the debtor no longer has any obligation. C. I. 1267 ff.; C. G. 1271 ff.; C. H. 1203 ff.; C. B. 364, 398 ff.; C. A. 1345, 1375 ff.; L. 1 Dig. *de Novationibus*; Inst. 1. 3. t. 30. § 3; Vinn. in this place.
3. Through condonation, or an act by which a creditor from full liberty remits a debt to his debtor. For each one can yield his own right in all those things which do not regard the public good, provided he was not incapable of contracting. It is had by presumption of law if the creditor has returned the security to his debtor, or ordered it to be returned; but by no means if the creditor has returned the pledge, or freed the surety. An acceptilation is called a condonation of this sort, because through it the creditor has as though accepted that which is owed to him. Hence it is said in Law that acceptilation is an imaginary payment. "But just as what is owed is rightly paid in part, so acceptilation can be made in part of the debt." Inst. 1. 3. t. 30. § 1. - C. I. 1279 ff.; C. G. 1282 ff.; C. H. 1187 ff.; C. B. 397.
4. Through compensation, or fictive and reciprocal payment, which has place by the law itself when persons are mutually debtors toward one another. C. I. 1285 ff.; C. G. 1289 ff.; C. H. 1195 ff.; C. A. 1433 ff. - From C. B. 388, a declaration of one party to the other party is needed. - This legal compensation is not had between that which is owed only naturally and that which is also owed civilly; likewise this compensation is not had as to those things which are subject to rescission or restitution in full. Cf. 1471.

5. Through confusion, which has place when the obligation of the debtor and the right of the creditor are joined together in the same person; for example, if the creditor becomes the heir of his debtor, or the debtor of his creditor, or the same person becomes heir of the creditor and debtor at the same time. C. I. 1296 ff.; C. G. 1300 ff.; C. H. 1192 ff.; C. A. 1445; L. *Sicut acceptatio* Dig. *de Solutionibus* etc. Cf. C. B. 889.

6. Through destruction or loss of the certain and determined thing owed, which at times frees the debtor from obligation, as in merely gratuitous contracts, and also in others where the fault of the debtor does not enter. But at times it does not free him, for example if it happened by fraud of the debtor, or he was in culpable delay, or he took the case upon himself. Certain and determined, for example such a horse; but something else must be said if the thing was uncertain and indeterminate; for genus and species do not perish. Therefore, if you promised a horse in general, not such a horse, not one of your horses, the obligation remains, even if all your horses perish; hence you must buy and hand over another. C. I. 1298 ff.; C. G. 1302 ff.; C. H. 1182 ff.; C. B. 275, 280; L. *Si ex legati* Dig. *de Verbor. obligat*.

7. Through rescission, or rescindability, which has place when a contract, consisting of essential conditions, is dissoluble because of some defects. That contract holds until it is rescinded. C. I. 1300 ff.; C. G. 1304 ff.; C. H. 1290 ff.; C. B. 346 ff.

8. Through prescription, concerning which it has been spoken above. C. I. 1236; C. G. 1234; C. H. 1930.

9. Through contrary will. For "those obligations which are contracted by consent are dissolved by contrary will. For, if Titius and Seius have agreed between themselves that Seius would have the Tusculan estate bought for one hundred gold pieces; then, the matter not yet having followed, that is, neither the price having been paid nor the estate having been handed over, it has pleased them that they withdraw from that purchase and sale, they are mutually freed." Inst. 1. 3. t. 30. § 4. Cf. n. 964.

967. What is understood by accidental modifications of contracts? - Accidental modifications of contracts are certain extrinsic or intrinsic qualities of contracts which strengthen or weaken their obligation; increase or diminish it; determine, suspend, or destroy it. Now the principal modifications of contracts of this sort, which pertain to the practice of the confessor, are: an oath which extrinsically confirms the contract, and the various modes of contracts by which the obligations of contracts are intrinsically constituted in various ways.

968. What is the force of an oath added to a contract? A promissory oath is added to contracts in order to confirm them because of reverence for the divine Name. Hence besides the obligation from justice by force of the contract, there is also an obligation from religion by force of the oath. The obligation of an oath affects only the person swearing. For by it we are obligated to God to do what we promised. Therefore, although the obligation of a contract passes to the heirs, as one which affects the goods of the contracting party himself, nevertheless the obligation of the oath does not pass to them. As to the obligation of an oath, the general rule is: An oath follows the nature of the act. For the accessory follows the principal. L. 1. 6. nn. 870, 873.

In Roman Law several contracts, otherwise invalid, became valid and firm by oath. This could well be done by force of the law itself, restoring the natural obligation taken away, or removing the action introduced for seeking restitution in full, because of reverence for the oath added to the contract. By more recent law, contracts otherwise invalid or rescindable become neither valid nor firm. C. H. 1260: an oath is not admitted in contracts, and if it is made it is held as not added. This nevertheless does not prevent someone in conscience from having to stand by the promise and oath by which he freely renounced a favor conceded through the laws, if this renunciation is not illicit and prohibited, and there is question of a favor of a merely private person; for example if someone confirms by oath some simple promise, to which civil law neither assists with an action conceded in the external forum, nor resists, by taking away its natural validity.

969. You will resolve: An oath is invalid if the act itself is invalid by the fact itself, whether by natural law or by positive law. Trent, sess. 25. C. 16 *de R. R.*

When the obligation of the act has been removed, the obligation of the oath is also taken away. Those things which are tacitly present in the act, namely if I am able, if the matter is not notably changed, if the other keeps faith, etc., are also present in the oath. Hence, if you swear that you will observe the statutes of some community, if these are no longer observed by the greater part of the community, neither are you bound to observe them. L. 1. 3. n. 181.

970. Does an oath added concerning not rescinding a contract altogether firm a contract which is rescindable by positive law? It is disputed.

Some say that it is firmed both from religion and from justice; and therefore that it gives a right of justice to the promisee. For the validity or firmness of the act, removed by law, is restored through the oath. But an oath by its own nature does not furnish this, since through it we are obligated not to man, but to God alone. Nor does an oath make a new obligation from justice, but confirms one made from religion. But others say that it is firmed only from religion. Firmed from religion; that is, the promisee stipulates for himself a new security and a certain quasi-pledge, with an oath interposed, which consequently it is not lawful to extort from him, when he is reasonably unwilling, as from an unwilling creditor, by dispensation of the oath. And indeed, because of reverence toward God, an oath is to be kept whenever it can licitly be kept. Therefore it must be denied when rescindability is introduced immediately and directly on account of the common good. For then it would be harmful to the common good, and therefore illicit and invalid. The same must be said if renunciation of right is prohibited. For then it is illicit. Trent, sess. 25. C. 16 *de R. R.* But it must be affirmed if rescindability has been introduced immediately and directly on account of the private utility of the contracting parties, and renunciation is not prohibited. For then each one can renounce a benefit established in his favor. Hence the oath does not seem to stand by which someone freely promises another that he will not revoke a testament or legacy made in his favor, since that renunciation is prohibited under whatever form. C. I. 916. Cf. 1034. But do the oaths of minors, wives, and similar persons hold for firming contracts? Gury 792 denies it, "even if the law has been established for their utility, since wicked men would always exact an oath from them, which would yield to the detriment of society." But Struggl, tr. 5. q. 3. n. 27, affirms it. Secondly, on account of the general reason that that law was enacted immediately and directly on account of the good of private persons. Cf. 223 and C. *Cum contingat* 28 *de Iurei.* It will perhaps be better to distinguish. For if the contract regards a thing good and useful in itself, then the aforesaid persons seem to be bound to fulfill it, with the benefit of

the law neglected. But if the contract regards obtaining helps by which they may indulge their desires and dissipate the family estate, the oath is contrary to good morals, and they can well use the benefit of the law. That is, the common good demands this protection of age and sex through rescindability. But to use it or not use it depends on the discretion of each one, and he certainly can reasonably renounce it. Besides, because an oath is accessory, and does not change the nature of the act, if the act is by its own nature revocable, as a testament; or revocable by positive law, as a donation when children have been received; or subject to rescission, as contracts of minors and wives, it is validly revoked and validly rescinded. - Lugo d. 22. nn. 200-202, *Resp. Mor.* 1. 6. d. 24; Lessius 1. 2. c. 17. d. 7; L. 177, 727, 739, 757, 891, 892; C. A. 937; Gousset in a. 1304; E. M.

971. What are the various modes of contracts? - The various modes of contracts, by which the obligation of a contract is variously modified, are: contracts of obligation under a condition, with a mode, to a term, alternatively, solidarily, divisibly or indivisibly, with a penal clause, under a cause, under a demonstration. A mode is to be observed from justice, unless it is repugnant to the substance of the contract. Violation of it often does not invalidate the contract, because, namely, it is something merely accidental. If the mode is base or impossible, it is held as not added, nor is the contract invalid, unless the mode is repugnant to the nature of it, or unless the will of the contracting party was altogether restricted to it.

972. When is a conditional contract had? - What if the condition is impossible or base or potestative? In what way is the condition to be fulfilled? - A conditional contract is when it depends on a future and uncertain event. C. I. 1557; C. G. 1168; C. A. 696. A condition is expressed by the words if, provided, provided that, or even by an ablative absolute, which nevertheless is not always constant.

On an event; for those things which are tacitly present, whether from the nature of the thing or from positive law, do not make the act conditional, although they may have been expressed. Future and uncertain; for if it depends on a past or present event, or on a future but certain event, for example if the sun rises the next day, the contract is immediately valid or null, although it is still uncertain to us.

Therefore a condition concerning the future suspends the contract and its obligation until it is verified; but a condition concerning the present or past suspends only the execution of the contract. C. I. 1161; C. G. 1181; C. H. 1114; Inst. 1. 3. t. 16. §§ 4, 6. Cf. Lugo, *Resp. Mor.* 1. 4. d. 3. n. 9. - Once the condition has been fulfilled, even if this is hidden, the contract is perfected by the law itself, and has retroactive effect, without need of new consent, just as if it had been contracted absolutely from the beginning. C. I. 1163, 1170; C. G. 1179; cf. ib. 1182. For this reason, if meanwhile the things have become better or worse, the advantage and disadvantage belong to the acquirer. C. I. 1163.

Cf. C. G. 1182. A condition concerning a base or impossible thing renders the contract null both by natural and civil law. C. I. 1160; C. G. 1172; C. H. 1116; C. L. 683; Inst. 1. 3. t. 20. §§ 11, 24. Nevertheless, from the same C. G. 900, donations among the living and by testaments are excepted, in which impossible or base conditions are held as not added. For it is presumed that they were not seriously added with the intention of suspending the contract. From C. I. 1065, a donation under an impossible or base condition is null. And from the same C. I. 849; C. H. 792; C. L. 1743, impossible or base conditions in testaments are considered as not placed. Thus also it is had in Inst. 1. 2. t. 14. § 10. Likewise marriage is excepted in Canon Law, in which impossible or base conditions are held as

not added, C. 6 *de Condit. appos.*, provided that the base or impossible condition is not contrary to the substance of the contract.

A contract is null when the condition is potestative, namely one which depends solely on the will of him obliging himself, for example: I will give you 1000 lire, if it shall please me. For a contract of this kind, as is clear, can produce no obligation. C. I. 1162; C. G. 1174. But the contract will be valid if the potestative condition is not the will itself of the debtor, but the will of the other party, or of a third person, or some fact to be fulfilled by one of the two contracting parties. Gousset in the cited article; Troplong, *della Vendita* c. 1. n. 132 ff.; C. H. 1115, 1256, 1449. A condition is to be fulfilled in that sense in which the contracting parties are prudently considered to have wished to oblige themselves. C. I. 1166; C. G. 1175.

Therefore 1. the will rather than the words is to be looked at. 2. Generally speaking, the condition must be fulfilled in its own form; nevertheless, sometimes it suffices that it be fulfilled equivalently, namely when such is prudently considered to have been the will of the contracting party. Gousset in the cited article; L. 734. A condition is considered fulfilled whenever it stood through him who obligated himself under it that it not be fulfilled. C. I. 1169; C. G. 1178; C. H. 1119, 1122; C. L. 679, 1744; C. B. 162. Before the condition is fulfilled, the creditor can exercise all acts conservative of his right. C. I. 1171; C. G. 1180; C. H. 1121; C. A. 897 ff.; E. M.

973. When is a resolutory condition of a contract had? - Besides the condition about which we have spoken, which, because it suspends the contract, is called suspensive, there is another condition, which is called resolutory, because, once verified, it resolves a valid contract and restores the parties into the same state in which they were before the contract. C. I. 1158, 1164, 1168, 1183; C. G. 1183; C. H. 1123; C. A. 696; C. B. 158. - When the condition occurs, the contract ceases by the law itself, and has retroactive effect, just as if nothing had been done from the beginning. C. I. 1170; C. G. 1179. - Therefore if the thing meanwhile has been made better or worse, the advantage or disadvantage belongs to the alienator. - Once the contract has been resolved, prejudice is not done to third parties as to rights over immovables previously acquired. C. I. 1511, 1787. - A condition of this kind is understood in every synallagmatic contract, if the other party does not fulfill his obligation. Cf. n. 965. C. I. 1165; C. G. 1184; C. H. 1124; C. B. 159, 160, 161, 346 ff.

974. When is a contract under a mode had? - A mode must be distinguished from a condition, that is, a merely superadded burden, for example: I give you this estate with the obligation of celebrating so many Masses annually. Now this contract holds immediately, with the burden of fulfilling the obligation remaining on the other party; if the other party does not fulfill it, he sins against justice, but the contract does not therefore fall. C. 4 *de Cond. appos.* A contract of this kind is said to be with a mode. A mode added for the advantage of the one receiving, for example, I leave a thousand lire to Caius, so that he may buy himself a little field, is regularly as not written, and does not induce restitution. A mode added for the utility of others induces an obligation from justice. L. 734. An accidental or accessory base mode is to be held as not added; a principal or substantial base mode invalidates the act; for example, Titius the sectarian left you an immense sum of money, at the same time willing that you write his eulogy after death in a public newspaper, in praise of the sectarians; Caius left you a sum of money, so that you take care of the cremation of his body and retain the rest for yourself.

975. When is a contract to a term had? A contract of obligation to a term, or to a determined day, is when, although its obligation immediately arises, nevertheless execution is suspended to a determined day. C. I. 1172; C. G. 1185; C. H. 1125; Inst. 1. 3. t. 16. §§ 2, 3. A term is always presumed to have been established in favor of the debtor, unless otherwise has been agreed. C. I. 1175; C. G. 1187; in favor of the creditor and debtor, unless the thing and its circumstances demand otherwise, C. H. 1127. What is owed to a term cannot be exacted before the established day. If nevertheless it was paid before that day, it cannot be sought back. C. I. 1174; C. G. 1186. Nevertheless it is rightly sought before the day if the debtor has begun not to be solvent. C. I. 1176; C. G. 1188; C. B. 163, 186 ff.

976. When is a contract of alternative obligation had? A contract of alternative obligation is when two things are obligated disjunctively, so that the debtor is freed by paying one or the other. C. I. 1177; C. G. 1189; C. H. 1131. The choice belongs to the debtor, unless otherwise has been agreed. C. I. 1178; C. G. 1190; C. H. 1132; C. B. 262; C. A. 906. But if one thing perishes, he is bound to give the other; or its price, if this one also perishes later, namely if by his fault; otherwise he is freed from every obligation. C. I. 1180; C. G. 1192, 1193; C. H. 1134-1136; C. B. 265.

977. Note: A facultative obligation is not to be confused with an alternative obligation. In it only one thing is obligated; but the faculty is given of substituting another thing for it. Paul left his house to Peter, unless his heir preferred to pay the sum of 10000 lire. Peter cannot exact anything except the house, although the heir can pay him 10000 lire for the house. Hence, if the house perishes by chance, the heir will be bound to nothing; and in this properly lies the difference of one obligation from the other. Gousset 765.

978. When is a contract of obligation *in solidum* had? A contract of solidary obligation is either on the part of creditors, namely when the whole credit can be exacted by each creditor, and therefore payment made to one creditor frees the debtor from the trouble of the other creditors, C. I. 1184; C. G. 1197; C. A. 892; or on the part of debtors, namely when each debtor can be compelled to pay the whole debt, so that payment made by one debtor frees the rest as to the creditors themselves. C. I. 1186; C. G. 1200; C. A. 891. This solidary obligation of debtors is not presumed, but must be expressly stipulated. C. I. 1188; C. G. 1202; C. H. 1137. But if one received the whole, he communicates it with the rest; if one paid the whole, he seeks it back from the rest, his own part being deducted. C. I. 1198, 1199; C. G. 1213, 1214; C. A. 896; C. H. 1142, 1143, 1145. - If one of the creditors interrupts prescription, or exacts legal interest, this benefits all. C. I. 1192, 2130; C. G. 1199, 1207; C. A. 891 ff.; C. B. 421 ff. The solidary obligation or right of the testator is divided by the law itself among heirs; and therefore each owes or seeks for that portion by which he is heir; but all owe or seek the whole. C. I. 1203; C. G. 1219; C. A. 888.

979. When is a contract of divisible or indivisible obligation had? A contract of obligation is divisible or indivisible from a divisible or indivisible object; namely if it is composed of some thing which, when it is handed over, or of some deed which, when it is put into execution, can be divided, or not, whether from the nature of the thing, as a horse; or from law, as a mortgage; or from the acceptance of the contracting parties, as a pair of horses. C. I. 1202; C. G. 1217. If you have bought one hundred casks of wine and twenty perish, the purchase still holds if it was made divisibly. If you donate a horse, and then learn that the horse is not only yours, but yours and your brother's at the same time, the donation does not hold, since it was made indivisibly. From C. G. 1330, obligations are indivisible

among the parties; they are applied divisibly only to their heirs. If a debtor dies, to whom there are several heirs, if he himself obligated only one to pay, the obligation is indivisible; otherwise the debt will be divisible.

Likewise, if a creditor dies, to whom there are several heirs, if he himself leaves the credit to only one, who can exact the whole credit, it will be indivisible; otherwise it will be divisible. C. I. 1204, 1205; C. G. 1220, 1221. Those who indivisibly owe something, each owe the whole but not wholly; and those who indivisibly are creditors of some thing or work, the whole is owed to each, but not wholly.

The whole, because the thing is indivisible. Not wholly, because the right or obligation of the whole is not in each one, but in all; and thus if two promised you one hundred gold pieces for buying an estate, both owe you one hundred; hence each is bound to the whole, but each one of them does not owe to give you one hundred, and therefore they are not bound wholly. For this reason he who pays or receives seeks back from the rest, or communicates with the rest, according to each one's part. C. I. 1206, 1207; C. G. 1222 ff. - C. H. 1149 ff.; C. A. 888 ff.; C. B. 356, 420.

If several are obligated divisibly to one, or one is obligated divisibly to several, for example if Titius, Sempronius, and Caius owe 90 lire to Aurelius, or Aurelius owes 90 lire to Titius, Sempronius, and Caius, and Titius, for example, is unable to pay his part of the debt, the other two are not therefore burdened; and if Titius condones to Aurelius his part of the credit, Aurelius is not therefore freed from paying his part to Caius and Sempronius.

Therefore generally if one of the creditors has remitted the debt, or the debt has been remitted to one of the debtors, the whole thing is owed to the remaining creditors, and the remaining debtors owe the whole thing, but with the price of that part repaid which belonged to him who remitted, or to whom it was remitted. If three persons divisibly sell an ox to someone, and by the fault of one after the sale and before delivery the ox perishes, the other two furnish nothing, and nevertheless exact the whole price, namely what is owed to themselves for a third part to each. Pothier, *delle Obbligaz.* n. 273. If several have divisibly promised one and the same individual thing to one person, for example to build a house, and they have not built it, each is liable for his part of the damage. C. I. 1216; C. G. 1232. Cf. Troplong, *della Vendita* cap. 4. a. 1647. n. 576 ff.

980. When is a contract with a penal clause had? - What is understood by earnest money? R. To the first: A contract with a penal clause is when someone, to firm an obligation, binds himself to something if he does not keep it. C. I. 1209; C. G. 1226; C. H. 1152; Inst. 1. 3. t. 16. § 7. Hence the debtor cannot exempt himself from the obligation by paying the penalty, unless this has been expressly established. C. H. 1153; C. A. 1336. If the principal obligation is invalid, the penalty is invalid, but not conversely. C. I. 1210; C. G. 1227; C. H. 1155. The penalty is owed from the time when he is placed in delay, and indeed from justice if it is sought, for at least culpable non-execution of the principal obligation; but by no means are both the penalty and the principal thing owed at the same time, unless it was established for simple delay. C. I. 1211-1213, 1229, 1230; C. G. 1228-1130; C. H. 1153; C. A. 909-911. Cf. C. B. 339 ff. A conventional penalty is owed before any sentence, since such a penalty involves a pact.

R. To the second: What is given in advance by the contracting parties holds the place of security for compensation of damages, if the agreement is not fulfilled, unless otherwise has been agreed, and is

called earnest money, *caparra*. The party which is not at fault, if it does not wish to urge fulfillment of the agreement, can retain for itself the security accepted from the other; or exact double of that which it gave. C. I. 1217; C. A. 908-910. Cf. C. B. 336 ff.

981. When is a contract under a cause, or under a demonstration, had? When is a contract of this kind invalid because of error? R. To the first: An obligation under a cause or under a demonstration is when a cause is expressed, or the thing is designated; for example, I leave Titius one thousand lire because he undertook my patronage; I leave Titius one thousand lire which I received from Sempronius.

R. To the second: In a contract under a cause (*because*), or under a demonstration (*I sell this*, or *so much*), error does not invalidate unless it pertains to the essence of the thing. Hence, as to cause, if someone sells to another fields which each considers to be adjacent to fields which that other already possesses, but it happens that other fields are described in the instrument, the contract will be null; but otherwise if one or the other falsely thinks they are more fertile. - If someone contracts with a man as with a physician, who nevertheless falsely professes the knowledge of healing, he is not held by the contract; but otherwise if he summons a certain less skilled physician whom he thinks to be another of the same name, celebrated by reputation. As to the thing, if the error is in quantity, the whole thing is owed if the quantity was designated demonstratively (*this*); but if taxatively (*only so much*), the excess of quantity is not owed. Now a thing is considered designated demonstratively if the thing is expressed in the first place, and afterward its quantity; for example, I leave Titius my estate of thirty *iugera*. But taxatively if the quantity is expressed in the first place, then the thing; for example, I leave three gold pieces in such a box. But the circumstances of things must be weighed, and from them the intention of the contracting party must be investigated. - Gur. 794; Lugo d. 23. nn. 111, 112; *Resp. Mor.* 1. 6. d. 17; Inst. 1. 2. t. 20. § 29 ff.; C. A. 562, 675, 676, 677, 901; C. L. 1745, 1746.

V. On Promise

982. What is the order of matters to be treated? Having explained the general doctrine of contracts, we now make a step toward their various species. We shall speak first of gratuitous contracts; then of onerous ones.

983. What is a promise? A promise is a deliberate and spontaneous obligation of fidelity, made to another concerning some good and possible thing. - Deliberate and spontaneous: because through it we freely assume an obligation toward another, so that we may confer some benefit on him. Hence an indeliberate or half-deliberate promise, extorted by fear or fraud, gives birth to no obligation. S. Th. 2. 2. q. 89. a. 7 ad 3. Obligation of fidelity; for by a promise we ordinarily oblige ourselves only from faith, or the virtue of fidelity, by which deeds correspond to words. Concerning some good thing: for a promise concerning a bad thing gives birth to no obligation, according to R. 60 of Law in the Sixth: In evil promises it is not expedient to keep faith. This is to be understood even if the promise had been firmed by oath; for according to R. 58 of Law in the Sixth: An oath furnished against good morals is not obligatory. And possible; for according to R. 6 of Law in the Sixth: No one can be obligated to the impossible. - C. A. 861.

984. You will resolve: A promise differs from a simple proposal in this, that one promising obliges his fidelity to another, or himself from the virtue of fidelity, or even of justice; but one proposing does not oblige himself to another, but only determines himself in the present to do or omit something in the future. Hence he who does not keep a simple proposal, for example of fasting or of paying certain prayers, per se does not sin, unless he is obligated from elsewhere to doing something similar; but only the ugliness of inconstancy follows, beyond and against his intention. S. Th. 2. 2. q. 88. a. 1; Lugo q. 22. n. 1.

985. Does a promise not yet accepted oblige? A promise does not oblige before acceptance by the promisee, that is, of him to whom the promise is made, or without it. It is proved: Because an active right on the part of the promisee must result from his own acceptance; and therefore without this, neither can a passive obligation in second act result on the part of the promisor. Moreover, every pact must be perfected by the consent of each party making the pact. Therefore also a promise. C. A. 861.

986. You will resolve: Therefore before acceptance a promise is revocable by the promisor, because before acceptance it gives birth to no obligation and still remains in the power of the promisor. From C. A. 862, if the promise is verbal, it must be accepted immediately; if written, acceptance must be made and notified in the time established by law; before that time it cannot be revoked, but after it has elapsed it is no longer obligatory. But someone can accept through another chosen for this, or through another who has care of him, for example a father for a son, a religious for a monastery, a Prelate for his Church, a wife for a husband. For he is considered to constitute one person morally with him. From C. A. 881, no one can make or accept a promise through another, except in cases determined by law. A promise, whether made through a messenger or through a mandatary, if revoked before acceptance, does not hold.

But if it is made through a mandatary, it is necessary that the revocation become known to the mandatary; and if it could not become known, the revocation has no value, and the promise holds just as if it had been made by the mandator himself. If the promisor dies before acceptance, a promise through a messenger or through a mandatary does not hold, for the mandate ceases. If the promisee dies before acceptance, the promise can still be accepted by the family and by the heirs, if the promisor intended these persons also per se and principally; otherwise, however, the promise remains altogether invalid. Cf. 991, 1002.

987. How does a promise oblige? A simple and gratuitous promise, speaking per se, obliges only under venial sin. It is proved: Because the obligation of a simple promise arises only from the virtue of fidelity, which per se obliges only under venial sin. Hence by the common judgment of men, violations of simple promises are customarily esteemed little. L. 837.

Speaking per se; for by accident even a gratuitous promise could oblige under mortal sin, as would happen: 1. When the promisee, because of the promise not fulfilled, would incur grave damage. 2. When the promisor would confirm the promise by a promissory oath; for thus he would at the same time be obligated from the virtue of religion. 3. When the promisor would confirm his promise by a handwritten document, so that the promisee could act civilly; for thus he would at the same time be obligated from the virtue of justice. Therefore someone can oblige himself from justice, and then he is gravely obligated in grave matter. "It does not appear," says Lugo d. 23. n. 91, "why you could not gratuitously and without any preceding debt wish to oblige yourself from justice to another to give or do something afterward in his favor. For just as you can gratuitously donate to him a house, and

therefore transfer into him some real right in the house, which is the object of proper justice, why could you not also gratuitously transfer into him a right, not in the thing, but to the thing, and constitute yourself his debtor from a debt of justice? Indeed, all that which can be given for a price can also be given gratis, and just as you can sell a house for a price, so you can also donate it gratis; and thus in each case equally you give a proper right of justice in the house. Therefore, just as, with a price accepted, you can oblige yourself from justice to doing or giving something afterward, from which obligation you give a right from proper justice against yourself, so you will be able to give this very right gratis, and constitute yourself debtor from justice, just as if you had received a price for this obligation." "And here Sanchez, Sporer, and others commonly with Tournely note that to constitute grave matter in a promise, matter four times greater than in mortal theft is required, because the promisor acts concerning his own, but the thief concerning another's." L. 720; S. Th. 2. 2. q. 88. a. 3 ad 1.

L. *Si pollicitus* ff. *de Pollicitat*.; Gousset 782.

988. Is a right to the thing given through a promise? If by a promise someone obliges himself from justice, although a right in the thing is not given, nevertheless a right to the thing is given. For justice obliges to not harming another's right; therefore if at least a right to the thing is not transferred to the other, that promise no longer obliges from justice. But if by a promise someone obliges himself only from fidelity, no right to the thing is given to the other in any way... "For fidelity does not oblige to that which I owe to another, but to that which I owe to myself." Lugo l. c. n. 14. One failing faith injures no right of the promisee, because he has bound not the thing, but merely his own fidelity; hence he is not unjust, but lying and unfaithful.

989. Does an onerous promise, once the condition has been fulfilled, oblige under mortal sin? R. Affirmatively, per se. It is proved: Because a promise under an onerous condition, once the condition has been fulfilled, obliges from justice; but the obligation of justice per se, and from its genus, is grave. Hence, when the condition is gravely onerous and the promisor would subtract much from the reward, he would sin mortally; but when the condition is only lightly onerous and the promised reward is great, the promisor would sin only venially, even if he subtracted more, because as to the excess he seems to have obligated himself only from fidelity. C. B. 780, 782.

990. What about promises as they are generally customarily made? - Simple promises, as they are commonly made, do not urge even from fidelity, because commonly there is not in the mind of the promisor an intention of obliging his faith; therefore they enunciate a mere proposal. - Gousset 781, 783.

991. Whether, or how far, does a promise oblige if before execution the promisee or the promisor dies? R. To the first: It obliges in no way if the promise was made principally in favor of the promisee; because, with him dead, the end intended in the promise ceases. But otherwise if the promise was made chiefly in view of the family of the promisee, or of his heirs.

R. To the second: When the promisor has died, if the promise was to be fulfilled from justice, furnished with the due conditions, it must be fulfilled by his heirs; because every real obligation must pass to the heirs in the same mode and by the same title by which the promisor was obligated. Therefore, under grave or under light obligation, from justice, the heirs will be bound just as the promisor, while he was living, was bound. This same thing seems to have to be said of a donation, if

the donor, after the donation has been made, dies before delivery of the thing. Cf. 994. If the promise was to be fulfilled only from fidelity, then the heirs per se are freed from every obligation; since such a promise involves a personal obligation, which does not pass to the heirs. Per se; unless, namely, the contrary will of the promisor is established. C. A. 900-955.

992. How does the obligation of an accepted promise cease? - It ceases on account of the following causes: 1. On account of condonation by the promisee; for anyone can renounce his own right. - 2. On account of change of the object, namely if the thing promised meanwhile became impossible, illicit by laws, or harmful or useless to the promisee, for whose utility and advantage it was made. C. A. 936. - 3. On account of a supervening change of state of the promisor or of the promisee, so that the promisor would not have promised if he had foreseen this change; as, for example, if someone promised one hundred florins to a poor person, and meanwhile he himself falls into poverty, and needs them for sustaining himself or his family honorably; or, if someone promised marriage to a girl who afterward becomes poor, very deformed, or is corrupted by another. - 4.

On account of ingratitude of the promisee; for this not only takes away the obligation of the promise, but also, if it is grave, makes a donation revocable, as is had in C. ult. *de Donat*. 5. Through compensation, namely when two persons promised something to each other, and one does not wish to stand by the promises; for, as is said in R. 75 of Law in the Sixth, In vain does someone ask faith to be kept to himself by him to whom he refuses to keep the faith furnished by himself. 6. On account of defect of the condition, or of the principal cause of the promise itself; as if someone promised something to another on account of poverty, whom afterward he finds not to be poor. For a promise is always considered made under such tacit conditions. Struggl 23; L. 720; S. Th. 2. 2. q. 110. a. 3 ad 5; Gousset 784.

993. What about promise from civil law? Promise is admitted in Roman Law, Dig. 1. 50. t. 12; likewise C. A. 861 ff. And it is also admitted in C. B. For in a. 780, a promise of some prestation in a contract is admitted, which must be established in writing; in a. 518, a promise of donation is admitted, which must also be established by a legitimate act; in a. 610, a promise of loan for consumption is had; in a. 656, a promise of salary for negotiation of marriage, which promise nevertheless gives birth to no obligation; however, what was paid on that account cannot be sought back. In a. 657 ff., there is question of public promise of some reward, which induces the obligation of payment. And promise is had several other times in the same Code, especially promise of a prestation to be paid to the bearer, concerning which there is question in a. 693 ff. From C. I. and C. G. nothing special is had concerning promise. From C. G. 893, it is drawn that no civil action is given from a simple promise. From C. I. 710, promise does not seem to be excluded from the various modes by which one's own rights can be transferred to others. The same must be said of C. H. 1089, 1254. But specifically there is question in C. G. 1589, 1590 concerning a promise of sale, and it is not distinguished from sale itself. But cf. here n. 1129. There is also question of it in C. H. 1451, and those contracting have the right to reclaim execution of the contract. In C. I. 53, 54, there is specific question of a reciprocal promise of marriage, which produces no legal obligation. Nevertheless if it was made by public act or private writing, or if publications were made by a civil magistrate, the one promising, who without just motive refuses to execute the promise, is bound to compensate expenses made by the other party in view of the promised marriage.

The same is prescribed in C. H. 43, 44. Likewise there is question in C. I. 1129; C. G. 1120; C. A. 881 concerning promise of the act of a third person; for example, that Titius will give surety for you. A promise of this kind gives a right to obtaining indemnity from him who obligated himself, or promised the ratification of the third party, if that one refuses to fulfill the obligation. Besides, if he promised only that he would take care that the other give or do, if he took care of this in vain, he is bound to nothing further. The same can be drawn from C. H. 1254. Lugo d. 23. n. 114. C. H. 836; C. G. 1326.

VI. On Donation

994. What is donation? Donation, strictly said, is the liberal conferral of some gift. Of a gift; a gift is whatever is given liberally to someone with the mind that it become the receiver's. Is given, namely from one's own patrimony; hence, if someone, for example, renounces an inheritance or legacy, it is not properly donation. Liberal conferral; for the gift which is conferred on another by donation ought not to be owed to him from justice, nor ought the one giving the gift oblige the other to furnish something else; donation ought to be an act of liberality, and not of justice. C. I. 1050. Meanwhile, nevertheless, a consequent debt of gratitude, or even an antecedent one, is not repugnant to donation, and therefore donation can be remunerative from gratitude, or an act of gratitude, although thus it recedes somewhat from the properties of donation. C. I. 1051. Conferral; for by donation the thing donated is not promised as to be given in the future, but in the present, by act, is given. Conferral; for by natural law, even before delivery of the thing, the thing donated becomes proper to the donee; for donation is a consensual contract, not a real one. But in order that donation induce an obligation in the donor, acceptance by the donee is necessary. For no one by natural law, without his own consent, can acquire a right in another's things. L. 725, 726. It can be accepted either by oneself or through a procurator.

C. A. 938-942; C. H. 618, 619, 623, 629, 630; C. B. 516, 517; C. L. 1452, 1454, 1455. But although donation generally does not hold before acceptance by the donee, nevertheless a donation made to a church or to another pious cause holds before it is accepted. The reason is that the thing is considered donated or promised to God Himself, who is present everywhere and immediately accepts. Ferraris v. *Donatio* a. 1. n. 26; L. 726.

995. Of how many kinds is donation? - Donation is divided 1. into liberal and remuneratory. The former is that which is made from the pure virtue of liberality and without a debt of gratitude; but the latter is that which is made at the same time from the virtue of gratitude, and from the motive of compensating this debt. C. I. 1051; C. H. 618; C. A. 940.

2. Into donation *mortis causa* and among the living. The former is that which is made by the donor in view of impending death, and consequently from its nature is revocable before death, because of this implicit condition imbibed: If I shall have died in this illness, in this danger; or, I shall not have revoked the donation before death. Through it there is had a right to the thing, or even in the thing, which is not had in a testament, and it is essentially revocable, and in this it differs from donation among the living.

996. He resolves: A disposition by which someone now and irrevocably gives to another the ownership of a thing, while reserving to himself its use or usufruct until death, is not a donation

mortis causa, but inter vivos. C. I. 1074; C. G. 948. Nor are those dispositions to be regarded as donations mortis causa, but as donations inter vivos, by which sick persons actually and irrevocably give to persons present, e.g., relatives, servants, friends, movable or even immovable things, without any condition regarding death. Promises which are commonly made in life concerning some thing to be given at death to relatives, servants, or friends, do not have the force of a donation mortis causa; nor by force of such a promise will anyone be able, commonly speaking, to claim even the least thing; because such promises are usually intended to denote nothing other than a mere purpose, or good intention of making a donation at some other time. Care must therefore be taken lest relatives, servants, and friends too readily interpret the will of the deceased in their own favor, and accordingly secretly carry off various things under pretext of a promise or donation.

997. Whether a donation mortis causa is valid? By natural and common law a donation mortis causa is valid. The reason is that in itself it is a certain legitimate way of disposing of one's own goods, provided it is clothed with the due conditions. Namely: 1. It must be made in view of death; otherwise it would be judged a donation inter vivos. 2. It must be accepted by the donee himself; for no one can acquire a right in another's things unless he first consents. 3. It must not have been revoked. If the donee dies before the donor, it is revoked by that very fact, and it does not pass to his heirs, at least in the rigor of law, because it was not directed to them. It is likewise revoked if the donor survives the danger of death, and the donation was made precisely in view of the proximate danger of death. Inst. 1. 2. t. 7. § 1.

998. Whether a donation mortis causa is valid also according to more recent laws? - As regards the more recent laws, according to C. B. 2301 ff. a donation mortis causa is explicitly admitted, under the condition, namely, that the donee survive the donor. A contract by which someone is obliged not to revoke it is null. According to C. A. 956, a donation mortis causa, the prescribed formalities being observed, is certainly valid as a legacy. And it is valid also as a donation, if the donee has accepted it, and the donor has expressly renounced the faculty of revoking it, and has handed over to the donee a written document. According to C. L. 1457; C. H. 620, a donation is admitted which has effect at the death of the donor; and it is governed by the same laws as testamentary succession.

According to C. I. 710 and 827, a donation mortis causa more truly is valid, like any other disposition and agreement for transferring ownership in conscience. According to C. G. there is a grave difficulty on account of art. 893, by force of which one cannot dispose of his goods gratuitously except by donation inter vivos and by testament. But more probably it is also valid; for in art. 967 it is said that one can dispose of his goods by testament, whether under the title of institution of an heir, or under the title of legacy, or under any other designation suited to manifesting his own will. But a donation mortis causa is reduced to a testament or to a legacy, or at least is another norm suited to manifesting one's own will. And indeed, if that donation were written in a testament, it would be valid as a legacy. Hence at most the general doctrine of a contract lacking legal forms would have place here. Besides, that donation certainly seems to be valid as a conditional donation inter vivos, as is a donation in view of marriage, cf. art. 1083, if it is not revocable at the donor's nod, but only from the event of health; for then the condition is casual, containing nothing contrary to law. Moreover, if a donation mortis causa is annulled according to French Law, "it is indeed annulled by the sentence of the judge, but probably not by the very fact." Gur. Cas. 816. Namely, there is in this contract its own natural force, which C. G. itself recognizes in several places, aa. 1235, 1311, 1338, etc. Therefore

before the sentence of the judge it will be valid in conscience. Finally, "very grave interpreters of the law, e.g., Merlin and Delvincourt, assert that manual donations mortis causa are valid, provided there is delivery or relinquishment (dessaisissement); and the Supreme Court so declared on Dec. 12, 1815." Gur. Cas. 811, Comp. 836; Gousset 797, 798 and on a. 893; L. 741-743.

999. He resolves: A donation under the condition that it be restored if it is demanded back is more probably valid; for "although it is not valid as a donation inter vivos, which requires that the donor irrevocably strip himself of his thing, nevertheless it can be valid as a donation mortis causa, on account of real delivery, which ought to have no less force, even though no mention of death is made." Gur. 836; C. L. 1473. He to whom a movable thing has been given mortis causa can secretly take it after the donor has died, provided he is certain about the donation and the last will of the deceased. For the thing was not given so that it would be paid by the heir, which is proper to a legacy, but so that it would be taken by the donee himself. Then, too, he has a right in the donated thing; for a donation mortis causa is a conditioned donation, which through the death of the testator becomes absolute. Therefore, when the donor has died, the donated thing at once passes absolutely into the ownership of the donee. Cf. 997. Therefore here he can take it as his own. Hence, if he is compelled by the judge to take an oath that he has received nothing from the goods of the deceased, he can assert under oath that he has received nothing from the goods of the deceased, namely, nothing which was not his own. - Gousset 797 and on a. 931.

1000. What is the nature of a donation inter vivos? - A donation inter vivos is an act of spontaneous liberality, by which the donor strips himself irrevocably of the thing donated in favor of the donee, who accepts it. C. I. 1050; C. G. 894; C. L. 1456; C. A. 938, 946. - He strips himself actually and irrevocably; nevertheless nothing prevents a donation from being made under a condition, whether suspensive or resolutory.

C. I. 1066, 1078; C. G. 944, 953. A suspensive condition is tacitly present in donations which are made on account of marriage, C. I. 1068; C. G. 1088. A resolutory condition is tacitly present in reciprocal donations which two persons make to each other, cf. C. I. 1083. But a condition invalidates a donation when it is placed wholly in the power of the donor, C. I. 1066; C. G. 954; or when it imposes on the donee the burden of satisfying any future debts whatsoever of the donor, C. I. 1067; C. G. 945; or when it establishes that, if the donee or his children die first, the donated thing is to revert to someone other than the donor himself, C. I. 1071; C. G. 956; except in the case in which testamentary substitution is permitted, C. L. 1473; and according to the same C. L. 1474, substitution in favor of a third person, contrary to the preceding disposition of the law, is null, but does not produce the nullity of the donation. So also C. H. 641. One can, however, donate under reservation of usufruct for himself, and, when he is gone, also for others, but not by calling others successively one after another. C. I. 1074. Cf. C. G. 949; C. H. 640. - If the donor reserves to himself the faculty of disposing of some object or some sum which is included in the donation itself, if he dies before that disposition, such object or sum passes to the heirs of the donor, not to the donee himself, notwithstanding any contrary clause.

C. I. 1069; C. G. 946. It is otherwise according to C. L. 1464; C. H. 639. In favor of the donee, to whom at once the ownership of the donated thing is irrevocably transferred, namely a right in the thing; whence donation differs essentially from a promise, which gives only a right to the thing. Nor is delivery of the thing required, as is openly clear from C. I. 1062, 1125; C. G. 938, 1138. Cf. Rogron

on aa. 711, 937, 1138; L. 732. But delivery is required by C. A. 943, if the donation is verbal; and by C. H. 632, if a verbal donation concerns a movable thing; otherwise in both these Laws it does not obtain effect. Cf. 1011. Who accepts: without acceptance there is as yet no donation, both in positive law and in natural law. For this reason it can be revoked, even if it has been confirmed by oath, because the oath follows the nature of the act. C. I. 1057; C. G. 952; C. H. 629; Lugo d. 23. n. 42; Inst. 1. 2. t. 7. § 2; L. 725-727.

1001. Whether an absent person sufficiently accepts a donation when he receives the message or the donor's letters? "A donation made to an absent person, if it is made through a messenger, can be revoked until it is accepted before the messenger; for it is not sufficient if it is accepted before others. But if the donation is offered by letters, Viva says it is sufficient that the letters reach the donee. But Lessius and the Salmanticenses say that more is required, namely, that letters or a messenger of acceptance be sent back, so that the donation may be valid." L. 725, 728. Certainly, in a gratuitous contract, because it produces an obligation in one person only, the union of wills seems sufficient in that one person alone who acquires the right. Cf. here n. 340. This as regards natural law. Cf. n. 940. As regards positive law, cf. 1011.

1002. What if the donor, after sending a messenger, has revoked the donation? If the donor revokes the donation before it is accepted, and the revocation becomes known to the messenger whom he sent, the messenger can no longer effect anything; since every power of offering or delivering has been taken from him. - But if the revocation does not become known to the messenger before execution, then a distinction must be made: either he acts only in the manner of a messenger reporting another's donation, or delivering the thing, or he has a mandate to make the donation. If the former, the subsequent donation is invalidated by the revocation that has been made, because consent on the part of the donor is entirely lacking. If the latter, his acts are valid, and the donation can be validly accepted. For the mandator is bound to ratify what by force of the mandate has in good faith been done in his name. This as regards natural law. As regards positive law, cf. 986, 1011.

1003. "Whether after the death of the donor a donation can be validly accepted? - Lessius distinguishes. If the donation has already been made, and the donor before death sends a messenger or letter, then he judges that it can be accepted. The reason is that the donation remains virtually in the letters or messenger sent. And Sanchez, Lugo, and Viva probably hold the same. But Lopez ... and others more probably deny this ... and the Salmanticenses judge it probable, because after the death of the donor his will cannot be united with the consent of the donee, as is required for acceptance.... But if, say Lugo, Lessius, and Sanchez, the donation has not yet been made, but has been ordered to be made by a messenger, even through a gift sent by him, then after the death of the donor the donation can no longer be accepted, from L. Inter causas ff. Mandati, etc., where it is expressly declared that a mandate expires after the death of the mandator. Notwithstanding this, however, Sanchez says that the donation can be accepted, because here the mandate, since it is a certain favor granted, does not expire by the death of the mandator.

And Lessius and Viva, etc., deservedly think this probable.... Nevertheless it must be noted with Lugo, Molina, and Sanchez, from the same L. Inter causas, that if the donation has been made by a messenger, while the messenger and the donee are unaware of the death of the mandator, then the donation will be valid." L. 730; Lugo Resp. Mor. 1. 4. d. 6. n. 6; Ithur. Cas. 8.

But there is a grave difficulty in this, that the donee should validly accept the donation after the donor's death; for then the donor by death has already ceased to be owner of the donated thing; and it can no longer be a donation inter vivos, but a legacy, which is quite different. Cf. 986. - This as regards natural law. As regards positive law, cf. 1011. - Gousset 799; C. H. 623, 629; C. L. 1465.

1004. When the donee has died before acceptance, can his heir accept the donation? Sanchez, etc., affirm it, because the heir represents the person of the deceased. Lessius, the Salmanticenses, etc., however, more probably deny it, because the heir succeeds to the real rights of the deceased, but not to personal rights, such as the right of accepting a donation; because liberality adheres to the person. Lessius nevertheless concedes that if the heir is the son of the donee, he could accept by equity, since such is then presumed to be the mind of the donor. L. 731. Cf. 986. This as regards natural law. As regards positive law, cf. 1011. - C. H. 630.

1005. What, by natural and positive law, concerning the capacity of the donor? By natural law all those can donate who can alienate their goods; for donation is a species of alienation. Hence it is required that the donor be sound in mind, and that he not have been declared incapable by law when he completes the donation. From Roman law the following are incapable of donating: 1. Those who are both deaf and mute from birth, unless they know how to write. 2. Those condemned for a capital crime. 3. Wards or minors below puberty, unless it concerns things of slight importance. 4. Spouses between themselves, unless the donation is of slight importance. 5. A father toward a son remaining under his power, except for the sake of marriage, war, studies, and the like. 6. "If anyone has brought ruin upon himself by the nuptials of an incestuous and forbidden marriage, let him be deemed to have neither wife nor children from her. Let him, surviving or about to die, give or leave absolutely nothing to the aforesaid, either through an interposed person or otherwise." L. 6 de Incest. et inutil. nupt. C. Cf. Nov. 89, Cap. 15. 7. "If anyone has legitimate children, he cannot leave or give to natural children and to their mother, or to a concubine, more than one ounce; ... or if there are no children, but only a concubine, we permit half an ounce to be left or given to her." Nov. 89, Cap. 12. An ounce is the twelfth part of an inheritance. - L. 721 ff. According to C. L. 1476; C. H. 624, all who can contract and dispose of their own goods can donate. According to C. I. and G., those cannot donate who, by the same law, cannot make a testament; and regularly minors, C. I. 763, 1052, 1386; C. G. 902-904, 1905; wives, C. I. 134; C. G. 217, 905; and incapable persons interdicted and renounced, C. I. 1052, 1387; C. G. 502, 902. - According to C. I. 1054; C. H. 1334, spouses cannot, during marriage, give to one another. According to C. L. 1178 ff., spouses can make donations between themselves; but these are always revocable. According to C. G. 1094, 1096, 1098, 1099, donation between spouses is admitted, yet it is always revocable; and generally they can give to each other, inter vivos or by testament: 1. If there are no descendants, whatever they could give to an outsider as to ownership, and moreover the usufruct of the part of the inheritance reserved to ascendants. 2. If there are descendants, either a fourth part of the goods as to ownership, and at the same time another fourth as to usufruct, or only the usufruct of half the part. 3. If a spouse has children from a preceding marriage, he cannot give to the new spouse beyond the part which falls to the child who receives less than the others, nor exceed a fourth part of the goods.

According to C. Comm. G. 446, acts transferring ownership of goods, whether movable or immovable, by gratuitous title, of merchants who have made cession of goods, within ten days before the sentence of the tribunal declaring the day of the same cession, are null and without effect.

According to C. Comm. I. 707, the same acts are null by full right from the day of cession. Cf. n. 1022; L. 721, 723, 724. From Canon Law, rectors of churches, and beneficiaries, as well as all administrators of ecclesiastical goods, and Regular Prelates, cannot donate immovable goods and precious movable goods dedicated to God without the Apostolic Beneplacitum. Extrav. Ambitiosae de Reb. eccles. non alienand. - From Trent, sess. 25, c. 16 de Reg., donations and renunciations, even sworn ones, which are made by those entering Religion, are invalidated unless they are made with the permission of the Bishop or vicar within the two months immediately before profession, and profession follows afterward. Cf. L. 1. 3. n. 935. From the Norms of the S. C. EE. et RR., June 28, 1901, n. 121: "That Sisters perpetually professed may licitly strip themselves of the radical ownership of all their goods by acts inter vivos, the permission of the Apostolic See is required."

1006. Whether someone validly and licitly accepts a donation from one who is burdened with debt? Lessius, Molina, Navarrus, etc., affirm it, and Lugo and Paludanus apud St. Alphonsus think it probable. The reason is that he can indeed transfer ownership, since he is still the true owner of the thing which is donated; while you, in accepting, are not the per se and efficacious cause of the creditor's loss, but only the accidental and permissive cause. The per se and efficacious cause is only the donor, for he himself is the one who determines to make the donation. Therefore, provided you have not induced him to donate, you do not sin against justice. Nor do you sin against charity; for this does not oblige you to reject a grave advantage of your own, in order to preserve debtors unharmed.

But Paludanus, Bonacina, Lugo, and others apud the same St. Alphonsus more truly and more commonly deny it. The reason is that the donee is the true per se and efficacious cause of the creditor's loss; for donation essentially does not consist in the will of the donor alone, but also in the will of the acceptor, without which no alienation or donation exists. Therefore, just as the donor injures justice by rendering himself unable to pay, about which no one doubts, so also does the donee cooperating in the unjust action of the donor with damage to the creditors. Hence he is bound to restitution of the loss. Nor indeed is it valid to object that alienation in itself is not the cause of the creditors' loss, but the condition of the alienator. For this condition in the case either exists from that alienation, or at least is aggravated by it. L. 722; H. A. tr. 10. n. 128. Each opinion seems not to lack its own probability. - Ithur. Cas. 8. n. 12; L. 812, 694, 695; D'Annib. ed. 4, p. 2, n. 433. Cf. here 1005 at the end.

1007. Note: According to C. I. 1091, 1092; C. G. 920, 921, creditors are not granted the right of demanding reduction of a donation made by one burdened with debts. This right is granted only in an inheritance, if the legitime has been injured, to the heir in whose favor the law has reserved the legitime. According to the same C. I. 1235; C. G. 1167; C. A. 953; C. H. 643, creditors can indeed impugn acts done by debtors in fraud of their rights. Alienation is in fraud if by it the debtor has been made unable to pay, and this did not escape the knowledge of the alienator in gratuitous contracts, and of the alienator and receiver in onerous ones. Yet fraud does not harm third parties who, not participants in the fraud, have acquired rights in an immovable before the petition for revocation of the alienation was transcribed. C. I. 1235. Hence the alienation that has been made is valid, and the thing alienated in fraud passes into the ownership of the acquirer.

According to C. H. 643, 1291, 1297, gratuitous contracts of a debtor, when otherwise, by reason of the donation made, the creditors cannot receive what is owed to them, are presumed to have been

made from fraud and are rescindable. According to C. A. 950, one who is bound to support another cannot injure his right by a donation made to a third person. He who has been injured in this way will be able to sue the donee, so that the donee may furnish him what the donor cannot.

1008. What, by natural and positive law, concerning the capacity of the donee? By natural law, on the part of the donee there is required capacity to receive. But all human beings are capable who are not constituted incapable by law of receiving donations. Nor are infants, the insane, or others lacking the use of reason to be regarded as incapable, since they are capable of ownership, and can accept or occupy things through others, e.g., through parents, guardians, etc. Cf. 856. From the Common Law the following cannot accept a donation: 1. All who receive from those who cannot make donations, according to what was said in n. 1005. 2. Those receiving from persons who are burdened with debt, in fraud of creditors; and these are bound to compensate the loss which thence befalls the creditors. 3. Those receiving in defraudation of the legitime which is owed to necessary heirs. 4. Spouses. Generally the reciprocal donations of spouses are invalid. Exceptions: Unless the donation has been confirmed by oath; if the death of the donor intervenes, who dies before the donee, provided the thing was delivered during life; if the donation is remunerative, or is made mortis causa; if a wife gives to her husband so that he may obtain some dignity. L. 722, 723, 740. 5. "We allow chief physicians to receive what the healthy offer for their services, not what those in danger promise for their health." L. 9 de Professoribus et medic. 6. No one can give to a second spouse, whether by donation inter vivos or by an act mortis causa, more than to a son or daughter of a preceding marriage. L. 6 de Secund. nupt. C. 7. "He who perhaps has contracted nuptials contrary to the precepts of the laws, or contrary to the mandates and constitutions of Princes, shall obtain nothing from that same marriage, whether it was given before the nuptials or afterward in any manner whatever." L. 4 de Secund. nupt. C. From more recent Law, donation can be made to all, even to unknown persons, dishonorable persons, and those yet to be born, provided they have been conceived, and afterward are born living and viable, C. I. 1053, 724; C. G. 725, 906; C. H. 627; C. L. 1479; and, according to C. I. 1053, 1059, provided that the one from whom the person hoped to be born is already born, donation can be made to him. He is judged viable who is born after the one hundred eightieth day from conception. C. I. 160, 162; C. G. 312, 314. In doubt, he who was brought forth alive is presumed to have been born viable. C. I. 714; C. A. 23. - But generally those are excepted to whom something cannot be left by testament, C. I. 1053; C. G. 902. Moreover, specifically the spouse is excepted according to C. I. 1054; C. H. 50, 1334. Also excepted according to C. H. 1335 is the child of a spouse from another marriage, and the person of whom someone is the presumed heir at the time of the donation. Therefore to illegitimate children donation cannot be made beyond what can be left to them by testament. But just as a wife cannot give without the consent of her husband, or by the authority of justice, so neither can she accept a donation. C. G. 217, 906; C. H. 61.

According to C. L. 1478, 1489, pure and simple donations made to persons who cannot contract without due authorization produce effect independently of acceptance, insofar as they are useful to the donees. Donations made by a married man to his concubine are null.

1009. Note: According to C. I. 1055; C. H. 628, any donation in favor of an incapable person is null; according to C. G. 911, it will be null. According to C. L. 1481, a donation made to an incapable person produces no effect. Cf. C. H. 1334, 1335.

1010. What is the quantity of goods which can be given? Goods which are in commerce can be donated, and regularly all those which someone has at present, but not future goods; the legitimate portion of the inheritance and what is necessary for his own subsistence always being preserved. Nevertheless one can donate that which he has in determinate hope, e.g., fruits to be born from a certain field this year; fish which he will bring back from fishing, etc.; with regular exception of the hope of a future inheritance, concerning which every pact is prohibited. Cf. 995; C. I. 1064, 1091; C. G. 913 ff., 943, 947; C. H. 634-636; C. A. 944, 951; C. B. 2274 ff.; C. L. 1453, 1460; C. He. 470.

1011. What are the special prescriptions of positive law concerning donation? On the form of donations. Manual donation, from hand to hand, and therefore of movable things, can be made without writing, even according to the more recent laws, which touch only non-manual donations and donations of immovable things. Moreover, unless these are made by public instrument, acts of donation are null according to C. I. 1056, and are subject to the penalty of nullity according to C. G. 931. Exceptions, however, must be made: 1. Donations which are, as it were, conditions of another contract, e.g., I give, I sell you a farm, from which you will give Titius one hundred gold pieces annually; for these donations are something accessory. C. I. 1128; C. G. 1121. 2. Donations by which someone renounces some right of his; for they are donations in a broad sense. 3. Remunerative and onerous donations; for these are not donations properly so called. According to C. A. 943, a donation made only verbally and without effective delivery confers no right of action on the donee. This right must be founded on a written document. - According to C. H. 632, 633, a donation of a movable thing, made verbally, requires delivery; otherwise it will lack effect, unless the donation is made in writing, and the acceptance is established in writing. But a donation of an immovable thing, in order to be valid, must be made by public writing, and acceptance must be made in the same or another writing, which will have no effect unless it is made during the life of the donor. Acceptance, if it is recorded in a separate writing, must be notified to the donor in authentic form. - According to C. L. 1488, 1459, a donation of movables can be verbal, but with delivery of the thing; however, it must be written if it is without delivery. A donation of immovables, if it does not exceed 50,000 reis, can be made by a private writing signed by the donor and by two witnesses. If it exceeds the aforesaid quantity, it must be made by public writing. But in order that they have effect with respect to third parties, they must be registered. - Cf. here n. 1000; Gousset 799 and on a. 948. On the acceptance of a donation. Only adults who are neither under guardianship nor under curatorship can accept non-manual donations and donations of immovable things. C. I. 1059; C. G. 935. Hence, for non-emancipated minors, he accepts who exercises paternal power or guardianship. Emancipated persons and incapacitated persons who have been renounced need the intervention of a curator. C. I. 231, 1059; C. G. 935. But wives according to C. I. 134 can accept without the consent of the husband; but according to C. G. 217, 934 they need the husband's consent. Nevertheless all these, if they accept by themselves, have a donation which is valid also in the civil forum until the other party protests; since restitution in integrum is granted to him, and this is clearly drawn from C. I. 1061. L. 725. - Acceptance must be expressed in the same or another act; and, if a donation has been made to an absent person, it is not understood to have been made before it has been announced to the donor. C. I. 1057; C. G. 932. Hence before this, the donation is as if it had not intervened, and accordingly the donor can meanwhile revoke the donation by his own right. And if meanwhile the donor dies, the donation vanishes. So also according to C. H. 623, 629, 630, 632, 633; C. L. 1465, 1466. For the donor has ceased to be owner of the donated thing; and if the donee could still accept the donation,

the act of donation would already be turned into something wholly different, namely into a testamentary disposition. But once acceptance has been made, the donation is perfected, and transfers every right into the donee, without any need of delivery. C. I. 1062; C. G. 938. So also by Roman law, Inst. 1. 2. t. 7. § 2.

Moral bodies also cannot accept donations unless the faculty has been obtained from the Government. C. I. 1060. This disposition of the Law is in no way valid for the Church. On donation in view of marriage. Donations in view of marriage can be made and received by a minor, with the intervention of those whose consent is needed according to Civil Law for contracting marriage. They can also be made and received by an incapacitated person, with the intervention of a curator. C. I. 1386, 1387; C. H. 1329. Donations made to one or both spouses are not for that reason judged also to have been made to children to be born according to C. I. 1062, but they are indeed made to them according to C. G. 1082, if namely the spouse donee dies before the donor. These donations, made in contemplation of marriage, cannot be impugned because of defect of acceptance, C. I. 1062; C. G. 1087; C. H. 1330; nor can they be revoked because of ingratitude or because children have been born, C. I. 1087; C. H. 1333. Cf. C. G. 960. But they are null if marriage does not follow, C. I. 1068; C. G. 1088; C. H. 1333; C. A. 1247, or if it is pronounced invalid; nevertheless rights acquired by third parties remain, indeed also the rights of children, if at least one of the spouses contracted it in good faith. C. I. 1068. - Inst. 1. 2. t. 7. § 3. Cf. here n. 1022. On the nullity of donations because of omission of legal forms. Donations null in the external forum because of defect of form are not also null in the internal forum. This is clear: 1. Because, generally, a natural obligation independent of civil obligation is admitted according to C. I. 1237 and C. G. 1235. Hence he who has voluntarily satisfied a natural obligation cannot reclaim what has been paid. Therefore there is a certain natural obligation to satisfy a donation which has not been clothed with the formalities prescribed by law. And as regards C. I., this is most clearly confirmed by art. 1311. - 2. Donations under the form of an onerous contract, e.g., of sale, between persons capable of disposing of their own goods and of receiving, are certainly valid if they contain nothing contrary to the laws. And this is proved from actual jurisprudence. Moreover this jurisprudence openly shows that the prescribed formalities of donations do not touch the donation itself, but only the act or instrument of donations; otherwise all donations disguised under another onerous contract would be null. - 3. For the law itself in reality does not speak of the donation, but of the act of donation, or of the instrument in which the donation is contained; namely, that the donation may be valid with respect to third parties, and in the external forum. Only the act is subjected to nullity unless it has been made according to the prescribed form. C. I. 1056; C. G. 931. Cf. C. I. 1310, 1311, 1312, 1316, 1320, etc. An act is certainly understood to be perfected when it has been made according to law, because we must take the words of the law with effect, unless the law itself has openly expressed something else. Hence nothing essential, whether by its nature or by law, ought to be lacking to it. 4. It is commonly handed down that according to the laws no formality is required for manual donations. This is drawn from the fact that the formalities prescribed in C. I. 1070; C. G. 948 are not required for the donation itself, but for the act of donation. Therefore the same holds for non-manual donations and even for donations of immovable things. The same seems to have to be affirmed according to C. A. 943. For defect of forms does not take away the right in the thing, but the right of action. There is a graver difficulty from C. H. 633, in which mention is made not of the act of donation, but of the donation itself. But even here the Code admits a milder interpretation; for it is said that, IN ORDER THAT a donation of an

immovable thing BE valid, it must be made by public writing. Therefore it is not invalid by the law itself, by full right, if made otherwise. Hence also according to this Code the defect of forms renders the donation only rescindable by the sentence of the judge. According to C. B. 518, a legitimate form is required for the validity of a donation. Yet the execution itself of the promised thing supplies it. Cf. here n. 936; Gousset on a. 931. On simulated donations. Simulated donations are those which are hidden under an onerous contract, namely when the profit received from that contract is altogether notable, and with the intention of donating someone therefore sells or rents the thing for less. These donations are valid as to form, if the act under which they lie hidden is valid as to its proper form, provided they have not been made to those to whom it is not permitted to donate, or beyond that which it is permitted to donate to them. C. I. 811, 1010, 1011; C. G. 853, 854, 918.

1012. What is the obligation of donation? - Once the donation has been perfected, the donor is bound at once to hand over the thing which he has donated; and if he has destroyed it, alienated it, or made it worse, he sins gravely in a grave matter, and is bound to compensate the donee for every loss. The donee likewise is bound to fulfill the burdens attached to the donation. And if the donee has not obeyed the imposed conditions, the donation is resolved, namely, if it was made under a resolutory condition. C. I. 1065, 1078; C. G. 953; Lugo d. 22. n. 42.

1013. What are the cases in which donations do not obtain their full effect? - There are these two cases: reduction and collation.

1014. What is reduction? Reduction is: the rescission of a donation or legacy in proportion to the excess above the disposable quantity, which rescission must indeed be made by public authority. The reason is that the legitime should not be injured contrary to right. Rescission, and therefore the act, is valid, and one can retain what he has received if reduction is not demanded. But it cannot be requested except by those for whom the law reserves the legitime. Nor indeed can they, during the life of the donor, renounce this right. If the value of the donations exceeds or equals the disposable quota, the testamentary dispositions are without effect. But if the testamentary dispositions exceed the disposable quota or the portion of this quota which would remain after deducting the value of the donations, reduction is made proportionately without any distinction between heirs and legatees. Meanwhile the donee makes the fruits of the donated thing his own during the life of the donor. Manual gifts also are to be reduced, provided they are immoderate, so that excessive inequality among the children would be had thence. Immoderate, lest parents be dealt with as though they were managers of the affairs of the children. Immoderate, with attention to the conditions of the amount of the patrimony, the person giving, the cause of giving, etc. Therefore provision is made for the legitime of children by computing into the inheritance left at the time of death the things which the deceased, while living, had previously donated to outsiders: namely, for the determination at that time of the legitimate and disposable part; for the legitime is owed only from that time of death. Hence one mass, as it were, is formed from those things which the testator left when dying and from those things which he donated while living, so that the legitime may be taken from this mass. But also the debt which perhaps the testator left must be deducted. It is deducted, however, not from the donated things, but from the things left. For the things donated, since they had already been alienated by the testator, are not obligated to creditors. According to C. He. 527, alienations made by the disposer with the manifest intention of eluding the dispositions concerning the legitime are

subject to reduction. - Cf. here n. 673; C. I. 821-824, 1091 ff.; C. G. 920 ff.; C. H. 654 ff., 887, 818 ff., 1036, 1039, 1040, 1044; C. L. 1482, 1493 ff.; C. He. 474 ff., 486, 522 ff.; C. A. 951, 952; L. 740.

1015. What is collation? Collation is the act by which one of the heirs brings back into the sum of the goods which the testator left to be divided among the heirs those goods which he received from the donor, so that they may be divided equally among all; unless he rather wishes to renounce the inheritance, for this is an obligation of heirs, and then he can retain those things up to the concurrence of the disposable part. The reason is that, lest equality among the children be injured, the law presumes that the testator did not so much donate as, as it were, give a part of the future inheritance. As it were; for it is a true donation: since it is in the power of the donee to renounce the inheritance and to retain the donated things up to the disposable amount, if more has been donated to him.

C. I. 1001, 1014 imposes collation upon sons and descendants only toward other descendants who are coheirs; not likewise toward legatees, or creditors of the inheritance, and other heirs. But coheirs can request collation for determining the computation of the legitime, not for completing the disposable portion. C. B. 2050 ff. likewise imposes collation only upon descendants. C. H. 1035; C. A. 787 impose it upon the necessary heir. Likewise C. He. 626; C. L. 2098 impose it only upon legitimate heirs. But C. G. prescribes collation indiscriminately for any heir, 843-846, 857. Collation in two ways can be made: 1. In kind, i.e., by bringing back the donated thing itself. 2. By receiving less. The former mode is made ordinarily in immovables, the latter in movables. C. I. 1015 ff.; C. G. 858 ff.; C. H. 1045 ff.; C. He. 628; L. 954; C. L. 2100 ff.

1016. What are the exceptions of collation? - Various donations are exempted from collation: 1. Those which the testator gave while expressly exempting the heir from collation, or under the title of a preferential right (antiparte), within the limits of the part of which he was able to dispose. C. I. 1001; C. G. 843; C. H. 1036, 1038; C. L. 2099. According to C. I. 1004, 1006, 1012, donations of ascendants made to a descendant of the heir are presumed to have been made with dispensation from collation; likewise donations made in favor of him or her who is the spouse of a descendant. Nor is an immovable subject to collation if it has perished by chance and without fault of the donee. Cf. C. H. 1038-1040, 1045; C. G. 847-860, 855. - 2. If expenses were made by the donor in someone's favor, e.g., for food, clothing, customary gifts, etc. Likewise expenses of education, nuptials, learning a craft, and similar things. For these are owed by equal right to all children from natural law itself, from piety, from paternal custom. C. I. 1009; C. G. 852; C. H. 1041, 1042, 1044; C. L. 2105; C. He. 629, 631, 632. 3. The fruits of things subject to being brought back, which the donee received before the death of the testator. For these were never in the patrimony of the father. C. I. 1013; C. G. 851; C. H. 1049; C. A. 789 ff.; C. B. 2050 ff.; Gousset on a. 852; L. 958, 959.

1017. Whether a son must bring back expenses made by a father of slender fortune for him to be promoted to the priesthood? Resp. Negatively, generally speaking, because those expenses redound to the common good of the family, namely to its honor, advantage, etc., and these are judged to have been given gratuitously by the parents. But the patrimony given by the father to the son for receiving sacred orders must be brought back into the division of the inheritance, because it can be equated with the dowry of a daughter, which necessarily must be brought back. Otherwise equality among the children would be injured, which collation intends to prevent. This is also clear from C. I. 1007; C. G. 851; C. H. 1035, 1043, 1046; C. A. 788; C. He. 626; C. L. 2104; L. 488, 455, 456.

1018. Whether expenses made by a father for the sake of a son for a doctorate, benefice, studies, books, etc., must be conferred? - Resp. Negatively, for these redound to the common good of the whole family, honor, advantage, etc. Exception: if expenses are made which are altogether extraordinary. C. B. 2050; L. 724, 950, 955. According to C. H. 1043 they must be conferred. They must likewise be conferred according to C. L. 2104. Cf. C. A. 792.

1019. Whether money used to redeem a son from military service must be conferred? Resp. Affirmatively, if he is redeemed for his own utility, because equality seems to require this; otherwise, if the son is redeemed for the utility of the father, e.g., sick, old, or poor, or for sustaining the family, because the family which receives the advantage must also bear the burden. Rogron on a. 851 Cod. civ.; Gousset 729 and on a. 852; L. 955. - According to C. H. 1043 and C. L. 2104 it must be conferred.

1020. Whether a son is bound to bring back those things which he badly spent from the paternal goods, e.g., in games, drinking, etc.; and those things which the father paid to extinguish his debts? Resp. To the 1st, negatively, provided the son did not badly consume more than the father was content that he should spend on his own support and honest recreations; otherwise, if the expenses had exceeded. Resp. to the 2nd: Those things which were given for paying debts must be conferred, unless they were contracted in lesser age and he was not made richer thereby. For these are understood to have been given by the father with exemption from collation, since the son would not be bound to pay those debts, and restitution in integrum would be granted to him by the laws. - But if the son is a debtor to the father, he is indeed compelled to impute to his own part what he owed him, as debtor, just as any other debtor would have had to restore to the heirs, not as heir and by right of collation; for only donated things come into collation. C. I. 991, 101; C. G. 829, 843; L. 543, 544, 957; C. H. 1043; C. G. 851; C. I. 1007; C. A. 788.

1021. Whether the law of collation obliges in conscience? "The law of collation regards both the external and internal forum. Nevertheless, when it is certain, whether from the verbal declaration of the donor or from various circumstances of fact, that the donation was made with exemption from collation, although this exemption, because of defect of an authentic document, cannot be proved in the external forum, the donee is not obliged to collation. But, generally speaking, the donee cannot retain the excess over the legitimate part, whatever the will of the donor may be." Gousset on a. 852. For the will of the donor was not to donate absolutely, if he did not at least implicitly dispense from collation, by imposing, e.g., on the donee the obligation of never manifesting to anyone the gifts received.

1022. What are the exceptions to the irrevocability of donation inter vivos? - A donation 1. is resolved, but not by full right, if the attached conditions are not fulfilled. Cf. C. I. 1078, 1079, 1080; C. G. 953, 954, 956; C. H. 647, 651, 1333; C. B. 525 ff. 2. It can be revoked if the donee shows himself ungrateful toward the donor in the cases and time determined by law. Inst. 1. 2. t. 7. § 2; C. B. 530; C. I. 1081, 1082; C. G. 955, 956, 957; C. H. 648-650, 653; C. L. 1482, 1488 ff.; C. A. 948, 949; unless, however, they are donations on account of marriage, and also according to C. I. unless they are purely remunerative donations. C. I. 1087; C. G. 959. 3. But it is revoked by full right according to C. G. and C. H., but not by the law itself according to C. I., because of offspring supervening, even if that offspring had already been conceived at the time of the donation, even also if it was born posthumously, or if the donor has legitimated a natural son born after the donation; excepting

according to C. G. mutual donations of spouses, or of ascendants in favor of spouses, made on account of marriage; excepting according to C. I. remunerative donations and those made on account of marriage. According to C. H. 1333, donations on account of marriage are not revoked unless the marriage does not follow. According to C. L. 1482, 1483, 1486, the donor can revoke the donation because of the supervening of children, unless at the time of the donation the donor already had a legitimate descendant, or unless it was made on account of marriage. Nor can he renounce this right. Certainly just and pious is the presumption of law, that a donor lacking offspring made the donation with this virtual or tacit condition: Unless I acquire children; for everyone is judged tacitly to wish to prefer his own to outsiders. Hence every contrary agreement is also regarded as null. But since in this case the donation is revoked by the law itself, it does not revive through the death of the offspring. C. I. 1083-1087, 1090; C. G. 960, 961-966; C. H. 644-646. - According to C. A. 954, by the reception of children, donations do not vanish. 4. All donations inter vivos made by either spouse to the other can always be revoked. Nor indeed does the wife need the consent of the husband or the authority of the judge. C. G. 1096. According to C. B. 519, 528, the donor can fail to execute a donation if he is in need, or if he cannot fulfill the obligation of supporting others, and he can revoke a completed donation. According to C. A. 947, 954, if the donor suffers need, he can demand the fruits of the donated thing. The same right belongs to the donor's children born after the donation in a case of need. - According to C. B. 534, a donation which has as its cause a moral duty or a motive of propriety is not subject to restitution or revocation.

L. 738, 739.

1023. Whether a donation made to the Church or to a pious cause can be revoked because of ingratitude, or because of the arrival of offspring? Resp. To the 1st: A donation made to the Church cannot be revoked because of the ingratitude of the Prelate or clerics; because that donation is made principally for the good of the donor's soul, and principally to God, who cannot be ungrateful. Lugo d. 23. n. 175; L. 738. Resp. To the 2nd: "All commonly teach that it can be revoked only as to that in which it is undutiful toward the children, or as to their legitimate portions, not as to the whole. The reason is that as to the portion owed to the children, the donor is not presumed to have preferred the Church, but rather to have wished in the first place to satisfy his own duty of piety. But as to the rest, the Church is judged to be loved more, or equally, with the children; wherefore, just as a donation made to one son is not revoked when other sons are born, except as to their legitimate portions, so it must be said of a donation made to the Church, or to a pious cause." Lugo d. 23. n. 194. "Wherefore the revocation would subsist, and the donation would not revive, even if the children died, because an action once extinguished always remains extinguished." Ithur. Cas. 8. n. 12; L. 739.

VII. On Testament

1024. What are testament, codicil, legacy, fideicommissum? Testament, which according to the etymology of the name is the same as a testification of the mind, according to the thing signified is: A lawful declaration of the will concerning what someone wishes to be done after death concerning his things, with the direct institution of an heir. So according to Roman Law. - A lawful declaration of the will, i.e., a legitimate disposition of the will, and one congruent with law. Therefore a testament properly is not a contract, but an act approaching donation. Concerning what someone wishes to be done after death; for a testament is not only made on account of death, but also first acquires its force

through the death of the testator, according to that saying of the Apostle to the Hebrews 9:16, 17: Where there is a testament, the death of the testator must intervene. For a testament is confirmed among the dead; otherwise it is not yet valid while he who has testified lives. The faculty of making a testament is from the law of nature itself; otherwise there would no longer be any care for preserving and increasing goods acquired by one's own labor or received from another, and for rendering them stably fruitful.

Gal. 4:7; Gen. 25:5; Job 42:15. Cf. n. 1042. - With the institution of an heir; for by this a testament differs from other last wills, namely from a codicil, legacy, and fideicommissum, in which no heir is per se and directly instituted. - Inst. 1. 2. t. 10; L. 919. A codicil, or little codex, is the supreme will of the deceased, less solemn, outside a testament, concerning what someone wishes to be done after his death, without the direct institution or nomination of an heir to whom the inheritance is immediately owed, so that, apart from the institution of an heir, the testator may be able to dispose of his goods in other ways, e.g., by committing legacies to the heir, or fideicommissa, etc. C. A. 553. But a codicillary clause is a clause inserted into a testament, by which it is declared that if the testament is not valid because of some defect, nevertheless it ought to be valid by force of the codicil. For a codicil five witnesses sufficed, even not summoned, and even women. - L. 919 ff.; Inst. 1. 2. t. 25. A legacy is a certain donation left by the deceased in a testament, and to be furnished by the heir. L. Legatum 36 de Legatis etc. Dig. A donation of a certain kind, for properly it is not a donation, since it is not transacted immediately between the giver and the acceptor. To be furnished by the heir; for a legacy is a certain particular law spoken to the heir, and therefore it is called a legacy: which is from lego, whence lex is derived. To be furnished by the heir, namely after the death of the testator. Left by the deceased to the legatee, to whom therefore the ownership of the thing passes immediately from the testator, although its possession is first with the heir, and the thing must be handed over by the testamentary heir. Inst. 1. 2. t. 20; C. A. 535; C. B. 1939. Fideicommissum is so called because the testator commits his supreme will to the faith of the first instituted heir, so that he afterward gives back the inheritance, either whole or in part, to another. Hence a fideicommissum is a mediate substitution of an heir; mediate, namely, of another after the first. At least two grades of succession must be instituted in order to have it, but the institution can also be of a second and further heir. C. I. 899; C. G. 896; C. A. 608, 609; C. B. 2100. But immediate substitution is had when someone names an heir in such a way that, if he cannot or will not enter upon the inheritance, another is heir in place of the first, who is instituted immediately by the testator himself, and not, by mediation of the prior one, from whom he receives the inheritance, as in mediate substitution. Mediate, indirect substitution is called fideicommissary substitution. Immediate and direct substitution is called vulgar substitution. C. I. 895; C. G. 898; C. A. 604; C. B. 2096, 2097; C. L. 1858 ff., 1866 ff. A fideicommissary institution is distinguished from a fiduciary institution insofar as in the former the restitution of the inheritance is committed to the faith of the heir openly, or in the testament itself; in the latter, secretly, or privately. Inst. 1. 2, tt. 15, 16, 23, 24. According to C. I. 759, "a testament is a revocable act, by which someone, according to the rules established by law, disposes, for the time when he will have ceased to live, of all his substances, or part of them, in favor of one or more persons." Almost the same according to C. G. 895; C. H. 667, 668, 764; C. L. 1739, 1794, 1839. - Hence the institution of an heir is not necessary, and the distinction between testament and codicil has been removed. It is otherwise, however, according to C. A. 552, 553; C. B. 1937, 1939. Properly, an heir is one who is instituted in succession to the whole patrimony, or to a quota part of it; not if

only some particular object is left to him, C. B. 2087. Likewise mediate, or fideicommissary, substitution has been taken away, C. I. 899, 900; C. G. 896; with a certain determined case excepted according to C. G.

1025. He resolves: A testament is a personal act, which cannot be left to the will of another. C. L. 1740. The inheritance devolves upon the heir from the death of the testator, neither before nor after. Not before, because of a living person there is as yet no inheritance; not after, because the heir continues the person of the deceased, and, by fiction of law, is the same person with him. Hence if the heir enters upon the inheritance later, the entry has retroactive force from the moment of the death of the deceased; and if he dies before entering upon the inheritance, he transmits his right to his own heirs. C. I. 933; C. G. 777; C. A. 531, 532, 533, 536, 537, 545, 797; C. H. 657, 661; C. B. 1942; C. He. 537, 538; C. L. 2011. Hence in an inheritance a day from which the inheritance ought to begin, or on which it ought to cease, is regarded as not having been added. C. I. 851; Inst. 1. 2. t. 14. § 9; cf. C. A. 695.

1026. Of how many kinds is a testament? By reason of the disposition of goods, according to C. G. 1002, 1003, 1010, testamentary disposition is threefold: universal, by universal title, by particular title. It is universal when the testator leaves to one or more persons the universality of his goods. By universal title, when the testator leaves to someone a quota part of all goods, half, a third; all immovables, all movables, or a quota part of these. According to C. I. 760, both these dispositions are called by universal title. By particular title is any other disposition of some determined thing, C. I. 760; C. G. 1010. The first and second disposition, according to C. I. 760; C. H. 660, 667, 668, 768; C. He. 483, confer the quality of heir; the third, that of legatee. According to C. G. 1002, that threefold disposition can be made under the designation of institution of heir or legatee; and thus an heir or legatee can be universal, by universal title, and by particular title. C. G. 1003, 1010, 1014. C. L. 1736.

By reason of form, according to Roman Law, testament is distinguished: 1. Solemn, in which all the conditions prescribed by the laws are observed. But it is twofold: first, in writing or closed, which, marked with a seal, is handed over to be subscribed by seven witnesses, suitable, male, pubescent, etc., with whom the testator subscribes, if he can; but if he cannot, an eighth witness must be added. The other, open, which is made before seven witnesses, whether in open writing or by living voice; whence it is also called nuncupative. 2. Privileged, which is valid without the solemnities. Such is a testament made by a soldier, or by another in time of plague, or in other circumstances of this kind. Inst. 1. 2. tt. 10, 11; L. 920, 926. Likewise by reason of form, according to C. I. and C. G., testament is threefold: 1. Holographic, which for validity is written entirely by the hand of the testator, with indication of year, month, and day, and with the placing of the name. C. I. 775; C. G. 970. According to C. I. it is expressly required that the signature of the name be placed at the end of the dispositions. The note of time can be made in full letters or in numbers in any part of the testament. The note of place is not necessary. Any paper, even if not sealed, suffices; nevertheless, if the matter is brought before the judge, a fine in France of 30 francs must be paid by the heir. A holographic testament, before it can be committed to execution, must be presented to the judge in the tribunal of first instance; but the judge, after sufficient examination, will order that it be kept with some notary. But this form is entirely accidental. C. G. 1007. Likewise, according to C. I. 26, 912 ff., a holographic testament, at the instance of him whose interest it is, is deposited with the notary of the place in which the succession has been opened, in the presence of the praetor and two witnesses, and the due

instrument of the matter is drawn up. Succession is said to be opened from the point at which the right of the heir in the things of the deceased begins. C. He. 560. It is not the same as the opening of the testament, namely when the testament becomes of public right. Gousset on a. 970. Cf. C. He. 505, 556; C. L. 2009 ff. 2. Public, or solemn, is written by one notary before four male witnesses, adults, etc., or by two notaries before two witnesses, and is subscribed by the testator, the notary, and the witnesses. And if the testator cannot subscribe, mention must be made in the acts, and also of the cause by which he is prevented from subscribing. The testator must declare his will before the witnesses to the notary, or notaries if there are two, who write it; and according to C. I. the notary can use the work of a secretary for writing. Then it must be read to the testator before the witnesses. Finally, mention must be made that it was dictated by the testator, written by the notary, and read to the testator. C. I. 776 ff.; C. G. 971 ff. - Cf. C. L. 1914 ff., where several formalities of a public testament are established; if any of these is lacking, the testament will be without effect. 3. Mystic or secret, which the testator, closed and marked with a seal, hands over to the notary before six witnesses, asserting that this is his testament, written by himself or by another, and subscribed by himself. This attestation must be written over the codex of the testament, and subscribed by the notary, witnesses, and testator. If the testator could not subscribe the testament, mention must be made of this, and another witness is added besides the six required. C. G. 976 ff.; C. I. 782 ff. But according to C. I. 783 only four are required; and if the testator cannot write, the same is observed as in a public testament. If it was written by another, even only in part, according to C. I. the testator must subscribe the testament on each page, and declare that he has read the testament. If a secret testament, because of some defect, is not valid as such, it can nevertheless be valid as a holographic testament, if it has its required conditions. C. H. 715.

Cf. C. L. 1920 ff., where several formalities of a closed testament are established; if any of these is lacking, the testament will be without effect. Those who can write can make a holographic testament; those who can speak can make a public one; those who can read can make a secret one. The deaf-mute and the mute can make a testament by holographic or secret testament. C. I. 775, 778, 785, 786; C. G. 971, 972, 978, 979; C. H. 688, 695, 697, 698, 708, 709. - L. 920. There are besides privileged testaments, which have a special form. These are: 1. The testament of a soldier, and of those who by office are assigned to armies. Cf. C. I. 799-803; C. G. 981-984; C. L. 1944 ff. 2. Testament in time of plague. Cf. C. I. 789, 790; C. G. 985-987. 3. Testament made at sea. Cf. C. I. 791 ff.; C. G. 988 ff.; C. L. 1948 ff. 4. Public testament of rustics. Cf. C. G. 974. 5. Testament made in a foreign region. C. L. 1961 ff. - L. 926, 929; C. I. Dispos. etc. initio 8, 9. According to C. H. 676, a testament can be holographic, open, or closed. A holographic one, as to validity, must be written wholly on stamped paper corresponding to the year in which it is made, and subscribed by the testator, with indication of year, month, and day, aa. 678, 688 ff. But by the law of July 21, 1904, stamped paper is no longer required. An open testament is made before a notary and three suitable witnesses, aa. 679, 694 ff. - A closed testament can be written by the testator himself or by another, on ordinary paper, with the place, day, month, and year noted; it is subscribed by the testator at the end, and each page is also initialed, if he himself writes it; but if another writes it, then one's own signature must also be placed on each page. Both in this closed testament and in a holographic one, words blotted, corrected, or written between the lines must be noted by one's own signature. This testament, wrapped in another paper, closed and provided with a seal, the testator hands over to the notary before five witnesses, declaring it to be his testament; the act of this matter is written by the

notary on the outer part of the testament, and is subscribed by him, by the testator, and by the witnesses, aa. 680, 706 ff. But special testaments are had: military, aa. 716 ff.; maritime, aa. 722 ff.; made in a foreign region, aa. 732 ff. According to C. A. and C. B., a holographic testament also is admitted. - According to C. A. 577, 584, a testament can be made judicially or extra-judicially, in writing or by voice, written or nuncupative, with or without testimonies. Cf. aa. 578, 590, 598, 601. According to C. B. 2231 ff., 2249 ff., 2259 ff., a testament in ordinary form can be made: 1. Before a judge, or before a notary with the assistance of legitimate witnesses, either by verbal declaration or by consignment of a written disposition. 2. By a declaration written by one's own hand, subscribed by the same testator with indication of place and day, unless he is a minor. But extraordinarily, namely when death is imminent, a testament, in defect of a judge or notary, can be made before the syndic of the Commune, or at sea before three witnesses. Once the succession has been opened, the testament must be sent to the tribunal of succession. According to C. He. 498 ff., a testament can be made in public and holographic form. The public form needs a public official, who writes it, and two witnesses. The holographic must be wholly written and subscribed by the hand of the testator, with indication of the place, year, month, and day on which it was written. - In a certain extraordinary case, in which the testator cannot use one of the prescribed forms, it can be made in oral form, by declaring his own will to two witnesses, who will take care that it be recorded in a legitimate written document. But this testament loses its force if, fifteen days having elapsed from the time it was made, the testator is found to be in a condition to use the ordinary form. A succession contract is admitted, however, which for validity requires the form of a public testament. According to C. L. 1751, 1752, a testament by signs or by monosyllables only is null. And the testator cannot forbid that a testament whose nullity has been declared by law be impugned. According to C. I. 761; C. G. 968, 1097; C. L. 1753, a testament cannot be made by two or more persons in one and the same act, neither for the utility of a third person, nor by reciprocal disposition. According to C. A. 583, 1248; C. B. 2265 ff., a common testament between spouses is admitted, which can be holographic; it is written and signed by one, while by the other it is declared to be valid also for his own testament, and this declaration is likewise subscribed by him. If an heir of his own accord, knowingly and prudently, has fulfilled a testament not made according to law, the testament is now regarded as valid. C. I. 1310, 1311; C. G. 1339, 1340.

1027. What are the conditions required for testaments? In order that a testament be valid and firm, it is required: 1. That it have the conditions required for gratuitous contracts, and especially free and spontaneous consent. 2. That the disposition of goods be made according to the reservation or legitime assigned by law to the heirs. 3. That it not be made by one incapable of testating, nor in favor of one incapable of receiving, or of succeeding to the rights of the deceased. 4. That the substantial formalities prescribed by law be observed. L. 921; C. L. 1748, 1749.

1028. What kind of witnesses are required in testaments? - According to Roman law they must be male, pubescent, free, not deaf, not mute, not blind, not intestable by law, not heirs from the testament, nor domestics of the testator or of the heir; nevertheless legatees are not excluded. Inst. 1. 2. t. 10. §§ 6, 9, 10, 11; L. 919. According to C. G. 971, 975, 980, there are required males, adults, subjects of the republic, enjoying civil rights, not clerks of the notaries who draw up the act, not legatees or heirs, nor their blood relatives or relatives by affinity within the fourth degree inclusive, that is, within the second according to the canonical computation for the transverse line; yet in a mystic testament legatees or their relatives are not excluded. For those who are excluded from the

office of witnessing are rejected only for a public testament. According to C. I. 788, even foreigners residing in the kingdom are admitted among the witnesses, and only practicing notaries' clerks and secretaries are excluded, and those to whom the exercise of civil rights has been interdicted. By the law of Dec. 9, 1877, women also are admitted. - C. A. 591-597; C. H. 681 ff.; C. B. 2234 ff.; C. L. 1966.

1029. Whether testaments for profane causes, lacking legal forms, are valid in the forum of conscience? It must altogether be affirmed according to C. He. 519, 520 ff. It seems it must be affirmed according to C. I. For art. 804 by no means establishes the nullity of these testaments by the law itself, but only asserts that the constituted formalities are to be observed under penalty of nullity. Hence, with no sentence of a judge intervening, these testaments are valid in conscience. It is confirmed from art. 1311, where the validity of a testament is openly admitted. It also seems it must be affirmed according to C. G. 970, where concerning a holographic testament it is said that it will not be valid unless the established forms have been observed; and in art. 1001, likewise, it is said that the established formalities of testaments must be observed under penalty of nullity. Likewise it seems it must be affirmed according to C. A. 601, since, if even one prescribed formality has been omitted, the disposition, it is said, will be invalid. Similarly, according to C. H. 687, a testament, it is said, will be null if the prescribed formalities have not been observed. Cf. also a. 705 coll. a. 715. It must also be affirmed according to C. B. 2231 ff., where the making of a testament is altogether distinguished from the testament itself, and according to C. L., which likewise distinguishes the testament from its form, 1739, 1919.

But when a sentence has intervened, which someone can legitimately invoke, one must stand by it. Cf. 936; L. 927. It is useful here to note the disposition of C. I. 1311: "The voluntary execution of one testamentary disposition after the death of the testator includes renunciation of opposing defects and any other exception." Here it is supposed that the defects are not unknown. - Gousset 795 ff.

1030. Whether testaments for pious causes are valid if they lack legal forms? Resp. Affirmatively, and this opinion is most common and certain. The reason is 1. because it is established from Canon Law, C. Indicante 4, C. Cum esses 10, C. Relatum 11 de Testam., etc. 2. Because pious causes pertain to the Church and are subject to her jurisdiction. But the Church is free and immune from the civil power in all those things which directly fall under her jurisdiction. Hence it was thus established by Trent: "The Bishops, also as delegates of the Apostolic See, in cases conceded by law, are to be the executors of all pious dispositions, both in last will and inter vivos." S. 22. C. 8 de R. 3. The S. Penitentiary, having been questioned many times, responded that this opinion must be adhered to. And indeed the Sacred Roman Congregations and the Supreme Pontiff constantly embrace this opinion in practice. - Hence the contrary opinion in this matter cannot be regarded as truly probable. L. 922; D'Annib. p. 2. n. 339, ed. 3; Gousset 793; E. M.

1031. Note: Testaments for pious causes therefore need no solemnity established by civil laws; but it is necessary only that the will of the testator be known with certainty. Hence, if the testament has been made orally, two or three witnesses suffice. C. Relatum cit. But the witnesses can be whoever are legitimately able to testify. But if a writing of the testator exists, it indeed suffices for the validity of the testament or pious legacy. Indeed, in the forum of conscience, a nod or other sign of the testator suffices, without any witness, provided nevertheless that the will of the testator is certain.

Hence a testament begun and not perfected, because of the intervening death of the testator, is valid as regards the pious legacies already expressed in it. L. 922, 923, 924, 925, 937, 940.

1032. Whether a testamentary disposition under a condition and to a day is valid? Resp. A testamentary disposition can be made under a condition. C. I. 848; C. G. 1040; C. H. 790; C. A. 695; C. He. 482; Inst. 1. 2. t. 14. § 9. - Impossible conditions, or those contrary to good morals, or contrary to the laws, are regarded as not attached. C. I. 849; C. G. 900; C. H. 792; C. L. 1743, 1745; Inst. 1. 2. t. 14. § 10. Cf. C. A. 696-699, 712; L. 930. - According to C. He. 482, immoral or illicit burdens and conditions render the disposition null. Burdens and conditions without sense or merely vexatious for third parties are regarded as not attached. According to C. L. 1746, a cause contrary to law produces the nullity of the disposition. If the condition is one of not doing something, security must be furnished by the heir. C. I. 855. And this holds for an inheritance and for a legacy. - If the condition is suspensive, i.e., when the validity of the testament depends upon fulfillment of the attached condition, the disposition is null if the heir dies before its verification.

But if the condition is resolutory, i.e., when the execution of the testament is suspended until the condition obtains its effect, but by no means the value of the testament, then the heir or legatee acquires a right before the fulfillment of the condition itself, a right to be transmitted to his own heirs even before the condition has been fulfilled, provided it is fulfilled. C. I. 853, 854; C. G. 1041; C. H. 759, 799. Cf. C. A. 701 ff.; C. L. 1822 ff. No account is taken of a day added to the institution of an heir, by universal title, from which day he ought to begin or cease, C. I. 851; C. L. 1747; Inst. 1. 2. t. 14. § 9. Cf. 1025. A disposition by universal or particular title is null under the condition that someone call another as heir or legatee if he himself is called by that other. C. I. 852; C. H. 794; cf. C. A. 543; C. L. 1509. Contrary to law, according to C. I. 850; C. H. 793, is a condition which prevents nuptials, whether first or subsequent; unless it concerns some pension, habitation, use, or usufruct to be furnished during celibacy or widowhood; and likewise unless the condition of preserving widowhood for obtaining the inheritance has been placed by the spouse upon the surviving spouse. - According to C. A. 700, the condition likewise of celibacy is regarded as not attached.

The condition of widowhood is permitted, however, to a surviving spouse having children. So also according to C. L. 1808. By Roman Law if that condition is imposed on a widow, it is valid, by whomever it is imposed. Auth. Cui relictum C. de Ind. vid. toll. But a legacy left to a girl so that she not marry is owed to her even if she marries. For that condition is invalidated by law, because it is greatly in the interest of the republic that offspring be increased. L. Quoties 22 ff. de Cond. et demonstr.; L. Ambiguitates 2 C. de Ind. vid. toll. But by Canon Law both conditions, of widowhood and of celibacy, seem to have to be sustained, whether imposed by a spouse or by another person, whether it concerns a prestation or another disposition, on account of the honesty of the state of widowhood and the greater perfection of virginity. - L. 930 dub. 7; Laymann de Testam. c. 10. n. 13.

1033. Whether substitutions and fideicommissa oblige in conscience?

Immediate substitutions, also called vulgar substitutions, by which another heir or legatee is substituted for an heir or legatee, if the first does not enter upon the inheritance or legacy, are valid according to C. G. 898; C. H. 774 ff.; C. A. 604; C. B. 2096 ff. The same is held according to C. I. 895, if the first heir or legatee does not wish or cannot accept the inheritance or legacy. According to C. I. 896, one substituted to him who was unwilling to be heir is understood to be substituted to him who could not be, and conversely; unless the contrary will of the testator is established. It is otherwise

according to C. A. 605. Hence, as regards substitutions of this kind, there can be no difficulty from positive laws for the forum of conscience. Thus substituted persons are bound to fulfill the burdens which were imposed on those into whose place they are substituted, unless they are presumed to have been imposed only on those first called. C. I. 897. According to C. A. 608 ff., 618 ff., fideicommissa remain entire, and accordingly both vulgar substitution and fideicommissary substitution are admitted.

According to C. H. 781 ff., fideicommissary substitutions, by which the heir is burdened to preserve the whole or part of the inheritance and transmit it to another, will be valid and will obtain effect always, provided they do not progress beyond the second degree, or are at least in favor of a person living at the time of the death of the testator. But they can never burden the legitime; they must be express, and in no way fiduciary. Their nullity, however, does not harm the institution of the first heir. According to C. L. 1866 ff., a fideicommissum is approved only for descendants in the second degree, or for the children of the testator's brothers. Likewise, the nullity of a fideicommissary substitution does not bring about the nullity of the institution or legacy.

According to both C. H. 785 and C. L. 1741, secret testamentary dispositions of giving goods back to another heir will have no effect. According to C. He. 488 ff., the disposer can oblige the instituted heir to transmit the inheritance to another substituted heir. Transmission, unless there is a contrary disposition, is made at the death of the instituted heir, who acquires the inheritance like any other heir, but with the obligation of transmission; however, this obligation cannot be imposed on the substituted heir. And the same holds for legacies. According to art. 531, fideicommissary substitution is null in relation to the legitimate heir if it injures the legitime. According to C. B. 2100, 2108, 2109, 2113 ff., fideicommissary substitution is admitted without limit. Nevertheless, a substitution regularly has no effect if, after thirty years have elapsed from the devolved inheritance, the fact which ought to initiate the substitution does not take place. The heir has only restricted ownership of the inheritance, namely so that he may preserve and give it back to the substitute; he is almost its usufructuary, unless the testator has rather restricted the right of the substitute. According to the same C. B. 2190, 2191, both vulgar and fideicommissary substitution are admitted also as regards legacies. According to C. G. 896, 897, 1048-1050, fideicommissa, or mediate substitutions of an heir, are prohibited, also called fideicommissary substitutions, by which namely the heir or legatee is ordered to preserve and give back to another; they will be null even with respect to the donee, legatee, and heir. Hence not only the burden of giving back, but even the donation itself, the legacy, and the inheritance are subjected to nullity. Exceptions are those dispositions by which parents leave their goods, or a part of them, to one or more of their children, with the burden that they give back those goods to their descendants, nevertheless in the first degree according to art. 1048, and also in the second degree according to the law of May 17, 1826, whether born or to be born. But this law of 1826, which permitted more, was abrogated May 7, 1849. The same faculty is given to a brother of leaving goods, of which he can dispose, to one or more brothers, with the burden of giving the same back to their children born or to be born, likewise only in the first degree. According to C. I. 899, 900, any disposition by which the burden of preserving and restoring to another is imposed on an heir or legatee is a fideicommissary substitution, which is prohibited by law. Its nullity brings no prejudice to the validity of the institution of the heir or of the legacy; but the substitution, even in the first degree, lacks effect: namely legal effect; not every effect, even in the forum of conscience; since it is simply prohibited by law, whence it is indeed null, but not by full right, or by the very fact.

But according to C. I. 832, 902, 932, it is permitted to leave an inheritance or annual prestations, on account of a pious cause or a cause of public utility, for feeding the poor, educating boys, dowering girls, etc., any heir being instituted, e.g., his own future firstborn, or another's. Likewise C. H. 788; C. L. 1872 permit imposing on an inheritance even a perpetual burden of paying a pension annually in favor of some pious cause. Likewise according to C. I. 901, ownership can be left to one person and usufruct to others; but by no means successively to several, but only to those first called after the death of the testator. So also C. L. 1570. Moreover it must first be noted that there is no substitution prohibited by law if there is no command and burden of preserving and giving back. A simple request, and without an imposed burden, does not constitute a prohibited substitution. Moreover the burden of preserving is necessary. Hence a burden only of giving back does not again constitute a prohibited substitution. For then the instituted heir is in reality not an heir, but merely an executor of the testament. Nor is there a substitution, nor a fideicommissary or fiduciary substitution, but only a certain simple trust in a person, a simple fideicommissum made to him, if what is left to him must be restored to another, either immediately or after some time. Of preserving, namely absolutely; not if he has prohibited alienation by donation, outside the family, etc. In addition, a burden of giving back to a third person is required, namely of giving back after the death of the instituted heir. Hence neither is a burden of giving back from a day, e.g., to Caius after he has reached puberty, ascended to sacred orders, etc., after ten years, etc., a prohibited substitution, but a certain legacy under a condition, or to a term, which is approved by the law itself. C. G. 1040, 1041, 1186; C. I. 854, 856, 857, 1173, 1174. For it is not what the law intends to prohibit, namely that someone by his testament should wish to determine future successions twice or several times, or even indefinitely. Cf. C. I. 901. And hence it is clear that substitution is not properly a conditioned disposition, but a disposition under a mode. Hence the named heir is instituted truly and absolutely as heir, and ownership is transferred to him, with the obligation of fulfilling the imposed burden; if this is not fulfilled, ownership is not lost, but he can always be compelled to fulfill it. Gousset on a. 896; Rogron on the same article. According to C. I. 829, it is permitted to entrust the name of the true heir or legatee to a fiduciary heir, provided that person is not incapable. But it will be grave for the fiduciary heir to betray the trust. Inst. 1. 2. tt. 23, 24; C. B. 2103 ff. It must also be noted that, generally, it is established that the inheritance or legacy is adjudged to him who is named in the testament. Nor is proof admitted that the person called in the testament is merely apparent, under whose name another person is designated, notwithstanding any expression of the testament. But this is not applied to the case in which the institution or legacy is impugned as made through an interposed person to one incapable. C. I. 829. From what has been said it appears that the preceding law is at least not unjust, and accordingly there is no reason why every obligating force should be taken away from it, per se and commonly speaking; although, as is clear from the very tenor of the law, a testamentary disposition made against such a law cannot be regarded as void by the law itself. Hence, if someone directly instituted as heir by a fideicommissary substitution possesses the inheritance, he will be able to retain it in conscience, and will be able to invoke the rescission of the substitution. Likewise if a substituted heir has already obtained the inheritance by the aforesaid fideicommissary disposition, he will be able to retain it in conscience until he is compelled by the judge to restore it. But if someone is instituted heir by fiduciary substitution, from a prior promise made to the testator, or a pact, of transmitting the inheritance immediately or after a certain time to a third person or to a pious cause, he certainly will not be able to retain it in conscience. For he is altogether bound to

execute the trust he gave, if it is legitimate. Otherwise he must renounce the inheritance, so that it may come to the intestate heirs. L. 351, 952; E. M.

1034. What of the revocation and caducity of testaments? Revocation of a testament is had on the part of the testator himself. A testament, under whatever form it has been made, can always be revoked at the nod of the testator, because a testament by its nature is an essentially revocable act; consequently the testator retains ownership of his goods until death. And this holds even though the testator has promised or written that he will not change the testament. C. I. 916; C. A. 552, 695, 716; C. H. 737; C. L. 1754; C. He. 509, 510; C. B. 2253.

Hence by positive Law the renunciation and alienation of a future inheritance and all pacts concerning future succession are prohibited; and by private agreement testaments cannot be changed into pacts. C. I. 954, 1118, 1460; C. G. 1130, 1600; C. A. 879, 1383; cf. ib. 602, 1249; L. 932, 933, 934. Nevertheless C. G. 1082 admits succession pacts under the form of a contractual institution of the heir of future spouses or of their future children. C. A. 602, 1249 admits succession pacts only between spouses. C. B. 1941, 2274 ff. admits succession pacts among all, as regards institution of an heir, legacies, and burdens. Moreover no one can in any way renounce the liberty of revoking or changing testamentary dispositions; any contrary clause or condition lacks effect. C. I. 916.

"Such pacts are odious, and full of dangers because of the snares which are prepared for the life of him concerning whose goods the pact is made." L. 934. Exception: 1. Unless the renunciation is made, according to ancient law, in favor of a religious community; for then every presumption and danger of snares ceases. Cf. 955, 1010; unless by reason of the Constitutions of a religious order someone must dispose of all goods and rights acquired and to be acquired, and this in favor of the pious community or of a certain person; unless a pact is made concerning the inheritance of an uncertain person, e.g., if any inheritance comes to me while I live, let it be yours; the danger likewise ceases. L. 934; Lugo Resp. Mor. 1. 4. d. 4, 5. 2.

According to Roman Law a testament confirmed by oath cannot be revoked. Gur. Cas. 847. 2. According to Canon Law a professed religious who, before the emission of simple vows, has disposed by testament concerning ownership of his goods, cannot in the least revoke or change the disposition without an indult of the Apostolic See. S. C. EE. et RR., Dec. 20, 1861, Bizzarri Coll. ed. 1885, p. 151. But according to the Norms of the same S. C. for New Institutes of simple vows, n. 122, for making and for changing a testament after vows, Apostolic permission is needed; and in urgent cases the permission of the Ordinary or Superior General suffices, or even, if it cannot be done otherwise, of the local Superior.

But a testamentary disposition once revoked vanishes and remains without effect, even though the new disposition cannot obtain execution. C. G. 1037; C. I. 919. The caducity of a testament properly is had on the part of the heir. Properly a testament is caducous when testamentary dispositions, although valid from the beginning, nevertheless become infirm on the part of the heir, if he is unwilling or unable to enter upon the inheritance.

But legacies remain, although the testament becomes caducous. C. I. 853, 854, 890, 891; C. G. 1039, 1040, 1041, 1043; C. A. 703-705; C. L. 1759. Cf. C. H. 689, 703, 704, 719, 720, 730, 731, 740, 764. Cf. C. I. 925. Revocation of a testament can be made in two ways: expressly and tacitly. Expressly, or 1. by destruction of the testament; 2. by an act drawn up before a notary, by which the change of will

is expressed; 3. by restitution of the testament made to the testator by its public depositary; 4. by a new testament contrary to the prior one: but then the revocation is not judged entire unless the dispositions of the new testament are contrary to all the dispositions of the prior one, and all are then valid: but if they are contrary, the most recent are valid.

C. I. 916 ff.; C. G. 1035 ff.; C. B. 2254 ff.; C. He. 511. Tacitly, by donation, sale, exchange, destruction, or any disposition of the thing bequeathed, by which the change of the testator is manifested. C. I. 892, 893; C. G. 1042; C. He. 511. Any alienation made by the testator, whether of the whole or of a part, of the thing bequeathed, even by sale with a pact of retro-sale, revokes the testament as regards that which was alienated, although the alienation is null, or the thing returns into the possession of the testator. C. I. 892; C. G. 1038. And the same holds if the testator has transformed the thing bequeathed in such a way that it has lost its preceding form and denomination. C. I. 892. - L. 700; C. A. 713 ff.; C. H. 738 ff., 869; C. L. 1754 ff., 1811; Inst. 1. 2. t. 17.

1035. Whether a testament is ever broken by the law itself? - A testament is broken, or the right of the testament itself is vitiated, by the agnation of a son or descendant. For a testamentary disposition, whether under the title of universal institution of an heir, or under the title of a particular legacy, made by one who, when he made the testament, either lacked sons or descendants, or was unaware that he had them, is broken by the law itself if there exists or supervenes a legitimate son or descendant of the testator, even posthumous, or legitimated, or adoptive. And the aforesaid breaking still has place even if the son was conceived at the time of the testament, and, if it concerns a legitimated natural son, even if he had been recognized by the father before the testament and legitimated after the testament.

But if the son or grandson has died while the testator is living, the testament is confirmed. But the testament is not broken, or deprived of its force, if the testator provided for the case that sons or their descendants existed or would supervene. C. I. 888, 889. - L. 950; C. A. 777, 778; C. L. 1760, 1814, 1815; Inst. 1. 2. tit. 17. § 5. 1; L. 1 de Iniu. ru. irr. f. test. When a testament has been broken, all dispositions in it are invalidated, and the pious legacies themselves do not remain valid from the presumed will of the testator, if the testator was unaware of existing offspring and did not hope that it would exist.

1036. Whether each testament is valid when a double testament is found, made on the same day. Fr. Gury in Cas. Consc. n. 833, where he cites Pontas: "each," he says, "testament is valid, since each enjoys all the conditions of a holographic testament and each was made on the same day. Therefore the two heirs have an equal right. And both ought to divide this inheritance between themselves.

For it is the same as if each had been instituted heir in the same testament." Cf. C. A. 715. Cardinal de Lugo d. 24. n. 47: "When," he says, "two testaments are produced made on the same day, and it cannot be known which was later; and the same, in my judgment, will be true when two are produced without the day on which they were made; some say that both are valid and the goods must be divided; which Fr.

Molina also follows, disp. 153, par., when they are on the same day; and certainly if there are any legacies, or any other things which are prescribed in both testaments, these seem to have to be fulfilled, since as regards these the will of the testator is certainly established; which at least will be true if a codicil suffices for their value, and that testament can at least be valid as a codicil because of

a codicillary clause formally or virtually placed. But as regards the other things in which those testaments are opposed, the common opinion, speaking of common law, deservedly teaches that neither testament is valid because of uncertainty, and that the inheritance comes to the intestate heirs.... Thus commonly the doctors, whom Sanchez reports and follows in the cited cap. 1, dub. 22, n. 3. Yet he limits this opinion with others, first, if neither heir should possess; otherwise the possessor is not to be despoiled in doubt. Second, unless in one testament those are instituted who, ab intestato, ought to succeed; for then that testament would have to be preferred. Third, unless one is in favor of a pious cause, because of whose favor it will be sustained." This opinion, which stands for the invalidity of both testaments, seems more probable, since this double testament shows the will of the testator suspended and not yet determined. For a testator making two testaments which are mutually opposed actually chooses neither, but is about to choose one or the other. Nevertheless the opinion which stands for the validity of both testaments does not lack its probability. Cf. 1034. C. L. 1756.

"Two tablets of a testament, written at the same time for the sake of a copy, as commonly happens, of the same paterfamilias, are produced; in one a hundred, in the other fifty gold pieces are bequeathed to Titius; you ask whether he is to have both fifty gold pieces and a hundred, or only a hundred? Proculus responded: In this case the heir must rather be spared; and therefore both legacies are by no means owed, but only fifty gold pieces." L. Sempronius 47 de Legatis etc. Dig.

1037. What, by natural and positive law, concerning the capacity of testators? - By Natural Law all can testate, with exception only of those who are not masters of their own mind, or have been declared incapable by law, even though they are under curatorship or guardianship; and they can testate even without a curator or guardian. Those deaf and mute from birth can also testate. - L. 942; C. A. 565-567; C. H. 662. By Canon Law, professed religious cannot testate, even if they are Bishops; even if they are perpetually secularized, without a special Apostolic Indult; and likewise Bishops and clerics, as regards the revenues of benefices, except by privilege or legitimate custom. Novices, since they are still of their own right, can testate. Nor indeed is their testament broken when profession has been made, even if the monastery has been omitted in it. Nor is Trent, sess. 25, c. 16 de Reg., opposed; since there it concerns dispositions inter vivos, valid of themselves at once, but by no means testaments, which of themselves are revocable. C. 1, 2, 7-9, 12 de Testam.; Trent sess. 25, c. 1 de R., c. 16 de Reg.; C. Inscrutabili of Innocent XII, Jan. 30, 1694; L. 935, 942; Schmalz. de Testam. n. 83 ff.; Ferraris v. Beneficiatus a. 3. n. 8; C. A. 573; E. M. By Roman Law all who have the use of reason can testate, except those deaf and mute from birth, those under puberty, sons who are under paternal power, prodigals, those polluted by an incestuous and forbidden marriage, those condemned to civil or natural death, as well as professed religious. But sons of families are permitted to testate concerning peculium castrense or quasi-castrense. Inst. 1. 2. t. 12; Tit. 22 Cod. According to C. I. 762, 763, all can testate who are not declared incapable by law. Moreover, as incapable, the following cannot testate: minors before the eighteenth year; those interdicted because of infirmity of mind; those who are not of sound mind at the time when they make the testament; those condemned to prison with hard labor, Cod. poen. 32. According to C. G. 509, 903, 904, the following can testate: 1. All who can make donations inter vivos. 2. Wives, who have full faculty of testating, although they cannot make donations without the special consent of the husband or authority of the judge; for they need neither of these in order to be able freely to dispose by testament. 3. Minors from the sixteenth year can testate only concerning half the part of the goods of which adults are able to dispose. If

nevertheless they exceed this quantity, the testament is valid, but can be reduced to the legitimate limits.

But those who are not of sound mind, and those interdicted, cannot testate. According to C. A. 568, 569, 574, those below puberty are incapable of testating. Those condemned to death and to hard prison cannot make any valid testamentary disposition. Minors before the eighteenth year of age can testate only nuncupatively and before a judge. After this age they can testate freely. Prodigals dispose only of half part of their patrimony. According to C. B. 104, 2229, those who are capable of contracting are also capable of testating. But one who has a restricted capacity of contracting does not need the consent of his legal representative for making a testament. A minor, after the completed sixteenth year of age, can testate. One interdicted because of infirmity of mind, prodigality, or vice of drunkenness cannot testate.

According to C. L. 1763; C. H. 663, minors before the fourteenth year of age and those who habitually or accidentally are not masters of themselves are incapable of testating. According to C. He. 467 ff., he is capable of testating who enjoys discretion of reason and is eighteen years old. For a succession contract a greater age is required. Dispositions made under the influence of error, fraud, force, or threats are null.

1038. What, by natural and positive law, concerning the capacity of heirs? - By Natural Law, all human beings, even the insane, the deaf, the mute, slaves, indeed even a community, can be instituted heirs, unless they are specially prohibited by Positive Law. L. 943. By Canon Law, professed religious of Orders to which it is permitted to possess immovable goods in common can be instituted heirs, and the monastery succeeds in their name, unless a contrary special Constitution of the Order is present. But religious promoted to the episcopate are capable of hereditary succession in such a way that administration of the goods and advantage belong to them, but ownership to the church over which they preside. The monasteries themselves also, to which it has been conceded to have ownership in common of immovable goods, can be instituted heirs. L. 944.

On account of the special Constitutions and Rules of their Order, the Friars Minor of the observance and the Capuchin Fathers cannot be instituted heirs, and likewise professed members and formed coadjutors of the Society of Jesus in particular. Schmalzgr. 1. 3. p. 3. tit. 26. n. 96, 97. - Lugo Resp. Mor. 1. 4. disp. 4, 5; E. M. By Roman Law those condemned to death, whether natural or civil, traitors, natural and spurious children, according to the restrictions to be set forth below, are prohibited from being instituted heirs. Cf. n. 1045; L. 943, 950, 951, 952. According to C. A. 22, 538 ff., 681, those are capable of succeeding who are capable of acquiring, not only those already born, but even those only conceived. The unworthy person is excluded from the right of succeeding: one who has offended the testator; one who by force or fraud induced the testator to declare his last will. Adulterers and incestuous persons cannot reciprocally succeed to one another. - The incapable person is excluded from any inheritance; the unworthy person only from the inheritance of him whom he himself affected with some atrocious injury. According to C. H. 744 ff., 756 ff., those are capable of succeeding who are not declared incapable by law. Declared incapable are abortive children who have not prolonged life through an entire day; moral bodies not permitted by law; and those unworthy from a crime established by law. Testamentary dispositions in the last infirmity in favor of the confessor will not produce effect.

According to C. I. 2, 721, 724-728, 764-766, 890, Cod. poen. 33, the following are incapable of an inheritance from testament, who by disposition of law cannot succeed as incapable, namely: 1. Those who, when the inheritance was entered upon, had already died before, or had not yet been conceived. 2. Those who were born non-viable. Nevertheless immediate children of a person living when the testator died can receive from testament, even if these had not yet been conceived. 3. Those condemned to prison with hard labor. 4. Those who are incapable of legitimate succession as unworthy, namely: 1. He who voluntarily killed or attempted to kill him whose succession is in question. 2. He who charges the same with a crime, if the crime charged is declared calumnious in judgment. 3. He who compelled the same to make or change a testament. 4. He who prevented the same from making a testament or revoking one already made, or who suppressed or concealed a later testament, or introduced some changes into it. Cf. L. 948, 949; C. H. 673, 674. He who has been excluded as unworthy is obliged to restore the fruits and revenues received after the opened succession. - Nevertheless the unworthy person can be admitted to the succession, if he whose succession is in question has expressly rendered him capable for this by an authentic act or testament. Likewise the descendants of the unworthy person retain the right to the legitime which would have pertained to the rejected one. - The unworthy person must be repelled from succession by the office of the judge, because it is a penalty; the incapable person is prohibited by the law itself. - Cf. C. He. 539 ff.; C. L. 1776 ff. According to C. G. 25, 338, 725, 727, 762, 906 ff., 1039, incapable of an inheritance are: 1. Those who were not conceived or were already dead at the time of the death of the testator. 2. Those born non-viable. 3. The civilly dead. 4. Physicians, surgeons, health officers, pharmacists, who cared for the deceased in the last illness, as well as confessors, if the disposition was made during such illness, namely that in which the sick person dies, certain cases being excepted. Cf. C. H. 747, 752; C. L. 1775, 1769. 5. Any communities without the approval of the Prince or of the Prefect, if the disposition exceeds the sum of 300 francs. More recently, however, broader faculties have been granted to Prefects in favor of civil communities, hospitals, church fabric funds, etc., which nevertheless are not extended to religious communities. But it is self-evident that these prescriptions have no force insofar as they injure the rights of the Church. - From succession, however, the following are repelled as unworthy: 1. He who has been condemned because he killed or attempted to kill the deceased. 2. He who charged the deceased with a capital crime which has been judged calumny. 3. An adult who, knowing the murderer of the deceased, did not denounce him to judgment. Cf. aa. 727, 730, 955, 1046, 1047.

Moreover, the following can take nothing from a testament as incapable: 1. Guardians, before the last accounts of administered guardianship have been rendered and approved, even if the guardianship has ended. C. I. 769; C. G. 907; C. H. 753; excepting ascendants, descendants, brothers, sisters, and spouse. C. I. 769. Cf. C. G. 907; C. H. 753; C. L. 1767, 1768, 1770. - 2. A notary, and one who was present as a witness to the testament. C. I. 771; C. H. 754; C. L. 1772; C. He. 503; or one who wrote the secret testament, unless the testator by his own hand, or orally before the notary and witnesses when it is handed over, has approved what he left to him. C. I. 771, 772. 3. Natural children whose filiation has not been legally recognized or declared have no right to succession or testament. Illegitimate natural children whom the testator legally acknowledged, or who are established as such by the sentence of a judge, legitimate children existing, cannot take anything from father or mother except the legitime, or that which is owed to them by right of succession. C. I. 181, 192, 193, 723, 743, 764, 768, 773; C. G. 334, 338, 723, 756, 908, 911. Incestuous and adulterine children, or

spurious children, can receive nothing except support; but they have a right to this if the testator acknowledged them, or if by the sentence of a judge they are established as such. C. I. 180, 193, 752, 767; C. G. 762. Cf. here 1042.

4. It is not permitted for a spouse who has married a second time to leave to the new spouse more than to the child procreated from the former marriage to whom he left less than to the others. C. I. 770; cf. C. G. 1098. - 5. An adulterous spouse cannot dispose in favor of his accomplice, if the adultery has been judicially proved before the death of the testator. C. L. 1771. According to C. B. 1938, 2333 ff., one can by testament exclude from legitimate succession a blood relative or spouse, without instituting an heir. One can take away from a descendant, father, mother, or spouse, on account of offenses established in the law itself, the part reserved to them by law, and restrict the right to that part for a prodigal descendant or one burdened with debt.

1039. Note: When the testator has erred in the name of the heir or legatee, if nevertheless the person is established, the institution and legacy are valid. And the same must be said if the thing bequeathed has been erroneously indicated. C. I. 836; C. He. 469. Cf. C. L. 1761, 1837. As regards the interpretation of testaments in various doubtful cases, cf. C. B. 2066 ff., 2088 ff. A testamentary disposition in favor of an incapable person, although simulated under the form of an onerous contract, or made through interposed persons, namely the father, mother, descendants, and spouse of him to whom it is left, according to C. I. 773 is null; according to C. G. 911, C. H. 755 it will be null.

Hence some affirm that a fiduciary heir, to whom it was committed to restore the inheritance to an incapable person, e.g., to a spurious son, can ascribe the inheritance or legacy to himself, for the condition of restoring contrary to law is null. Others say that he must restore it to him to whom it had been left, lest he betray the trust. Others hold, and more truly, that he must restore it to the intestate heirs, to whom the right assists from the just disposition of the laws. Cf. Lugo d. 24. n. 95; Salm. tr. 14. c. 5. n. 73; L. 351, 952 and here 1045. A testamentary disposition made in favor of a person who is uncertain in such a way that he cannot be determined is null. C. I. 830; C. H. 750; C. L. 1741, 1742; or in favor of a person altogether uncertain to be named by another. But a disposition by particular title is valid for a person to be chosen by a third party from among various families or moral bodies determined by the testator himself. C. I. 834, 872. Cf. C. B. 2065. "Legacies to pious causes do not become caducous because of uncertainty of place or church, but most often they will have to be given to the poorer church or hospital." L. 938. Cf. C. H. 650, 671. A disposition made generally in favor of the poor, the sick, etc., is valid. C. L. 1872; C. I. 832. Likewise a disposition is valid by which someone commits his last will to the disposition of another, if it is for pious causes. C. Cum tibi 13 de Testam. Communities or Colleges, as well as moral entities which have not been legitimately approved, since they do not enjoy civil rights, cannot receive from a testament; nevertheless it is permitted to leave to lay moral persons to be established, when they have legally assembled. But moral bodies legitimately constituted need Government approval. Dispositions for the soul or in favor of the soul expressed generically are null. C. I. 831, 832, 833, 932, 1075. According to C. H. 747, if an indeterminate disposition is for suffrages and pious works for the benefit of one's soul, half the part must be handed over to the Diocesan, and the other half to the Civil Governor; the former to be destined to suffrages and necessities of the Church, the latter to charitable hospices. According to C. L. 1775, one cannot institute his own soul as heir, except only

for the third part of the third of free disposition. But laws of this kind, insofar as they regard churches and pious causes, are altogether null in the forum of conscience. Cf. Gousset 793.

1040. Of how many kinds is an heir distinguished, and how is his succession made? Resp. To the 1st: An heir is distinguished as: 1. Legitimate, who succeeds by law ab intestato. 2. Necessary, who cannot be excluded by the testator. 3. Voluntary, who is called as heir from the free will of the testator. - An heir from testament is also distinguished, if he has been designated by testament, and an heir ab intestato, if by law he succeeds to a deceased person who made no testament or an imperfect testament. In the first case there is inheritance, or testamentary succession. In the other there is legitimate inheritance, or succession ab intestato. C. I. 720; C. H. 658, 763, 807; C. A. 531, 532, 538, 764; C. B. 1922, 1923; C. L. 1735. Cf. here 672, 673; L. 945; Inst. 1. 2. t. 19; Gal. 4:7. According to the various Laws, someone can or cannot die partly testate and partly intestate. And thus an heir also can or cannot, according to the various Laws, partly succeed from testament and partly ab intestato. According to C. He. 481, that portion of the goods of which the deceased did not dispose is devolved upon the legitimate heirs.

Resp. To the 2nd: Succession ab intestato is devolved upon blood relatives. C. I. 721, 722. Succession is made by heads and by stocks. It is made by heads when the inheritance is divided into as many virile or equal parts as there are heads, or persons concurring to the inheritance by their own right. It is made by stocks when succession is had by right of representation, by reason of the stock from which the heir has arisen. C. I. 733; C. L. 1980 ff. Representation has this effect, that the representatives hold the place, i.e., the degree and rights of the represented person, C. I. 729, who cannot be an heir, C. I. 734, 735. Hence the representatives have no other right to the inheritance than that which would have pertained to the person whom they represent, and accordingly they take the virile share of their author; and if they are several, they take it divided among themselves by persons, i.e., in equal parts, or it is divided by heads. And this has place also in testamentary successions, unless the testator has disposed otherwise, or it concerns only a personal right. C. I. 728, 890. But if several branches have come forth from the same stock, subdivision is made by stocks in each branch, but by heads among the coheirs of the same branch. C. I. 733. Thus, e.g., Gerontius had three sons, now dead before him: Francis, Dominic, and Ignatius. From Francis was born Lucius, surviving. From Dominic were born Lucidus and Lucida, surviving. From Ignatius were born Aloysius and Stanislaus; from these, now deceased, children survive: Lucia and Lucella of Aloysius, Marius and Marianus of Stanislaus. Gerontius, dying, leaves a patrimony of 108,000 lire. The division of succession is made by the stocks of Francis, Dominic, and Ignatius; i.e., into three parts, and to each falls a quota part of 36,000 lire. The whole quota part of the stock of Francis pertains to Lucius, namely 36,000 lire. The other quota part of the stock of Dominic must be subdivided into two parts and is divided by heads between Lucidus and Lucida; namely, to each fall 18,000 lire. The third quota part of the stock of Ignatius is subdivided again into the stocks of Aloysius and Stanislaus, i.e., into two parts; whence to each stock fall 18,000 lire. Moreover the portion which is owed to the stock of Aloysius is again subdivided into two parts, by heads, between Lucia and Lucella, and to each are owed 9,000 lire. Likewise the portion which is owed to the stock of Stanislaus is also subdivided by heads, between Marius and Marianus, and to each are also owed 9,000 lire. Representation obtains only in the direct descending line to infinity and in any case. But in the transverse line, the sons and descendants of brothers and sisters of the deceased can represent their parents. C. I. 730-732; C. G. 718 ff., 731 ff., 739 ff.; C. A. 726 ff.; C. H. 912 ff., 915 ff., 924 ff. Succession into lines is had if the

goods are divided between the paternal and maternal line, and blood relatives from each line are called to receive the inheritance.

1041. Of how many kinds are the goods of the testator distinguished? - For him who has no necessary successors, it is entire, that is, open, to donate absolutely all his goods to whomever he wishes, whether by act inter vivos or mortis causa, C. I. 809; C. G. 916; but otherwise if he has necessary successors. For to these a portion of the goods or inheritance is owed, constituted by law, which is called the legitime. C. I. 805, 808, 1091; C. G. 913, 915; C. A. 762, 774; C. He. 470. But that part of the goods which someone can freely either donate inter vivos to anyone or leave by testament is called disposable. The legitimate part is owed in full ownership, and accordingly without any burden whatsoever, mode, condition, or day; but it is otherwise for the disposable portion, to which burdens can be added. C. I. 808, 810; C. G. 913, 917; C. H. 813; C. A. 774. - L. 740, 950; Lugo Resp. Mor. 1. 6. 24.

1042. Who are necessary heirs? - By the very law of nature the right of succession seems to belong to proximate blood relatives. For the common good of society requires that there be a certain stability of wealth in families, which, by the disposition of divine Providence, are preserved and propagated by a continued series of generations. Necessary heirs are: 1. Descendants. 2. In their defect, ascendants. C. A. 762; C. H. 807. - If both are lacking, it is entirely open to the testator to dispose of all his property according to his judgment. C. I. 809; C. G. 916; with the right of the surviving spouse to a certain part of the usufruct of the goods left being preserved, C. I. 812, 814.

But descendants are natural and legitimate children, or only legitimate, i.e., legitimated and adoptive, and their descendants. C. I. 806; C. A. 763. - Descendants of sons succeed by right of representation if they concur with sons; and then, however many they are, they receive that portion, divisible among themselves, which belonged to their parent, that is, they succeed by stocks. But if no son survives, the testator can distribute his goods equally to each, according to the right conceded to him, and they themselves succeed by heads. C. H. 739-745.

To sons natural children, not legally recognized, no right is conceded in the goods of the parents; to those recognized, no right in the goods of those who are blood relatives of the parents. C. I. 743, 749; C. G. 756. According to C. He. 470, necessary heirs are descendants, parents, brothers or sisters, and spouse. By Canon Law, among necessary heirs is to be counted the church, to which by right pertain and are devolved ecclesiastical goods left by a Bishop, by a rector of a church, by a beneficiary, goods bought from the goods of the church, goods donated in view of the church, and improvements made in things of the church.

C. 1, 3, 4, 5 de Pecul. clericor. The goods of a solemnly professed Religious pertain to his Religion, unless special statutes of the Order stand in the way. The goods of a simply professed Religious pertain to his heirs, whether coming ab intestato or from testament. E. M. "An inheritance is usually divided into twelve ounces, which are contained under the name of the as. And these parts have their own names from the ounce up to the as, as follows: 1 ounce, 2 sextans, 3 quadrans, 4 triens, 5 quincunx, 6 semis, 7 septunx, 8 bes, 9 dodrans, 10 dextans, 11 deunx, 12 as." Inst. 1. 2. t. 14. § 5.

1043. What, according to positive law, is the reservation or legitime owed to necessary heirs? According to Roman Law: 1. As regards ascendants, the triens, that is, the third part of the as or inheritance, is reserved when descendants are lacking. - 2. As regards legitimate children, the triens,

if there are not more than four children; and the semissis, or half part, if there are more. 3. As regards natural children, they succeed to the mother by equal right with legitimate children. But they do not succeed to the father having legitimate children, although they can receive from him a twelfth part of the inheritance. But if the father lacks legitimate children, he can institute natural children as heirs, provided surviving parents are not deprived of their legitimate portion; and when these are lacking, natural children can succeed to all the father's goods. - Nov. 118; L. 947-901. According to C. G. 913-915, whether for testament or for donation inter vivos: 1. As regards the reservation owed to legitimate children, if there is one, the semis, or half part of the goods, is reserved; if two, the bes, or two thirds; if three or more, the dodrans, or three quarters. But under the name of child, his descendants who represent him are comprehended. - It does not seem that the part which would pertain to a legally recognized illegitimate child ab intestato can be taken away from him by testament. Cf. n. 1047. 2. As regards the reservation owed to ascendants, if legitimate children are present, they have no right; when children are lacking, ascendants have a right to the legitime, so that this portion is the semis or half part if they survive from each line; but the quadrans, or fourth part, if they survive only from one. 3. A wife does not come among necessary heirs, nor legitimate heirs ab intestato, unless the other legitimate heirs within the degrees established by law are lacking. Thus according to each Law, namely Roman and French. Nevertheless by natural law a testator must assign some part to the surviving spouse, if she does not have sufficient goods of her own, on account of the most close necessity between husband and wife.

According to C. I. 744, 805, 807, 808-810, 812-816, 818, 819: 1. The legitimate portion of legitimate children is half of the goods, whatever the number and sex of the children may be. But under the name of children are comprehended legitimate, legitimated, and adoptive children, and their descendants. 2. To illegitimate children duly acknowledged, if children or ascendants exist, there is owed half of the quota part which would have fallen to them if they had been legitimate, the legitimate children being computed together with them. But if descendants and ascendants are lacking, two thirds of the aforesaid quota are owed to them. Yet this portion which is owed to illegitimate children can be furnished in hereditary goods or in counted money; and it does not diminish the legitime of legitimate descendants or ascendants, since it must be deducted from the disposable portion. 3. The legitimate portion of ascendants, when descendants are lacking, is a third part, divisible between father and mother, and, if either of them is lacking, to be conferred on the survivor; if both are lacking, to be divided between ascendants of the paternal line and of the maternal line, provided they are of the same degree; otherwise to be conferred upon the nearer persons of either line. 4. The spouse has a right in the inheritance of the deceased spouse to the usufruct of a certain portion, greater or lesser, according as the deceased has left either descendants, or ascendants alone, or neither. But this portion is deducted from the disposable portion, and can be given by a certain part of the revenues, or by annual prestations. Note: 1. If the testator assigns to someone a usufruct or life annuity which exceeds the annual revenue of the portion of which he was able to dispose, then the legitimaries are given the option either of executing what was prescribed by the testator, or of renouncing for themselves the portion of which he was able to dispose. C. I. 810. - 2. The surviving spouse, and one not previously personally separated by a sentence which has passed into judgment, has the right of usufruct in that part of the inheritance which equals the part pertaining to each legitimate child, under the title of legitime, counting the spouse himself together with the children. C. I. 812. If the testator does not leave descendants but only ascendants, the

portion of usufruct will be the fourth part of the inheritance. C. I. 813. - But if the testator leaves neither descendants nor ascendants who have a right to the legitime, the portion of usufruct will be a third part of the goods. C. I. 814. The testator can indeed be more abundant toward the surviving spouse as regards the disposable part. Yet, if children from another marriage survive the testator himself, then he cannot leave to the second spouse more than that which he left to the least regarded child of the prior marriage. 3. Both the spouse and the natural child must impute to their respective quota, the former all things which came to him from matrimonial agreements, and the latter everything which he received from the testator while living, if it is subject to collation. C. I. 820. 4. Natural children, legitimate children being lacking, can be instituted for the whole as, the legitime owed to ascendants being preserved. C. I. 724, 745, 764; C. G. 723.

According to C. H. 808, 809, 834 ff., 840 ff., the legitime reserved for children and legitimate descendants is contained in two thirds of the hereditary patrimony of the father and mother. Nevertheless they themselves can dispose of one of these two parts, under the title of betterment, so that they may apply it to children and legitimate descendants. Of the remaining third part of the goods they can freely dispose. - The legitime of parents and ascendants, in defect of the preceding, is constituted by half of the hereditary goods. The disposition of the other half part remains free. To the widowed spouse, not separated by divorce, or without his fault, a certain part as to usufruct is reserved, which varies according to various circumstances. To natural children also legally recognized a certain part is reserved; but to illegitimate children who are not natural, only support.

According to C. L. 1784 ff., the legitime is contained in two thirds of the goods of the testator. According to C. A. 161, 162, 865, 766, 796, the legitimate portion reserved to children is half the part of the goods which would fall to them in succession ab intestato. But the legitimate portion of each necessary heir in the ascending line is a third part of the goods which would come to him in succession ab intestato. Legitimated natural children are counted among legitimate children. No legitime is owed to the spouse, but only suitable support. Cf. as regards the spouse, aa. 1242 ff. According to C. B. 2303 ff. and C. He. 470, 471, reservation of goods is had for descendants, for father and mother, for the spouse; and according to C. He. l.c., also for brothers or sisters.

According to C. He. 633, adult children who live together with their parents and have contributed work and profit into the domestic community of the parents can claim equitable compensation in the division of their inheritance, insofar as they have not expressly renounced it.

1044. Whether a testator is bound under grave obligation to leave goods to blood relatives who are not necessary heirs, if they are gravely in need?

Speaking of brothers or sisters, it must altogether be affirmed, at least as much as suffices for relieving their need, not only from the general precept of charity, which obliges gravely when the matter is grave, but also from the special obligation of piety, which also obliges under grave sin to aid brothers or sisters in grave necessity before all other poor persons or pious works. But if brothers or sisters are poor, even if they do not have grave need, it is still at least venial to pass them over. Toward other more remote blood relatives there does not seem to be a grave obligation of preferring them to other poor persons. Nevertheless passing them over, if they are gravely in need, would not be free from light fault, since toward them also there is some obligation of piety, although not so strict. C. He. 470 numbers brothers and sisters among legitimate and necessary heirs. L. 946.

1045. Whether parents can leave part of the inheritance even to spurious children? - "Spurious children, apart from support, can receive absolutely nothing from the father under any title whatsoever, neither inter vivos, nor from testament, nor ab intestato; and if they have received anything, they are bound in conscience to restore it to the heirs of the father.... The reason is that these spurious children have been made altogether incapable by law in hatred of the parents, as from Nov. 74, etc." Thus St. Alphonsus 951. And Struggl, tr. 7, q. 2, n. 13: "Whence in the case in which a father has excessively dowered a spurious daughter, she with her husband is bound, even before the sentence of the judge, to restore the excess of the dowry to the legitimate heirs, unless perhaps they freely remit this; as Sporer teaches here, cap. 5, n. 50, with Molina and Sanchez." The theologians commonly taught, according to the ancient laws, that to donate to spurious children, and to accept donations, to bequeath, and to acknowledge legacies, is grave. Namely, it is very much in the interest of the republic to protect good morals. Nor is it valid to say that illegitimate children who are not legally acknowledged, as are adulterine and incestuous children, can freely receive as though outsiders what their parents have freely wished to give or bequeath to them. For this openly contains fraud of the law, and would establish them in a better condition than legally acknowledged illegitimate children, which is evidently contrary to the will of the law. C. I. 180, 752; C. G. 762; C. H. 134, 139; C. A. 165.

166. Cf. aa. 752, 753, 754. - L. 951, 952; Gousset 727. Cf. here 1038, 1039.

1046. Whether necessary heirs can be disinherited? - According to Roman Law, children can be disinherited by the authority of the father alone, especially in the following cases: 1. If a son lays hands on a parent, or treats him contumeliously. 2. If he is his accuser or witness in criminal causes. 3. If he has relations with the same one's wife. 4. If he is unwilling to become surety for freeing the father from prison. 5. If he has prohibited the father from making a testament. 6. If a daughter, having refused an honorable marriage, lives luxuriously. Inst. 1. 2. t. 13; L. 948 ff. - According to C. A. 768 ff., necessary heirs can be disinherited for causes constituted in the Law. The same is held in C. H. 848 ff.; C. L. 1875 ff.; C. He. 477 ff. According to French and Italian Law, necessary heirs can never be disinherited by private authority. Yet by law they are excluded from the inheritance as unworthy in the cases already noted above. Cf. 672, 1038. According to C. B. 1938, 2332 ff., 2339, one can by testament exclude a blood relative or his own spouse from legitimate succession. On account of offenses established in the law itself, one can take away the part reserved by law from a descendant, father, or mother, and restrict the right to that part for a prodigal descendant or one burdened with debt. Several causes of unworthiness to succeed are likewise established.

1047. Who are legitimate heirs; what is their succession?

Legitimate heirs generally are those who are called to succession according to the disposition of the law, when the disposition of the deceased is lacking, either because he made no testament, or because he made an invalid testament, or because the instituted heir cannot or will not enter upon the inheritance. Moreover the law, by prerogative of order and degree, calls blood relatives to succession: descendants, ascendants, collaterals, the spouse, and, when these are lacking, the State. This is the order: Succession is deferred: 1. To descendants indefinitely. When these are lacking: 2. To ascendants, brothers, and their descendants, but not beyond the tenth degree, and to the spouse. When these also are lacking: 3. To other collaterals of the later order, i.e., paternal uncles, maternal

uncles, paternal aunts, maternal aunts; and, when these are lacking, to their children, paternal cousins, maternal cousins, cousins through paternal aunts; and when these are lacking, to those who next descend from them, up to the tenth degree. This is the prerogative of order: legitimate descendants exclude all others, except duly acknowledged illegitimate children. C. I. 736. These illegitimate children exclude all collaterals. C. I. 743, 745. Ascendants and Brothers exclude collaterals of the later order. The spouse excludes all collaterals, whether of the prior or later order, but only after the sixth degree. C. I. 742, 755. This is the prerogative of degree: nearer persons of the same order exclude more remote persons in the same order. C. I. 720-724; C. G. 723, 725 ff., 731 ff.; C. H. 912-914; C. A. 727 ff.; C. L. 1969 ff.

1. Succession of descendants. Legitimate heirs in particular are, in the first place according to C. I. 736; C. G. 745, legitimate children, or their descendants, without distinction of primogeniture or sex, although born from different marriages. They succeed in equal portions and by heads if they are in the first degree and are called by reason of themselves. They succeed by stocks if they are called by right of representation. But the descendants of the deceased exclude the others from succession. According to C. I. 737, under the name of legitimate children are also comprehended legitimated and adoptive children, and their descendants. Adopted persons and their descendants indeed succeed to the adopter, but they are excluded from the succession of all relatives of the adopter. - But the inheritance of the adopted person does not pertain to the adoptive parents; and accordingly it returns to his own blood relatives. C. I. 210, 212, 737. Almost the same are the dispositions of C. A. 730-734; C. H. 930-934; C. He. 457 ff.; C. L. 1985 ff.
2. Succession of ascendants. When descendants are lacking, and likewise when brothers or sisters and their descendants are lacking, ascendants succeed, namely according to C. I. 738, 739, father and mother in equal portions, or, if either has died, the survivor alone. And when descendants, parents, brothers or sisters, and their descendants are lacking, ascendants of the paternal line succeed in half part of the goods, and ascendants of the maternal line in the other half part. If nevertheless ascendants are not in equal degree, the inheritance pertains to the nearer one.

If they concur with collaterals, according to C. I. 740, in no case can the portion of the parents be less than the triens, or third part. The remainder is divided among the brothers or sisters according to their number in equal portions. But consanguine or uterine brothers or sisters, whether they concur with full siblings or are alone, obtain half of the portion which pertains to full siblings. If they concur with the spouse, according to C. I. 754 they take the bes, or two thirds. According to C. G. 746, 747, when descendants are lacking, and likewise brothers or sisters and their descendants, the nearer ascendant from the paternal line and the nearer ascendant from the maternal line each receive a half part of the goods, the others being excluded. Ascendants, the other legitimate heirs being excluded, succeed to their descendants who have died without posterity, in those goods which they gave to those descendants, or in their price, if these have been alienated. If the deceased without offspring left both parents and brothers or sisters, or their descendants, according to C. G. 748, 751, 752, half of the inheritance must be divided between father and mother; the other half must be divided equally between brothers and sisters, if they were born from the same bed; otherwise if they were born from a different bed. But if only one of the parents survives, the portion of the brothers, sisters, or their

descendants is the dodrans, or three fourths; only the fourth part is left to the surviving parent. The dispositions of C. A. you have in aa. 735 ff., and of C. L. 1493, 1996 ff. When descendants are lacking, if both parents are still living, the whole inheritance belongs to them in equal portions. According to C. He. 458, when descendants are lacking, the inheritance is devolved upon the parents of the stock of the parents. Father and mother succeed in equal portions. According to C. H. 935-938, in defect of descendants, ascendants exclude collaterals. Parents divide the inheritance between themselves in equal parts; and if only one survives, he receives all. - Grandfathers divide the inheritance equally between themselves if they are of the same line; or they divide it equally with others if they are of different lines, yet in such a way that half part yields to one line, the other half part to the other line.

3. Succession of collaterals. If someone dies without offspring and without parents, then his brothers and sisters, or their descendants, are called to succession, the rest being excluded. C. G. 750; C. I. 741. - According to C. I. art. cit. 741, consanguine and uterine brothers and sisters, concurring with full siblings, obtain half of the portion which pertains to full siblings. - If they concur with the spouse, they receive the bes, or two thirds. C. I. 754. - If they concur with ascendants, the triens being left to the parents, they themselves take the remainder in equal portions. C. I. 740. - But if they concur with spouse and ascendants, they take the triens, or third part. C. I. 740, 754. If someone dies without offspring, and without brothers and sisters and their descendants, and without ascendants of either line, half of the inheritance is deferred to the surviving ascendants, the other half to the nearer relatives of the other line; if nevertheless among the surviving ascendants there is father or mother, these have a right to the usufruct of the triens of the goods in which they do not succeed. C. G. 753, 754. - According to C. I. 742, 755, if someone leaves neither offspring, nor parents, nor other ascendants, nor brothers or sisters, the succession is deferred to the nearer relative or relatives without distinction of paternal or maternal line. But if a spouse is present, then two thirds fall to this spouse, and a triens to them. Relatives beyond the twelfth degree, namely the sixth according to canonical computation, do not succeed according to C. G. 755. When relatives are lacking in some line within the aforesaid degree, the whole inheritance pertains to the relatives of the other line. According to C. I. 742, succession is not extended beyond the tenth degree, namely the fifth according to canonical computation. So also according to Roman Law. The dispositions of C. A. you have in aa. 735 ff. When parents are lacking, the whole inheritance is divided between brothers and sisters in equal portions. But as regards other blood relatives, succession is not extended beyond the sixth line of consanguinity, namely the fifth degree according to Canon Law. According to C. He. 459, 460, in defect of descendants and heirs of the stock of the parents, the inheritance is devolved upon parents of the stock of grandparents. Grandfathers and grandmothers of the paternal and maternal line, if they live, succeed in every line in equal portions. If a grandfather and grandmother have died before, they are represented by their descendants, who succeed by stock in each degree. If a grandfather or grandmother of the paternal line or of the maternal line has died before, without his or her own descendants, the whole half part is devolved upon other heirs of the same line. If there are no heirs of the paternal or maternal line, the whole inheritance is devolved upon heirs of the other line. - With the stock of grandparents the succession of blood relatives of the parents ceases; nevertheless the usufruct is reserved to great-grandparents of the part devolved upon the descendants of

their stock, if they were living, and great-uncles and great-aunts have this usufruct in representation of the great-grandparents who died before, from whom they descend, as long as they live. According to C. H. 921-927, 940-955, when descendants, ascendants, and legally recognized natural children are lacking, brothers succeed to the inheritance in equal parts. When brothers are lacking, the spouse succeeds to the whole inheritance. If there are brothers and spouse together, the spouse receives the usufruct of the part determined by law. But if brothers and spouse are lacking, other collaterals succeed up to the sixth degree by civil computation. Cf. aa. 918, 919. The nearer blood relative excludes the more remote, with the right of representation preserved, a. 921. According to C. L. 2000 ff., when descendants and ascendants are lacking, the heirs are brothers and their descendants.

4. Succession of natural children. Natural children, legally recognized, when natural and legitimate children exist, according to C. G. 723, 757, 758, have a right to the third part of the portion which they would have obtained if they had been natural and legitimate; to half of that portion, if there are no legitimate descendants and there are ascendants, or brothers or sisters; to the dodrans, if all these are lacking; and if moreover there is no relative who enjoys the right of succession, the whole inheritance pertains to them.

According to C. I. 744, 745, 746, 747, 749, natural children, legally recognized, when legitimate descendants exist, have a right to half of the portion which they would receive if they were legitimate. Natural children must furthermore impute into that portion whatever they may have received from the parent or parents, subject to collation, even if they have been dispensed from collation. - If the parent dies without legitimate offspring and their descendants, but leaves his parents, or one of them, or another ascendant, or a spouse, natural children succeed in two thirds of the inheritance; the remainder is deferred to the ascendants or spouse. - But if ascendants and spouse are present together, a third part of the inheritance pertains to the ascendants, a fourth to the spouse, and the remainder to the natural children. - If there are no legitimate descendants and ascendants nor spouse, the whole inheritance is devolved upon the natural children; but they have no right in the goods of relatives of the father or mother, just as those relatives have none in the goods of natural children. - According to C. I. 180, 752; C. G. 262, children born from adultery or incest are altogether excluded from succession, and have only a right to support, namely if the testator acknowledged them or if by the sentence of a judge they are established as such. Support is certainly owed to children by the law of nature. Hence they can never be deprived of it by the father. Struggl. tr. 7. q. 2. n. 15; L. 949, 951. If a natural child has neither descendants nor spouse, his inheritance is devolved upon the father and mother who acknowledged him, or upon only one of them, if only one acknowledged him. But if he leaves a surviving spouse, half part of the inheritance belongs to the spouse himself, and the other half to father and mother, or to only one of them, as was just said. C. I. 750, 751. - C. L. 1994, 1995. According to C. A. 752, 753, 756, legitimated natural children have the same rights as legitimate children. But illegitimate children also have the same rights as legitimate children in the succession ab intestato of the mother. They do not have a right in the succession ab intestato of the father. But in the succession of legitimated and illegitimate children, their parents reciprocally have the same right as they do as regards the inheritance of their own parents. - According to C. He. 461, natural blood parents have in the maternal kinship the same rights as legitimate persons. In the paternal kinship they are heirs only insofar as the natural child follows the status of the father by recognition

or sentence of a judge. In concurrence with legitimate descendants of the father, the natural heir or his descendants obtain half of the part which the legitimate children and their descendants receive. According to C. H. 939-945, when descendants and ascendants are lacking, the inheritance is divided among legally recognized natural children. But if descendants or ascendants are present, they receive only the portion determined by the laws. But if they themselves die without legitimate posterity, their parents succeed to them. C. L. 1989 ff.

5. Succession of the spouse. According to C. G. 767, when all relatives are lacking within the twelfth degree, the spouse is called to succession, provided there was no divorce between them. According to C. I. 156, 158, 753-757, if legitimate children survive the deceased spouse, the surviving spouse, who had not been legally separated from the deceased spouse, succeeds to him in an equal part, the spouse being counted in the number of the children, as regards usufruct. If recognized natural children also concur with legitimate children, the usufruct of the spouse must be equal to the quota of the inheritance which pertains to the legitimate children. This portion of usufruct can never be greater than a fourth part. If legitimate offspring are lacking, if there are ascendants, or natural children, or brothers and sisters and their descendants, a triens of the inheritance in ownership is deferred to the surviving spouse; but if legitimate ascendants and natural children are present together, only a quadrans. If the deceased has left other relatives who have the right of succeeding, the surviving spouse obtains two trientes. If there are no relatives who have the right of succession within the sixth degree, the whole inheritance pertains to the surviving spouse. Moreover, whenever the spouse is called to succession with other heirs, he must compute in his hereditary portion whatever he has already obtained on account of matrimonial agreements and dotal gains. - If the spouse has been legally separated from the deceased spouse, then no right belongs to him. When separation is made by mutual consent, even before a tribunal and homologated, it is not regarded as made legally, and therefore does not prejudice the mutual rights of the spouses. The sentence must have been issued before the opening of the succession. But its effects obtain only against the spouse who is at fault, who also loses dotal gains and all useful things granted to him by the other spouse in the marriage contract, and likewise the legal usufruct. Nevertheless the spouses can by mutual consent render void the effects of judicial separation, either expressly or tacitly, by still living together peacefully, without authority intervening. According to C. A. 757 ff., to the surviving spouse, if there are children, there belongs a determined usufruct of a certain portion according to the number of children; if children are lacking, but there is another legitimate heir, a fourth part of the inheritance belongs to him. But if there is no other legitimate heir, the whole inheritance pertains to him. According to C. He. 462, when the deceased has left descendants, the spouse obtains, at his own choice, either half part of the succession in usufruct, or a fourth part in ownership. Concurring with heirs of the stock of the parents, he has a fourth part in ownership and three fourths in usufruct. Concurring with heirs of the stock of grandparents, he receives half part in ownership and the other half in usufruct. If heirs of one and the other stock are lacking, he receives the whole succession in ownership. As regards C. H., cf. what was said in the Succession of collaterals. According to C. L. 2003 ff., when descendants, ascendants, and brothers and their descendants are lacking, the spouse succeeds. When the aforementioned blood relatives and spouse are lacking, other transverse blood relatives succeed within the tenth degree.

Succession of the State. When all who have the right of succeeding are lacking, the inheritance is devolved upon the State. C. I. 758; C. G. 768; C. A. 760; C. H. 956-958; C. He. 466; C. L. 206 ff. C. B. 1924 ff. establishes five orders of successions. Blood relatives of the preceding order exclude blood relatives of the following orders, 1930. Representation is admitted only in the first three orders, 1924, 1925, 1926. In the fourth order the nearer blood relative excludes the rest, 1928. In the first order are the descendants of the deceased. Nearer descendants exclude descendants who are blood relatives of the deceased through their mediation. Children succeed in equal portions, 1924. In the second order are the father and mother of the deceased, and their descendants. Father and mother, if they are living, succeed alone in equal portions, 1925. In the third order are the grandfathers and grandmothers of the deceased and their descendants. If they themselves are still living, they alone succeed in equal portions, 1926. - In the fourth order are the great-grandfathers and great-grandmothers of the deceased and their descendants. If all the great-grandfathers and great-grandmothers are living, they alone succeed; if several, they succeed in equal parts. But if all have died, their descendant nearer in blood relationship succeeds to the deceased; and, if several are in the same degree, they succeed in equal parts, 1928. - In the fifth order succeed great-great-grandfathers and great-great-grandmothers and their descendants, 1929. A portion of goods is always reserved to the surviving spouse, varying according to the various blood relatives with whom he concurs, 1931 ff. - When blood relatives and spouse are lacking, the fisc succeeds, 1936.

By Canon Law, to clerics, as regards superfluous ecclesiastical goods left behind, there succeeds at present the Congregation of Spolia, unless a special Indult is present; as regards other goods, blood relatives succeed according to civil law, and when these are lacking, there succeeds either the Congregation of Spolia, or now the Congregation de Propaganda Fide for the support of missions, or, where this has not been received, the episcopal fisc, with the burden of expending them on pious causes. Reiff. h. t. n. 63. - Solemnly professed religious perpetually secularized cannot make a testament. The Congregation of Spolia succeeds to them, according to the Constitution of Gregory XIII Officii nostri, or now the Congregation de Propaganda Fide. But if they are secularized for a time, the right of succeeding to their inheritance pertains to their monastery, unless this is prohibited by the Constitutions of the Order. The goods of solemnly professed religious, if before profession they did not dispose of them, are devolved to the natural heirs if their religion is incapable of succession; but if it is capable of succession, they are devolved to the monastery. But all monasteries of regulars have the right of succeeding, except houses and Colleges of the Society of Jesus, and monasteries of the Friars Minor of the observance and of the Capuchins. Schmalzgr. 1. 3. p. 3. tit. 27. n. 67 ff.; Giraldi in 4. t. According to C. A. 761, the goods of a cleric ab intestato are divided in equal proportions among the church, the poor, and blood relatives. When a Bishop dies, there are owed to the Cathedral Church the sacred utensils enumerated in the Constitution of Pius IX Quum illud, June 1, 1847, which are not positively established either to have been donated to the Church or to have been acquired with the goods of the Church. And therefore Bishops are bound to make an inventory of these utensils and to declare whether they were acquired with their own expenses or with the goods of the Church. Cardinals Bishops are held to this same obligation, except suburbicarian Cardinals and Abbots nullius residing in the Roman curia. All their utensils, with whatever goods they were acquired, pertain to the pontifical sacristy. Relics of the Holy Cross are to be transmitted to their successors. - E. M. 1037, 1038, 1047. But if Bishops have governed several Churches, the sacred utensils destined for divine worship are to be divided among the several

churches in which they resided, according to the norm of the same Constitution. - C. 1, 2 de Success. ab intest.

1048. What is a lying inheritance? - When the heir is not known, or those who are known have renounced the inheritance, the inheritance is called lying. To administer it a curator is appointed, who is obliged to all those things to which an heir with benefit of inventory is held. If after thirty years no one appears, it, as vacant, is prescribed to the fisc. C. I. 980, 983, 2135; Cod. proc. civ. 896; C. G. 811, 814.

1049. What is the right of accretion? The right of accretion is that right by which the parts of failing heirs or failing legatees in the same inheritance or in the same thing bequeathed are added to other coheirs or other colegatees. C. I. 879, 884; C. A. 560; C. H. 981; C. B. 2094, 2158. The right of accretion has place in an inheritance when, in the same testament and by one and the same disposition, the testator called heirs jointly to the inheritance, without making a distribution of parts among them by expressly indicating the quota of each. But when the right of accretion cannot have place among coheirs, the portion of the failing heir is devolved upon the legitimate heirs ab intestato.

C. I. 880, 881, 883; C. G. 1044; C. A. 560 ff.; C. H. 982 ff. The right of accretion also has place in succession ab intestato, for the part of him who renounces accrues to the coheirs, C. I. 940. The right of accretion is likewise had in a legacy, when one of the legatees dies before the testator, or renounces the legacy, or is incapable, or the condition under which the thing was bequeathed to him fails; indeed also when one and the same thing in the same testament has been bequeathed to several, although by distinct disposition. C. I. 884; C. G. 1045; C. A. 689. Heirs and legatees receiving the portions of others take on the burdens and obligations annexed to them. C. I. 882, 887; C. A. 563; C. B. 1935, 2095, 2159.

As regards usufruct specifically, the right of accretion is given even if the legatee has accepted it and then fails, if namely it has been left to several persons in such a way that, according to the general rule, the right of accretion is given among them. C. I. 885. - When by the will of the testator the right of accretion is excluded, the part of the failing heir pertains to intestate succession with the same burdens imposed by the testator. C. I. 883; C. A. 562, 563. - If the legatee fails, the creditor failing, the thing bequeathed accrues to the heirs, who consequently are bound to fulfill the burdens enjoined upon the legatee according to their hereditary portions. C. I. 886; C. L. 1852 ff.

1050. When, where, and how is the opening of inheritance had? Succession is opened, whether ab intestato or testamentary, at the very moment of the death of the testator, in the place of his last domicile, and immediate possession passes by full right to the heir, if he is capable. C. I. 923, 925; by full right, and accordingly without another juridical act, without any sentence of a judge. - If among two or more called to succession there is doubt which one died first, suppose in a common shipwreck, if this cannot be verified, all are supposed to have died at one point of time, and therefore there is no place for transmission of inheritance from one to another. C. I. 924; C. A. 25; C. B. 20; C. L. 1738. It is otherwise according to C. G. 720 ff. and L. 22, 23 de Reb. dub. Dig.

1051. What of accepting or repudiating an inheritance? - For accepting or repudiating an inheritance it is required first that it has been deferred, for of a living person there is no inheritance, and therefore there can be no acceptance or repudiation of it. C. I. 954; C. G. 791; C. H. 991.

Moreover it is required that he who accepts or repudiates it be capable of contracting obligation and of alienating. For, by accepting it, he as it were contracts with the hereditary creditors and legatees. But by repudiating it, he alienates the same. Hence a family council, guardian, or curator is needed for those who are under guardianship and curatorship. C. I. 226, 296, 930, 931, 932; C. G. 776; and according to C. G. and C. H., for wives the consent of the husband is also needed. C. H. 992-996. It is open to each person to accept or repudiate an inheritance, whether testamentary or legitimate. C. G. 775; C. H. 988; C. He. 566. The reason is that no one is bound to accept a benefit which is often burdened with great obligations. Nevertheless renunciation is not presumed, but must be proved, and must be made in juridical form. One will be able to repudiate if he has not previously taken away or concealed anything from it. C. I. 953; C. G. 792; C. H. 1002; C. He. 571. According to the same C. He. 566, repudiation of an inheritance is presumed when it would be notorious or would be established from official acts that the debts of the deceased are insoluble. Once the inheritance has been repudiated, the part of the repudiating person accrues to the other written coheirs, if they were instituted jointly; otherwise to the legitimate heirs; and if he himself alone had been instituted, it is deferred to the following degrees. C. I. 946, 948; C. G. 786. And, after repudiating the testament, one will be able to receive legacies perhaps left to him. C. I. 945; C. G. 845. After repudiating an inheritance, one can still enter upon it as long as it has not been entered upon by others. C. I. 950; C. G. 790. The right of entering upon an inheritance ends in thirty years. C. I. 943; C. G. 789.

An inheritance is accepted expressly or tacitly. - Expressly, when by any juridical act, or even by private writing, someone assumes the right and name of heir. C. I. 934; C. G. 778; C. H. 999. Tacitly, when someone does something which necessarily demonstrates the will of entering upon the inheritance and of conducting himself as heir. C. I. 934, 938, 965; C. G. 778, 780, 796; C. H. 999, 1000. An inheritance once entered upon cannot afterward be repudiated, even though debt appears which previously was hidden. C. I. 942; C. G. 783; C. H. 997. Nevertheless against entry, as also against repudiation, restitution in integrum is given to those who have suffered fraud or fear. C. I. 942; C. G. 783; C. H. 997. - He to whom an inheritance has been deferred, if he dies before accepting expressly or tacitly, transmits to his own heirs the right of accepting. C. I. 939; C. G. 781. If someone renounces an inheritance to the damage of creditors, the judge can permit them to enter upon the inheritance in his name. C. H. 1001; C. G. 789. - C. B. 1943 ff.; C. He. 572 ff.; C. L. 2021 ff.

But it can be accepted purely, or under benefit of inventory. C. I. 929, 944; C. G. 774, 775, 784; C. A. 800 ff.; C. H. 998, 1003, 1023; C. L. 2018 ff., 1792; C. He. 580. Sometimes the making of an inventory is necessary by law, as in an inheritance deferred to a minor, C. I. 930; C. G. 461, 776, and in an inheritance devolved upon some community. C. I. 932. - An heir can use the benefit of inventory, notwithstanding any prohibition of the testator. C. I. 956; C. H. 1010; C. B. 1993 ff.

An inventory is a description of the movable things which the deceased left, C. I. 496; C. G. 600, but here in reality it is a description of all the goods of the deceased, or of the whole patrimony, C. A. 223; of the goods and debts of the inheritance; and all who know the patrimonial state of the deceased, if they are required by the competent authority, are bound to manifest it. C. He. 581. The benefits of inventory, which must be made at a certain time and with a certain solemnity, C. I. 955 ff.; C. G. 793 ff.; C. H. 1011 ff.; C. A. 800 ff., are three. - The first is that the heir is not bound to pay hereditary debts and legacies beyond the strength of the inheritance, and he can cede it to creditors and legatees in order to exempt himself from the burden of paying. - The second is that the proper

goods of the heir are not confused with the goods of the inheritance, and the heir preserves against the inheritance the right of demanding payment of his own creditors. C. I. 968; C. G. 803. The third is that in the administration entrusted to him, he is bound only for grave fault. C. I. 970; C. G. 804; C. H. 1023; C. B. 1970 ff., 1975 ff., 1993 ff.; C. He. 589; C. L. 2044 ff.; L. 961.

The inventory does not benefit him who, in making it, has concealed something by bad fraud, C. I. 967; C. G. 801; who has not duly sold the immovable goods of the inheritance, C. I. 973; C. G. 806; who by his own authority has sold movable hereditary things within five years, C. I. 974, or at any time according to C. G. 805. Namely, a benefited heir is almost an administrator of the inheritance. C. I. 969; C. G. 803.

1052. What are the rights and obligations of heirs? - Generally, heirs succeed to all the rights and burdens of the deceased, because they represent his person; only those are excepted which by their nature or by pact were affixed to the person of the deceased. For the heir does not succeed to the will of the deceased, but to his patrimony. Hence they acquire by full right ownership of the goods of the deceased, take on his obligations and debts, and must fulfill his will in the legacies. C. G. 724, 1009, 1012, 1013, 1017; C. A. 547, 548; C. B. 1967; C. L. 2014. As regards the mode of paying debts left by the deceased, each pays in proportion to his hereditary portion, and if because of a mortgage they are compelled to pay more, they have recourse against the others. For the division of things and burdens must be made by equal right among heirs, if there are several. C. I. 1029; C. G. 873. Cf. C. A. 550, 820, 821; L. 961. The division of inheritance can be rescinded if someone has been injured beyond a quadrans of his part. C. I. 1038; C. G. 887. Concerning this division of inheritance, cf. C. I. 984 ff., 1034 ff.; C. G. 815 ff., 883 ff. The heir is bound to sustain the expenses of the funeral. C. B. 1968; C. L. 1791 ff.; Lugo Resp. Mor. 1. 6. d. 13.

1053. What of the executor of a testament? - The executor of a testament is he whom the testator has named for executing the testamentary dispositions. - But if no one has been named, the execution of the testament pertains to the heirs; and as regards pious causes, if no executor has been designated, or the designated one is unwilling to perform the office, the Bishop of the place is executor. C. A. 817; C. H. 892, 911; C. L. 1893; C. Nos quidem 3 de Testam.; L. 936, 937, 938, 941; Trent sess. 22, c. 8 de R. - A testamentary executor is not compelled to take on the mandate. C. B. 2202. "Nevertheless one who refuses by that very fact loses the legacy, at least that which was left to him as reward for the office, and it yields to the other executors." L. 936; C. L. 1899. And certainly the execution of a testament contains a mandate gratuitous by its nature; for it is an office of a friend. C. L. 1892; Gousset on a. 1025. According to C. B. 2221; C. He. 517, he can demand suitable remuneration for his office. - But if he has accepted it, he must discharge his duty, and this under grave obligation. C. Ioannes 19 de Testam.; C. A. 816; C. H. 898-900, 908; C. He. 518; Lugo d. 24. n. 29; L. 941.

In order that someone be executor of a testament, it is necessary that he have the capacity of obliging himself. Hence interdicted persons, minors even with the consent of the guardian, and wives without the husband's consent cannot be executors. C. I. 904, 905, 1743; C. G. 1028-1030; C. H. 893; C. L. 1886, 1887; C. B. 2201. Religious can be executors by permission of their Prelate, unless the Rule of the Order stands in the way. C. Religiosus 2 de Testam. in 6; Clem. un. e.t.; L. 936. Several executors of a testament can be instituted, and when one is absent another can proceed to the execution of the testament. But all are obligated in solidum, unless the testator has established otherwise. C.

Religiosus cit.; C. I. 903, 910; C. G. 1025, 1033; C. H. 894-897; C. B. 2197 ff., 2219, 2224. - A testamentary executor does not transmit this office to his own heirs, C. I. 909; C. G. 1032; C. H. 909, 910; C. B. 2225, nor can he delegate it to another, C. H. 909; C. L. 1906. The executor must watch: 1. That seals be affixed if among the heirs there are minors, interdicted persons, absentees, or a moral body, C. I. 908, or generally if there is danger lest anything be taken from the inheritance. C. L. 2010, 2064 ff. 2. That an inventory be made, with the nearest heir present or duly summoned. C. I. 908; C. G. 1031; C. B. 2215. 3. That movable things be sold if money for payment of legacies is lacking. C. I. 908; C. G. 1031. 4. That he urge the execution of the testament at the time prescribed by the testator, even sustaining litigation if necessary. C. I. 908; C. L. 1899. 5. He must render an account of his execution within the time defined by law: according to C. I. 908; C. G. 1031, within a year from the death of the testator. C. B. 2203; C. L. 1905; C. H. 907. 6. Meanwhile he administers the hereditary mass and takes possession of it and disposes of its objects. He can make gratuitous dispositions which answer to moral duty and propriety. C. B. 2205. 7. He is liable for loss inflicted if he violates the obligations incumbent upon him. C. B. 2219; C. L. 1909. 8. He can always legitimately renounce his office. C. B. 2226. Likewise he can be dismissed by decree of the tribunal for a grave cause. C. B. 2227. - C. H. 901-907.

Although the testator can grant to the testamentary executor immediate possession of all movable goods, or of a part of them, provided it does not exceed a year, nevertheless the heir will be able to disturb him from such possession if he supplies him with enough money necessary for paying the legacies of movables, or proves that he has already paid them, or provides security for paying in the modes prescribed by the testator. C. I. 906, 907; C. G. 1026, 1027; C. B. 2217. But expenses which are made by the executor for the sake of fulfilling his office must be paid from the hereditary things. C. G. 1034; C. I. 911; C. L. 1908. "All, whether priests or laymen, to whose trust legacies for pious causes have been entrusted, are bound to make the Bishop more certain of this as soon as possible; he has the right of watching over the administration and of consulting for the security of the same legacies." S. C. C., Aug. 7, 1909, A. A. S. v. 1, p. 766.

1054. He resolves: "In the forum of conscience, heirs and executors are bound under grave obligation immediately to fulfill legacies, especially pious ones, when they can." L. 941. Cf. St. Thomas, Quodl. 6, a. 13; C. A. 685. Nor indeed can they either reduce or diminish legacies, or in any way commute them or substitute another burden, unless the faculty for this has been given by the testator; for their office is to execute, not to invert, the will of the deceased. - If the legacies are profane and cannot be fulfilled in the mode in which they were left, they are caducous and yield to the heirs. It is otherwise concerning pious legacies; for the testator wished them to yield to the good of his soul. Cf. 1068.

C. B. 2203, 2216; Lugo Resp. Moral. 1. 4. d. 32.

1055. Whether an heir of a testament, or executor, who has not made an inventory, or has not made it rightly, is bound in conscience toward creditors and legatees, even beyond the strength of the inheritance? Resp. Affirmatively, if he omitted the inventory by bad fraud; since he was the cause of loss foreseen at least in confused fashion.

Negatively, if without sin he omitted to make the inventory; because the law is founded on a presumption of fact, namely that the inheritance was rich, and consequently on a presumption of fraud, which is absent. - Lugo d. 24. n. 232; Gousset 728 and on a. 802; L. 932, 971; C. L. 1792.

1056. What of possession of a legacy, and of its fruits and increases?

A legacy properly differs from an inheritance in that it is situated in a particular and determined thing, that it is owed by the heir, and that possession of it must be obtained from him. A legacy to a pious cause is excepted, however. For then the manifest will of the deceased suffices, and accordingly even the heir ab intestato, succeeding in place of the designated heir, will owe the legacy. But although the legatee must obtain possession of the legacy from the heir, and is bound to seek it from him, nevertheless ownership of the legacy, or the right to the thing, C. He. 543, 562; C. L. 1826, is acquired by the legatee from the death of the testator. C. I. 862, 863, 876; C. H. 881, 885; C. G. 1014, 1018; C. B. 2174, 2176. Cf. C. A. 684; C. B. 2160, 2161, 2180, 2181. - Hence necessary expenses for furnishing the legacy must be sustained by the inheritance. C. I. 877; C. G. 1016; C. H. 886; C. A. 690; C. L. 1842. But the fruits of the thing and the increase are owed to the legatee already from the death of the testator, if the legacy is of some farm, or capital, or another fruitful thing, or if the testator has expressly prescribed this. Otherwise the legatee cannot claim interest or fruits except from the day of judicial petition, or of the promised furnishing of the legacy. C. I. 864, 865. Cf. C. G. 1015; C. A. 686; C. H. 882-884; C. B. 2164, 2184, 2185; C. He. 485; C. L. 1840. - If the legatee dies before the inheritance has been entered upon by the heir, the legatee can transmit to his own heirs the ownership itself of the thing, if the thing was determined, or at least the right to the thing, if the thing was less determined. And, if the thing bequeathed has perished without fault of the heir, it has perished for the legatee. Inst. 1. 2. t. 20. § 16. - The legatee receiving a particular thing from the testator, as a certain donation, does not represent his person, nor consequently does he succeed to his rights and obligations. When an estate is bequeathed, all real burdens follow the legacy, but not likewise the debts with which perhaps it is burdened, unless the testator has disposed otherwise. C. I. 862, 878, 1033; C. G. 874, 1014, 1020, 1024; C. H. 881, 882; C. A. 662; L. 932.

1057. Note: An heir who is also a legatee can renounce the inheritance and accept the legacy, and conversely. But he cannot accept part of the legacy and renounce another part, or accept a legacy affected by no burden and renounce another burdened one. C. L. 183. Cf. L. 4, 5 de Legatis et fideicommissis ff. - If a legacy is under a condition, since the condition suspends the disposition, and the legatee, and the same is true of the heir, dies before the condition is fulfilled, the legacy ceases, nor is his right transmitted to the heirs. C. I. 853. If the legacy is under a mode, the legacy is at once acquired by the legatee. Hence, if the legatee after the death of the testator, before receiving the legacy or before fulfilling the mode, dies, his right passes to the heirs, provided the mode can be fulfilled equally by them. But the legacy is owed, although he does not fulfill the mode, if this does not stand through him. Cf. C. B. 2192 ff. - A legacy to a day, or to be paid at a future time, is not owed before the established time. Meanwhile the legatee has a right to it, which right, if he dies before the established day, he transmits to his own heirs. C. B. 2177. A testamentary disposition which leaves the quantity of the legacy altogether to the judgment of the heir or of a third party is null, except remunerative legacies for services shown to the testator in the last infirmity. C. I. 835.

A legacy must be fulfilled according to its proper form. C. H. 386; L. 936. "When the ox which was bequeathed is dead, neither the hide nor the flesh is owed." L. 49 de Legatis etc. ff. C. B. 2147 ff., 2162 ff.; Inst. 1. 2. t. 20. § 29 ff. "If a father in his testament has ordered the heir to give so many gold pieces to his daughter when she has married; if the daughter is married when the testament is made, but while the father is absent and ignorant, nevertheless the legacy is owed: for if the father was not

ignorant of this, he seems to have thought of other nuptials." L. 45 de Legatis et fideicommissis ff. "What has been bequeathed thus: Let my heir, when he dies, give ten to Lucius Titius, since the legacy is to an uncertain day, does not pertain to the heirs of the legatee if he has died while the heir is living." L. 12 de Legatis et fideicommissis ff. "If a building has been placed upon areas that have been bequeathed after the testament was made, both will be owed: both the soil and the surface." L. 39 de Leg. et fideic. Dig. Cf. also L. 10 e.t. "If someone has bequeathed ten amphorae from that cask: even if not ten, but fewer, can be found, the legacy is not extinguished; but he receives only that which is found." L. 8 de Leg. et fideic. Dig. "If it has been bequeathed thus: Lucius Titius my heir is condemned to give Tithasus five gold pieces; then in another place thus: Publius Maevius my heir is condemned to give Tithasus five gold pieces; unless Titius has shown that the legacy was left by Publius for the sake of taking it away, he will receive five gold pieces from each." L. 44 de Leg. et fideic. Dig. When a testament has been rescinded, pious legacies recorded in it must still be paid, if the will of the testator concerning them is certain.

1058. Who can bequeath, and to whom? - Whoever can testate can bequeath. But it is lawful to bequeath to those who can be instituted heirs, and to those who can receive a donation. And thus by Canon Law some modest thing can be bequeathed to Convents of Friars Minor, and to professed members and formed Coadjutors of the Society of Jesus, although neither, from their own Constitutions, can be instituted heirs. Clem. I. § Cupientes de Verb. sign. According to C. I. 382, nothing prevents imposing some burden on heirs in favor of those who are to be born, e.g., a thousand annual scudi for dowering girls. C. B. 2177, 2178, 2180; C. H. 484; Inst. 1. 1. t. 20. § 20 ff.; S. C. EE. et RR., March 26, 1677; June 20, 1686; Lugo Resp. Mor. 1. 4. d. 5.

1059. What things can be bequeathed; what enduring force do bequeathed things have? It is peculiar to legacies that not only one's own thing, but also another's thing can be bequeathed, namely one which the testator knew to be another's; otherwise the legacy is not valid. Hence the heir is bound to buy the thing from its owner and hand it over to the legatee, or to hand over its just price to him. Thus according to C. I. 837, 838; C. H. 861, 862; C. A. 662; Inst. 1. 2. t. 20. § 4. But a legacy of another's thing according to C. G. 1021 will be null, whether the testator was ignorant or knew that the thing was another's.

Cf. C. B. 2169, 2170; C. L. 1801 ff. - C. I. 870; C. G. 1022; C. H. 875; C. L. 1827, 1828 establish that when an indeterminate thing has been bequeathed, yet contained under a certain genus or species, the heir, to whom the choice pertains, is not bound to give the best, nor can he give the worst. Cf. C. H. 1167; C. A. 656, 658, 659; C. B. 2155, 2156, 2182 ff.; C. He. 484; C. L. 1805 ff., 1812, 1816 ff., 1832 ff.; L. 938. If the testator has left something annual or monthly to someone and his heirs, or has ordered a determined number of Masses to be celebrated each year, it is owed also to the heirs of heirs, and these will have to be celebrated forever. S. C. C., Aug. 4, 1864.

If the legacy is real, left from some estate or estates, or for the satisfaction of which the testator obligated these by pledge or mortgage, it binds whatever possessors of the thing in proportion to the estate; namely heirs always; outsiders, if the legacy has been duly transcribed, or the mortgage inscribed, or the estate has come to them by lucrative title. But if the legacy is personal, it binds only the heirs according to hereditary portions. Hence, if the estate or estates are destroyed, the legacies still survive. - Monthly or annual legacies are owed whole at the beginning of each month or year,

even if the legatee dies after the month or year has begun. C. I. 837; C. A. 687. A legacy of an impossible or prohibited thing is without effect.

C. B. 2171 ff. When foods are left, food and wine are contained in suitable quantity. When support is left, all things are contained without which life cannot be supported: both food and wine, and clothing, and suitable instruction. C. L. 1831. A legacy of support can be demanded at the beginning of any year or month. C. I. 867; indeed it is owed according to C. L. 1841. - Annual legacies and legacies of support and usufruct cannot be made to several persons successively; and if this has been done, only those who are found in the first place at the time of the death of the testator acquire the legacy. C. I. 901; Inst. 1. 2. t. 22; Benedict XIV, de Syn. 1. 13. c. 25. n. 30 ff.; E. M.

1060. Whether a legacy left by a debtor to a creditor is to be judged given in compensation of the debt? According to C. I. 845; C. G. 1023, a legacy of this kind, without mention of the debt, is not presumed to have been made in payment of the debt. Nevertheless the general presumption is that someone wishes first to satisfy his obligation, and then to give gratuitously.

1061. Whether a legacy left to orphans can be given to the poor having useless parents; what of a legacy left to the poor? If true orphans are lacking, it can be given; because the will of the testator is sufficiently fulfilled; for he wishes to help children not having the means by which they may be supported. - But if true orphans are present, more probably altogether it cannot be given: because the express will of the testator must be fulfilled in its proper form whenever it can be fulfilled. Clem. Quia contingit de Rel. dom.; Trent sess. 22, c. 8. Nevertheless St. Alphonsus thinks that not improbably it can be given, because this more closely approaches the end of the testator, since then such children must provide not only for their own need, but also for the poverty of their parents. - L. 930.

A legacy left to the poor can be given to those who are in need according to their condition, and accordingly also to one's own blood relatives if they are truly in need; indeed someone can retain it for himself if he is truly in need, unless the testator left something else to him. - If it does not suffice for all the poor, it must be given according to the order of charity; and accordingly those more in need seem to be preferred. But the poor are regularly understood to be those of the place where the testator had his domicile. C. I. 832.

1062. Whether a legacy left to girls so that they may marry can be given to those who become religious? - If the legacy was left to a determined person, it is certain that it can be given, unless the mind of the testator is otherwise established. For the testator intends primarily to regard the person herself with his benefit. - If the legacy was left to indeterminate persons, certainly more probably it must be given only to those marrying, and first marrying. For the express will of the testator must be preserved in its proper form whenever it can be preserved. But this will of testaments is very pious: they intend to provide for girls of this kind so that they may be removed from the danger of sinning. L. 930.

1063. Whether a legacy left to a girl under the condition of marrying some man is owed if she marries another? "It is certain that it is not owed," because that condition does not injure the liberty required for marriage, since the girl can freely accept or reject such nuptials; and accordingly it cannot be regarded as a base condition, and as though not added. Exception, however, if "she herself

is induced to marry an unworthy man, because then that condition is rejected as base, and the legacy is owed to her if she marries another." L. 853. Schmalz. 1. 4. t. 1. n. 149, 150; C. A. 700.

1064. Whether a legacy left to girls so that they may marry can be given to girls who have already married without a dowry? Resp. Affirmatively, if it concerns determined girls; because the testator is presumed to have wished altogether to provide for them on account of a particular affection toward them, or so that, married, they may live decently. Otherwise, if it concerns indeterminate girls, because then the testator is judged rather to have wished to assist those marrying, so that they might avoid the danger of prostitution. L. 930.

But if the legacy concerns dowries, a more benign interpretation can be made also for poor married women; for a dowry is both for finding a husband and for bearing the burdens of marriage, and also for those professing a religious Institute; for a dowry is necessary for these also in order to embrace the state. - When dowries of this kind have been left to honorable girls, honorable girls are to be understood as those who are such in common estimation, not the immodest.

1065. What comes under the name of movables or movable goods in legacies? - Movable goods are generally those which can be moved from place, such as clothes, animals, money, etc. Movable goods, movable things, movable, or even movables in opposition to immovables, sound the same. Movables, without addition and without determination, are said to be all goods which are not immovable, excepting money, books, jewels, coins, active debts, instruments of the arts, linens for the use of the body, horses, arms, grains, wine, hay, and other similar things. Also except those things concerning which a particular commerce is exercised. Furniture, or movables precisely furnishing a house, are altogether restricted to those things which are ordered to use or to the ornament of habitation, such as seats, tables, cabinets, etc. C. G. 527 ff.; C. I. 416 ff.; C. H.

335 ff., 346; C. A. 647 ff.; Gousset on aa. 533, 535; Lugo Resp. Mor. 1. 6. d. 10, 11.

1066. He resolves: Hence silver furniture and animals are simply movables, excepting horses; linens, excepting those which are used for the body. If the testator says: I bequeath the movables to Caius and the immovables to Sempronius, Caius has a right to all movable goods, because the mind of the testator is evidently clear from the opposition of movables to immovables.

Gousset on a. 533; Rogron ib. If the legacy is stated thus: I bequeath to Titius all my movables, or movable goods, or the totality of movables, Titius has a right to all goods that are not immovable, because the word movables is not taken here without addition, but with an extension of meaning. Gousset 807 and on a. 533; Rogron ib.

1067. Whether the Supreme Pontiff can commute the last wills of testators? - There is no doubt that the Pope can commute last wills with cause, as is clear from Clem. Quia contingit de Relig. domib. With cause, "because although the dispositions of testaments are judged to be committed to the Pope or Prince, nevertheless they are committed not as to an owner, but as to a dispenser of the common good or of pious causes. Hence, since the Pontiff is not the owner of such goods, he cannot, either from ordinary or extraordinary power, convert these dispositions without cause to another use than that to which they were destined by the testators. Therefore if the legacy is profane, the Prince will be able, on account of public necessity or another just cause, to commute it into another profane or pious legacy. But if the legacy is pious, the Pope alone will be able, with just cause intervening, to convert it into another pious one." L. 931; Benedict XIV, de Syn. 1. 13. c. ult.; L. Legatum 4 ff. de

Administrat. rer. ad civ. pert.; S. C. de P. F. 1807, Collect. ed. 2. n. 689; A. S. S. v. 1, p. 609; v. 2, p. 353.

1068. Whether Bishops with a just cause can commute pious dispositions? The first opinion affirms. The reason is that, from Trent sess. 22, c. 6 de R., Bishops, at least as delegates of the Apostolic See, and from a just and necessary cause, by their own judgment, can commute last wills. But the second and more probable opinion denies. The reason is that from C. Tua de Testam. and from Trent sess. 22, c. 8 de R., it is imposed on Bishops to execute all pious dispositions, both in last will and inter vivos.

"Laymann nevertheless judges very probably, and the Salmanticenses, etc., agree, that if some cause supervenes, or if it was unknown to the testator, which, if he had known it, he would have disposed otherwise, then the Bishop with the heir can by epikeia interpret the will of the testator and convert the legacy to another use, for example if a legacy has been left for making sacred vessels which the church does not need, but rather chasubles. But when pious legacies can in no way be applied to the use intended by the testator, they are not caducous, but must be applied to another pious use at the judgment of the Bishop and executor." L. 931, 939, 940; Lugo Resp. Mor. 1. 4. d. 32. n. 1, 8, 9, 10, 11.

There is certainly no opposition between c. 8 and c. 6 of the cited Council of Trent; but each faculty, as appears from the tenor of the text itself, is asserted of Bishops, and accordingly from the Council of Trent they truly are executors of pious dispositions, and can commute them from a just and necessary cause. - According to the cited chapter 6 of Trent, Bishops cannot make commutation unless from a just and necessary cause, copulatively. Barbosa Collect. in C. Trid. in l.c.; De Luca Annot. in S. Conc. Trid. Disc. XII. - Trent sess. 25, c. 8 de R.; Collectan. S. C. de P. F. ed. 1. n. 1622; Reiffenst. de Testam. n. 804 seq.

1069. What of division to be made by parents among children? Parents are conceded the ability to divide their things among children, whether by act of donation or by act of last will or testament, with the same formalities of donations or testaments being observed. C. I. 1044, 1045; C. G. 1075, 1076. In order that the division be valid and firm, it is necessary: 1. That it be made among all the children, C. I. 1047; C. G. 1078. 2. That the legitime not be injured, C. I. 1048; C. G. 1079. 3. That if it is made by act of donation, the division comprehend present things only; but if it is made by testament, it can also comprehend future things. C. I. 1045; C. G. 1076. 4. When the division has been made by donation, ownership of the divided things passes to the children from acceptance of the donation, by which the division is perfected. But if it is made by testament, the division is perfected only by the death of the testator, and ownership passes to the children from that death. 5. If any things have not been comprehended in the division, these, just as omitted things, are deferred ab intestato. C. I. 1046; C. G. 1077. By division of the inheritance, the heirs are liable for the debts of succession. C. H. 633, 640.

VIII. On Commodatum

1070. What is commodatum? - Commodatum is: the gratuitous concession of some thing for use alone, and for a determined use, and for a certain time. C. I. 1805; C. G. 1875; C. H. 1740; C. L. 1506, 1507; C. A. 971; C. B. 598. - Of some thing, i.e., both immovable and movable, which nevertheless is not consumable by use. C. I. 1805; C. G. 1878. For use alone; and by this it differs from pledge or

deposit, whose use is by no means conceded: for use alone, and that determined, wherefore precisely a right to a certain use only is transferred to the borrower, and consequently the lender remains owner of the lent thing. C. I. 1805; C. G. 1877; C. H. 1741. - And for a certain time; in this commodatum differs from precarium, because in precarium the time is not determined as in commodatum: wherefore precarium is defined as that which is conceded for use to one asking by prayers, as long as he who conceded it permits. C. H. 1750; C. A. 974; C. Precarium 3 de Precariis; Troplong della Prescrizione c. 2 del Possesso n. 365, 366. Concession; for a promise of commodatum, although obligatory, is not yet commodatum, which is a real contract and is perfected only when the thing has been handed over. C. A. 971.

Gratuitous concession; for by this commodatum differs from lease, because in the latter use is conceded for a certain price, but in commodatum gratuitously. C. I. 1806; C. G. 1876; C. H. 1740; C. L. 1507, 1508; Inst. 1. 3. t. 15. § 2; L. 744, 745; Lugo d. 33. n. 8.

1071. What are the obligations of the borrower? - 1. It is illicit for the borrower to use things lent for a longer time or in another way than he received them to be used, if he understands that he is doing this against the owner's will, and that the owner, if he had understood it, would not have permitted it. Acting otherwise, he would not use the thing, but abuse it, and accordingly would be liable for damages. C. I. 1808, 1809; C. G. 1880, 1881; C. H. 1744; C. L. 1510, 1511; C. A. 972, 973; C. B. 602, 603. Cf. Ithur. Cas. 46. n. 6. 2. The borrower is bound to ordinary expenses for preservation of the thing, but by no means to extraordinary ones. The reason is that ordinary expenses are as it were a certain natural consequence of daily use, which has been conceded to the borrower, but extraordinary expenses are by no means so, since they are precisely for conserving the thing itself; and ownership of the thing remains with the lender. C. I. 1813, 1817; C. G. 1886, 1890; C. H. 1743; C. A. 981; C. L. 1519; C. B. 601; L. 18 In rebus § 2 Dig. h.t.; Lugo d. 33. n. 14; L. 747.

3. The borrower regularly is not liable for a fortuitous loss of the thing. C. I. 1810; C. G. 1882; C. H. 1744; C. A. 978, 979; C. L. 1516; L. 5 Si ut certo §§ 3, 4 Dig. h.t.; namely, his fault, a special agreement on this matter, and the sentence of a judge being excluded. The reason is that a thing perishes for its owner. Exod. 22:10. Likewise he is not liable for loss when this follows, not indeed fortuitously, but as it were necessarily, from the conceded use of the thing. For the owner is judged to have consented to that. C. I. 1812; C. G. 1884; C. H. 1746; C. L. 1516; L. 23 Si commodavero Dig. h.t.; L. Eum qui Dig. e.t. If the damage was done by the injury of another, the borrower is not liable for it. L. 19 Ad eos Dig. h.t. Nor is the borrower liable for loss if the thing perishes by the fault of him to whom the lender had ordered it to be handed over. L. 12 Si mei § 1 Dig. h.t. - Nor is he liable if the borrower used suitable means for restoring it. L. 20 Argentum Dig. h.t.; L. 752. 4. But the borrower is liable for fortuitous loss: if this has been brought into the pact, L. Ea quidem C. de Commodato, which is understood if he received the thing appraised, C. I. 1811; C. G. 1883; C. H. 1745; if fault of the borrower intervened, R. 25 de R. I. in 6; L. Si ut certo § 7 Dig. h.t.; if he applied the thing to another use, or did not restore it at the determined time, C. I. 1809; C. G. 1881; C. H. 1744; C. L. 1518; C. A. 978, 979; if he did not diligently guard the thing and preserve it from dangers, C. I. 1808; C. G. 1880; C. H. 1744; C. A. 978, 979; L. cit. § 5; C. Cum gratia un. h.t. According to C. I. 1808, 1810; C. G. 1880, 1882, the borrower is bound to guard the thing lent as a good paterfamilias; whence also, if in danger he exposes the lent thing rather than his own, he is liable for its

destruction and accident. Namely, since the contract is for his benefit only, natural equity requires that the borrower, in an equal cause, consult another's interest rather than his own. - C. L. 1514, 1516; Gousset 810. According to Roman Law, L. In rebus Dig. h.t.; L. Obligationes § 4 de Obligationibus et Actionibus, etc.; and according to Canon Law, C. un. de Commod., the borrower is liable for fault not only grave and slight, but even very slight; namely, he is liable for grave fault if someone lent for his own sake only; for slight fault if he lent for the sake of himself and of the borrower; for very slight fault if he lent for the sake of the borrower only. Cf. 1072. Precarium imposes obligation only from fraud and grave fault, because the other can revoke the thing at will. L. Quaesitum est § 3 Dig. de Precario.

If a thing has been lent to several persons together, each is liable in solidum. L. 4 § ult. h.t.; C. I. 1814; C. G. 1887; C. H. 1748; C. L. 1520. 5. "The restoration of a thing lent is not probably refused under pretext of debt." L. ult. C. de Commod.; C. A. 471. 6. The rights and obligations which are contracted by force of commodatum pass to the heirs of the lender and of the borrower. But if the commodatum was made only in view of the borrower, it by no means passes to his heirs. C. I. 1807; C. G. 1879; C. H. 1742; C. L. 1509. The reason is that if the commodatum was made exclusively by reason of the person, its final cause ceases adequately, e.g., if you lent a horse to your friend, who was very much delighted by riding. If, on the contrary, the commodatum was made by reason of some particular thing, its final cause does not cease unless the thing ceases, e.g., if you lent a horse to your friend for the labors of harvest.

But precarium ceases by the death of the receiver, but not by the death of the giver, if it is not revoked by the heirs. L. Cum precario ff. de Prec.; C. fin. de Prec.; L. 745.

1072. Whether, theological fault being excluded, laws of this kind oblige in conscience before the sentence of the judge? Theological fault: fault is one thing theological, another merely juridical. Theological fault is an omission or action, harmful to another, free, and which before God is sin. But juridical or civil fault is any negligence, or even an action harmful to another, even if involuntary and by no means sin before God. But such juridical fault according to Roman Law is threefold: namely grave, slight, and very slight. Grave fault, which is equated with fraud, is the omission of diligence and circumspection which men of the same condition commonly tend to use in the same circumstances of the matter: such as, e.g., if someone should leave a borrowed book outside before the door, and so a thief should take it away. It is equated with fraud, namely by presumption of law. L. 213, 223, 226 de Verb. signif. ff. - Slight fault is the omission of diligence and circumspection which the more diligent and cautious men of a condition of this sort are accustomed to use; such as if someone should leave a borrowed book inside a room, but with the door open; for the more diligent are accustomed to close the door. Finally, very slight fault is the omission of diligence and circumspection which the most diligent and most cautious men of such a condition use: such as if someone should leave a book lent to him inside a room whose door he indeed closed but did not test whether it was well locked. - L. 549, 749.

Although this distinction of faults is not expressly mentioned in C. I., C. G., C. A., C. H., C. B., nevertheless it is supposed when, for the diverse circumstances of the matter, those Codes require ordinary or extraordinary, lesser or greater diligence. Cf. C. I. 1151 ff., 1224, 1843, 1844; C. G. 1137, 1382 ff., 1927, 1928; Rogron on a. 1137; C. A. 1293 ff., 1306, 1323, 1324, 1331, 1332; C. H. 1902 ff. - In more recent law, the diligence which is generally required is that which the nature of the

obligation requires, corresponding to the circumstances of persons, time, and place. Unless something else is expressed, that diligence is required which must be furnished by a good paterfamilias. C. I. 1224; C. G. 1137; C. H. 1104. - Cf. C. B. 276 ff., 300, 539, 599, 680, etc., 831 ff.; Troplong della Vendita c. 4, a. 1624, n. 361 ff.

Now the more common and more probable opinion affirms the obligation of the aforesaid laws in the forum of conscience. For 1., as Lugo says, d. 8. n. 106: "It cannot be denied that according to the light of nature and the common sense of men, men seem to be obliged more to guard against fault in some contracts than in others: for he who has received a thing lent for his own convenience alone judges himself more obliged to guard it than he who, for the utility of the depositor alone, has it deposited with himself. Therefore it cannot be said that in the forum of conscience all are held only for grave and serious theological fault; otherwise they would not be held more in one case than in another. Therefore that distinction of contracts, whether for the favor of one or of both, even with positive and human law excluded, produces diverse grades of obligations; and consequently in some case and for some fault someone will be held from one contract even in the forum of conscience, for which in another case he was not held; and therefore he will not be held only for mortal fault, but also for slight fault, for all in every case are held for mortal and grave fault." 2. "The reason is," as Lessius says, 1. 2. c. 7. n. 45, "because these laws sanction that which is consonant with natural equity to furnish concerning another's thing, which by means of a contract we have with ourselves; with this sanction posited, he who makes such a contract, by accepting a commodatum, lease, deposit, pledge, etc., implicitly obliges himself to furnish that diligence which the laws require. Wherefore, if he does not furnish this diligence, although this was done by natural forgetfulness without any fault, he will be bound to restitution." "But Soto, etc., very probably deny. The reason is that, on the one hand, it is not equitable to oblige someone to a grave penalty without his grave fault; on the other, it is not presumed, at least it is not established, that someone wished to oblige himself in conscience to satisfy a loss done with only juridical fault. But the laws which are adduced to the contrary, obliging with only juridical fault, either presume theological fault, or oblige only for the external forum, or have not been received in another sense.... But those laws which in some cases prescribe restitution, these indeed oblige, even if sin is absent, but not before the sentence of the judge, as the Salmanticenses, etc., commonly say, whatever others say.... Likewise in offices it is probable for the same reason that no one is bound to restitution except from grave fault joined with serious theological fault.... Nevertheless he who receives a stipend is held even from slight juridical fault ... or he who promises diligence greater than common due diligence, or if the office of itself requires great diligence.... But it is always understood that juridical fault is joined with grave sin, so that it may oblige gravely." L. 554. Moreover no one furnishes very slight fault; for, except in the case of a special contract and obligation concerning it, the most exact diligence is required neither by civil law, which in reality requires only moderate and ordinary diligence, nor by natural law; for ordinarily no one uses it in his own things, much less in another's, and the thing is altogether extraordinary and unusual. - But one must deal more mildly with him who gratuitously and for another's convenience furnishes an office, e.g., in the case of deposit; and therefore the doctors require grave fault in him, while on the contrary they teach that very slight fault must be furnished by him who contracts only for his own convenience, as in commodatum, and they say that slight fault must be furnished when the contract yields to the convenience of both, as in sale, purchase, lease, pledge, and partnership.

1073. Whether someone is bound to save from danger things lent to him before his own things? - Resp. Affirmatively, if the things of another are much more precious than his own, especially if they were lent to him gratuitously. The reason is that the keeping which each prudent person would use for his own things is owed to another's thing; but each person would preserve his more precious things before cheaper ones.

Therefore he ought to act similarly toward another's lent things; otherwise he becomes guilty of injustice and is bound to restitution. But the other is bound to compensate the loss of the borrower's thing. For neither a borrower nor even a depositary is bound to extraordinary expenses for a thing lent or gratuitously deposited. C. I. 1817; C. G. 1890. - Hence, on the contrary, by parity of reason, one can per se prefer his own things if they are more precious than another's.

For no one is bound to undergo a greater loss in order to avert another's lesser loss. - In the case in which both the things of another and one's own are of the same value, it is disputed. Some judge that the borrower in this hypothesis must attend equally to saving the things lent and his own, because, by accepting them, he took on the obligation of using serious diligence in caring for and guarding those things as his own. Others, however, more commonly say that the borrower can probably rather save his own things from danger, because rightly ordered charity begins from oneself, at least speaking per se, with a special contract excluded. But if someone rather preserves the thing of another, the other is bound to compensate the loss of that thing; since it would be, in the case, to make an extraordinary expense. C. I. 1817; C. G. 1890. And these things, natural law being considered. As regards positive law, cf. 1071. Lugo d. 8. s. 10; L. 752; Ithur. Cas. 27. n. 14.

1074. What are the obligations of the lender? - 1. The lender is bound to disclose the defects of the thing; otherwise he is liable for damages. For he is their cause to the borrower. C. I. 1818; C. G. 1891; C. H. 1752; C. B. 599, 600; C. L. 1521; L. In Commodato § 3 Dig. h.t.; L. In rebus § 3 Dig. e.t. 2. The lender cannot demand back his thing before the established time, or before the constituted use. For we ought to be assisted, not deceived, by a benefit. C. I. 1815; C. G. 1888; C. A. 973; C. B. 604; L. In Commodato § 3 Dig. h.t.; C. un. de Commod.; R. 33 de R. I. in 6. - Exception: unless equal damage threatens the lender; since this condition is always understood: unless necessity urges. For it is not equitable to benefit another by one's own damage. L. 747; C. I. 1816; C. G. 1889; C. H. 1749; C. L. 1513; C. B. 605. It is otherwise, however, according to C. A. 976. 3. He is bound to restore extraordinary and urgent expenses which the borrower had to sustain for necessarily preserving the lent thing, unless he is at fault. C. I. 1817; C. H. 1751; C. G. 1890; C. A. 981; C. L. 1521; C. B. 601, 606.

IX. On Deposit

1075. What is Deposit, and how is it contracted? - Resp. To the 1st: Deposit is a contract by which a thing is handed over to someone to be guarded gratuitously, under this law, that the same thing be restored whenever it is requested. L. 1 Depositi; C. I. 1835; C. G. 1915; C. A. 957; C. H. 1758, 1760; C. L. 1431; C. B. 688. - A thing, namely movable. Deposit can be constituted only in movable things, C. I. 1831; C. G. 1918; C. H. 1761.

Even in immovables, C. A. 960; L. 746. - Gratuitously; for if a fee or interest has been established, deposit passes into lease and hire, or into loan at interest. L. 1 § Si vestimenta C. h.t.; C. I. 1837; C.

G. 1917; C. L. 1432; C. B. 689. - To be guarded; if the depositary is permitted to use it, it almost passes into commodatum or mutuum. L. 24, 26 § 1 h.t.; C. A. 959; C. H. 1768. Almost, since the deposited thing must be restored whenever it is sought. It is handed over, for it is a real contract, which is perfected by delivery of the thing. C. A. 957; C. B. 688.

Resp. To the 2nd: Deposit is contracted expressly or tacitly. Expressly, when such a contract is made explicitly; tacitly, when a thing is brought to those who by reason of office are bound to its custody, such as innkeepers, stable-keepers, and sailors. L. 1 in fi. Naut. Cauponae, etc.; C. I. 1866; C. G. 1952; C. A. 970, 1316; C. B. 701; C. H. 1783. According to the same Italian, French, and Austrian Law, those who exercise transport by land are held to the same obligations for deposited things as innkeepers. They answer for things to be transported as soon as these have been entrusted to them in port or at a station of goods. Loss and deterioration of goods entrusted to the carriers themselves is imputed to the carriers, unless they prove that a fortuitous event or greater force was the cause. But as regards other craftsmen, if they contribute nothing except work to the making of another's thing, when loss of the thing occurs, they are not bound to compensation unless fault has intervened. C. I. 1630, 1631, 1636; C. G. 1782, 1784, 1789; C. A. 970, 1160, 1316.

1076. What are the obligations of the depositary? - 1. The depositary cannot, per se, use the deposited thing. The reason is that the thing is given to him for custody, not its use conceded. Use of the thing can be judged permitted only if it can reasonably be judged that the owner of the thing consents to it, e.g., if by use the thing is exposed to no danger, nor made worse; if someone has deposited money not closed nor sealed. Wherefore, if the owner is unwilling, the owner must be compensated for the use made of the thing, if from this the depositary has become richer. C. I. 1846, 1852; C. G. 1930, 1936; C. H. 1767, 1770; C. A. 958, 961, 965; C. B. 698; C. L. 1437, 1438; Lugo d. 33. n. 4. - But he who truly uses another's thing at his own risk, even if he knows the owner is unwilling, acquires for himself what he gains thence by his own industry. By his own industry, since a thing consumable by use does not bear fruit by that use, but is destroyed. By his own industry, for fruits produced by the thing itself must be returned with the thing itself. C. I. 1852; C. G. 1936; C. A. 958, 961. But C. B. 698 and C. H. 1770 say that if the depositary uses deposited money, interest is owed from the day of use. L. 748.

2. The depositary must take that care of the deposited thing which he takes for his own things. L. 32 h.t.; L. 1 § 5 de Oblig. et action.; C. I. 1343; C. G. 1927; C. H. 1766; C. A. 961, 964; C. B. 690. - This obligation is stricter if the depositary offered himself to receive the deposit; if he stipulated a fee for the deposit; if the deposit was made for the convenience of the depositary alone; if an agreement intervened that he is liable for any fault. C. I. 1844; C. G. 1928; C. H. 1182, 1766; C. L. 1435, 1451. If the deposit is made for the depositor's favor alone, the depositary is bound only to furnish against fraud and grave fault, which is equated with fraud. L. Quod Nerva Dig. Depositi. If the deposit is also made for the favor of the depositary, as when he receives a stipend or fee, the depositary is liable even for slight fault, though not very slight fault. L. Depositum Dig. Depositi § 8 coll. § ult. Inst. de Locat. et cond. Except sailors, innkeepers, and stable-keepers, who are liable even for very slight fault, but not for fortuitous event or greater force. L. Et ita Dig. Nautae etc. Yet Laymann, de Deposito n. 1, with others, judges not improbably that this, namely that they are liable for very slight fault, is not valid in the forum of conscience before the sentence of the judge. - St. Thomas 2. 2. q. 62. a. 6; L. 750.

According to C. I. 1867; C. G. 1953; C. H. 1784; C. A. 1316; C. B. 701, innkeepers and stable-keepers as depositaries are liable for theft or damage inflicted, if the theft was perpetrated or the damage inflicted by servants or persons placed over the direction of the inn, or by outsiders who frequent it. The depositary is held by no obligation if anything happens by prevailing greater force, unless he had already previously delayed returning the thing requested by the depositor. C. I. 1845, 1868; C. G. 1929, 1954; C. H. 1182, 1784; C. L. 1435, 1436; C. A. 964, 965. Exception for the internal forum, if the thing would have perished equally and at the same time and danger with the owner, because then that delay was not the cause of the loss. According to C. A. l.c., the depositary is not liable for a fortuitous event, even if the more precious deposited thing could have been saved by damage to his own thing.

3. He must return the deposit as soon as it is sought, if this can be done. L. Depositum § 22 Dig. Depositi. The reason is that the deposited thing is for the convenience of the depositor alone; and accordingly there can per se be no cause for retaining the deposit. Per se; for accidentally it sometimes must not be returned, as if it is demanded for one's own or another's harm. L. Depositum § 39 Dig. Depositi. But the thing is to be restored whenever the thing is asked back, even if perhaps a day was established in the contract for restitution. But before the established day, the depositary regularly cannot restore the thing except from a just cause. C. I. 1860; C. G. 1994; C. A. 462, 963; C. H. 1766, 1775, 1776; C. B. 695, 696; C. L. 1448. If a deposit has been made by a person who can contract obligation with a person who cannot contract it, the depositor has only a vindicatory action for the deposited thing if it exists with the depositary, or otherwise an action of restitution up to the concurrence of the quantity which has been turned to the utility of the depositary. C. I. 1842; C. G. 1926; C. L. 1433. 4. The depositary must restore the deposited thing to him who deposited it. If nevertheless he understands the thing to be stolen and knows its owner, he must warn this owner, after establishing a suitable space of time in which he may himself demand it back; but if this owner has been negligent, the depositary is freed from every obligation by restoring the deposit to him from whom he received it. Therefore the thing is regularly to be restored to him who deposited it, even to a thief, if the owner, having been summoned, has failed. L. 31 h.t.; C. I. 1853, 1854; C. G. 1937, 1938; C. H. 1771; C. L. 1441, 1442. Cf. here 1343, 1351. When the depositor has died, the thing is to be restored to the heir. If there are several heirs and the thing is divisible, his part is to be returned to each; but if the thing is indivisible, all must agree as to the mode of receiving the thing. L. 1 § Si pecunia 36 h.t.; C. I. 1855; C. G. 1939. When the depositary has died, the thing is to be restored by the heir. But if the heir in good faith has sold the thing, he is bound to return only the price, or his action to it, if not yet paid. C. I. 1851. 5. Restitution must be made by him with whom the deposited thing was, and in that place in which the thing is found without bad fraud of the depositary. L. 12 § 1 h.t.; C. I. 1859; C. H. 1774. According to C. G. 1943, in that place in which it was deposited. According to C. B. 697, in that place in which it was to be guarded. 6. The depositary, as also the borrower, cannot compensate to themselves debts from deposit, from commodatum, and precarium. Thus according to positive law. L. ult. C. de Commodato; L. Si quis C. Depositi; C. Bona fides de Deposito; C. I. 1289; C. G. 1293, 1885; C. H. 1200, 1747. Nevertheless, if someone retained the thing under this title, he would indeed sin against legal justice, but by no means against commutative justice. By natural law, "it is probable," says Lessius 1. 2. c. 27. n. 16, "that

compensation has place in the forum of conscience when no other reason is available for obtaining the thing owed to oneself." But if the depositary finds that the deposited thing is his own, he is held by no further obligation. C. I. 1861; C. G. 1946; L. 753.

1077. Whether, theological fault being excluded, the depositary is bound to compensation if the thing perishes from his negligence? - These are the words of Busembaum apud St. Alphonsus 749: "If he to whom a thing is lent, leased, deposited, or pledged guards it negligently, so that it perishes, but the negligence is not theological mortal fault, it is probable, as I said from Soto and Sa, that he is not bound to restitution in conscience. Others nevertheless think otherwise, namely, that he who has contracted juridical fault in guarding is bound to restore, if this was grave; and next if it was only slight, indeed even sometimes if it is very slight, namely when the deposit has been made for the convenience of both, and if he receives a price for custody. See Lessius cap. 7 d. 8; Laymann tr. 4 cap. 25, where he teaches that the depositary is held only for fraud, or gross fault, which is equated with fraud." These things as regards Natural Law. As regards Positive Law, cf. 1076. L. 751; St. Thomas 2. 2. q. 62. a. 6.

1078. What are the obligations of the depositor? Necessary expenses made by the depositary must be refunded by the depositor, and the damage which perhaps the depositary suffered on account of the deposit must be compensated. Under this title the depositary can retain the deposit until complete payment of the debt. His office ought to be damaging to no one. L. 5, 23 Depositi; L. 60, 62 § Quod vero 5 de Furt.; C. I. 1862, 1833; C. G. 1947, 1948; C. H. 1779, 1780; C. A. 967; C. B. 693, 694; C. L. 1450.

1079. What is sequestration, and what is its nature? Sequestration differs from deposit insofar as some contested thing is deposited by those who dispute with a third party under this condition, that, when the litigation is finished, it be restored to him whose it will be. L. 110 de Verbor. signif. ff.; C. I. 1870; C. G. 1956; C. H. 1763; C. A. 968. - The sequestrator cannot lay aside the office he has undertaken, against the will of those whose interest is concerned, unless from a grave and just cause, L. 5 § 2 h.t.; C. I. 1874; C. G. 1960; nor can he return a part to one of the depositors. L. 17 h.t.; C. H. 1763. This sequestration is called conventional, and is distinguished entirely from judicial sequestration, which is constituted only by the office of the judge, and can be constituted both for movables and for immovables. C. I. 1875 ff.; C. G. 1961 ff.; C. H. 1785 ff. Also distinguished is sequestration in the hands of third parties, by which namely he who detains a thing of your debtor, or who owes something to your debtor, is prohibited from returning it to him, so that provision may be made for you.

X. On Mutuum

1080. What is mutuum? Mutuum is sometimes taken for the thing itself given as a loan, but sometimes and more often for the contract itself by which that thing is given as a loan to another; and it is defined: a contract by which, through delivery, ownership of a thing consumable by use is transferred to another, with the obligation of returning only as much in the same species and goodness after some space of time. Through delivery, so that it may be indicated that it is a real contract, which is perfected by delivery of the thing. Wherefore a promise of mutuum is not

mutuum. C. A. 983; C. B. 610. Ownership is transferred; for he who receives a thing by mutuum can use it; otherwise it would be a mere deposit.

But he cannot use it unless he has ownership, since that thing is consumable by use, and no one can consume another's thing at will. - Consumable, whether physically as bread, or morally as money, which, although by use it does not perish in itself, nevertheless perishes for him who hands it over to another. - With the obligation of returning as much, otherwise it would be a donation. In the same species, otherwise it would be sale or exchange, if in a different species; commodatum or lease, if the identical thing and in the individual had to be returned. And goodness, lest the lender suffer detriment from the benefit. - After some space of time, by which it is distinguished from exchange, by which immediately gold, for example, is given for silver. - L. 754; L. 2 de Reb. cred.; C. I. 1819; C. G. 1892; C. A. 983; C. H. 1740; C. B. 607; C. L. 1523, 1524; E. M.

1081. Whether there is a precept of lending? - As there is a precept of giving alms to the poor, so there is a precept of granting a loan to the rich who, on account of a peculiar circumstance, are in the greatest need of it. The reason is that the precept of charity binds us toward all human beings, even the rich, and requires that we gladly furnish this which we would wish to be furnished to us in an equal case, if nevertheless we can assist them by a loan without grave inconvenience. "No one," says Benedict XIV in the Encyclical Vix pervenit, "can be unaware that in many cases a man is bound to assist another by a simple and bare loan, especially with Christ Himself warning: From him who wishes to borrow from you, do not turn away," Matt. 5:42.

1082. What are the obligations of the borrower in mutuum? - 1. By force of mutuum the borrower becomes owner of the lent thing, which, in whatever way it perishes, perishes for him. L. 9 de Reb. cred.; C. I. 1820; C. G. 1893; C. H. 1740, 1753; L. 755. 2. The borrower must restore the thing lent in the same species and in the same quantity, quality, and established time; and, in defect of the thing, he must pay its value, according to the established time and place. C. I. 1828; C. G. 1902; C. L. 1524 ff.

If no time and no place have been established, restitution must be made according to the value corresponding to the time at which he is constituted in delay according to C. I., or at which the loan was made according to C. G. 1903. - The borrower cannot return money before the predefined time if it has been credited to him with legal interest; but if, from some agreement made, it exceeds the measure, he can do so only after five years, and with the creditor warned six months before, according to C. I. 1832. L. 2, 22 de Reb. cred.; C. B. 247. 3. Money given by mutuum must always be restored in the same numerical sum expressed in the contract. And whether the value of coins is increased or diminished, the same numerical sum must be restored in the species current at the time of payment. C. I. 1821; C. G. 1895; C. L. 1638. It is lawful, however, even in the forum of conscience, to give banknotes for silver or gold coins, any law or pact to the contrary having been removed.

Italian Law of May 1, 1866; S. Poenit., Jan. 21, 1873. But when gold or silver money has been given by mutuum with a pact of restitution in the same species and quantity, and its intrinsic value is modified, the equivalent must be returned according to the value at the time the loan was given. C. I. 1822; C. A. 988, 989. Cf. C. H. 1170, 1754; L. 782, 791; Gousset 814. 4. If the borrower does not restore the thing, or its value according to the established pact, interest is owed from the day of judicial petition. C. G. 1904. Indeed, if he is in culpable delay, he is also liable for the damages of which he is the cause. C. H. 1108.

1083. What are the obligations of the lender? 1. He is bound to warn the borrower concerning a defect of the thing handed over, if there is one; likewise concerning imminent damage, ceasing profit, and danger of the principal, unless he wishes to lend gratuitously; otherwise the borrower does not consent, and sustains an injury which the lender will be bound to repair. C. I. 1824; C. G. 1898; L. 754. 2. He cannot demand the thing back before the established time. C. I. 1824; C. G. 1899; C. B. 609; L. 754. If the time of restitution was not established, the judge can grant delay to the borrower according to the circumstances. C. I. 1826; C. G. 1900. But if it was established that the borrower should pay when he can, or when he has means for this, the judge will establish a term according to the circumstances. C. I. 1827; C. G. 1901; C. L. 1524 ff. 3. He is bound, per se, not to receive more than the lent thing was worth when it was given by mutuum; because mutuum per se is a gratuitous contract in this sense, that it imposes no other burden on the borrower than that he return in species, at the due time, that which he received. L. 754, 755.

1084. Whether you can receive the thing lent in the same measure and quantity if its price increases during the loan? Whether you can demand more if it decreases? If, when the thing is handed over by mutuum, there is equal doubt on both sides whether at the time of restitution the thing will be worth more or less, it is lawful to make an agreement that, with the same goodness and measure preserved, it must be returned at its time, even if its price has been greatly increased. The reason is that, since there was equal danger on both sides, equality is already preserved by that very fact. - The aforesaid pact is not lawful per se if it is certainly established, or is far more probable, that at the time of payment the value will be increased. The reason is that equality is not preserved in this way, but more is demanded than is given at the time of the loan. Hence, if a modius of wheat is now worth three francs and will be worth four at the time of restitution, it is not lawful to agree that just as much be paid. Exception, however, unless you had determined to preserve the thing until the time of the price; because then more is demanded by reason of ceasing profit.

If you foresee diminution of value or price, you can demand only as much, and the borrower must pay as much, as the thing was worth when it was handed over by mutuum; because in reality you do not demand more than you gave. - According to C. I. 1823; C. G. 1897, if metallic bars or saleable things are given by mutuum, they must always be restored in the same quantity and quality, although their price is increased or diminished. L. 782, 791; La-Croix 910 ff.

1085. Note: "That a loan furnished to a Church, Pious Cause, or University cannot be demanded back unless it is proved to have been turned to its utility. L. Civitas ff. Si certum petatur. And the same is said of a loan given to a minor, who otherwise is not bound, even when made an adult, to restore. L. 3 C. Quando ex facto tut. If nevertheless a Prelate, with the consent of the chapter, and the same is said of a governor with the consent of officials, receives a loan in the name of the church, the church itself is always bound to pay; since Prelates with the chapter can rightly alienate movable things of the church.... - That a loan given to sons of families, regarded as such and lacking castrense goods, without at least tacit consent of the parents, need not afterward be restored by them, at least in the external forum. L. 14 C. de S. C. Maced. Sons can use this privilege, even if they renounce it.... Exception: 1. If the loan is in things other than money, of which the law speaks. 2. If the son swore to pay; although after payment he has an action for reclaiming it; indeed he can procure for himself relaxation of the oath. 3. If the loan was given with the father knowing and not contradicting, or was turned to the utility of the father or children in things which the father was bound to furnish to him.

Likewise if the lent thing still exists, or if the father was accustomed to pay the debts of the children. - It is doubtful whether sons of families in the first case posited are free from restitution of the loan not only in the external forum but also in the internal. Bonacina, etc., deny it, because Civil Law does not take away natural obligation.

But Lessius, etc., affirm it sufficiently more probably, because the law with just cause can indeed take away a natural obligation, and is judged to have done so in this case in order to provide against the damage of parents and to avert the wickedness of usurers. But it does not seem that it can be denied that the supreme human power, on account of the high dominion which it has, can indeed, for the common good, transfer ownership of things from one to another, as is clear in the law of prescription." L. 756, 757, 918; C. I. 1307; C. G. 1312; C. H. 1263, 1304; C. A. 152; C. L. 1535, 1536. Cf. here 953.

1086. What are usury and a usurious contract? Resp. To the 1st: Usury is profit immediately arising from mutuum as something owed. Profit immediately arising from mutuum; for usury is properly committed when the lender seeks profit immediately because of the mutuum, and precisely under the title of mutuum, or something above the principal and the substance lent. Therefore, although he also who sells a thing above the highest just price, or leases it to another for use, sins against justice, nevertheless he is not said to commit usury strictly so called. Profit is understood as whatever can be estimated by price; whence, if, in giving a mutuum, you demand, e.g., that the other return to you what from another source he owes you by justice, it is not usury. As something owed, namely by justice, or by a pact of grateful spirit or benevolence. Wherefore, if the borrower, precisely from a natural grateful spirit and without an intervening pact, liberally gives something beyond the principal to the lender, or even from fear lest otherwise a loan be denied to him in the future, or lest he be judged ungrateful, the lender can accept this without the vice of usury. - C. L. 1636.

Resp. To the 2nd: A usurious contract is a pact by which the lender obliges the borrower to give something estimable by price above the principal from the title of mutuum alone. Hence simple mutuum, or mutuum without usuries, is distinguished from mutuum with usuries, which is called fenus and fenerari. L. 33 de Reb. cred.; L. 758, 761-765, 774, 777-781, 791; St. Thomas 2. 2. q. 78. a. 2; E. M.

1087. Of how many kinds is usury, and what are its names? Resp. To the 1st: One usury is mental and another real. The former is that by which the lender, without an externally manifested pact, either formally intends profit, not to be offered gratuitously, but as though owed under the title of mutuum; or virtually, for example if he internally hopes for profit in such a way that such hope is the principal motive of lending. But the latter is that by which the lender brings profit into an external pact, whether expressly or tacitly. Real usury is either open or disguised. Open usury, or express and formal usury, is when in the contract of mutuum itself something beyond the principal is demanded under this title. Disguised or virtual usury is that which is cloaked by another distinct contract, in which profit because of the mutuum is involved; as would happen if a merchant sold goods at a dearer price than is just precisely from the fact that he must wait for payment, for thus a greater profit would be virtually demanded because of the mutuum. - L. 761, 762; St. Thomas 2. 2. q. 78. a. 2; De Malo q. 13. a. 4.

Resp. To the 2nd: As regards the names of usury, centesimae were usuries in which the hundredth part of the principal, that is, one for a hundred, was paid each month, and accordingly twelve for a

hundred each year, twelve percent; by this reckoning in the hundredth month the usury equaled the principal. This was the gravest of usuries, and as it were the as, from which the lesser usuries were called by the names of the parts of the as: the very least usury, semunciaria, one half percent per year; uncia, unciaria, one percent; sextans, sextantaria, two; quadrans, quadrantaria, three; triens, trientaria, four; quincunx, five; semissis, semissalis, six; septunx, seven; bes, bessalis, eight; dodrans, nine; dextans, ten; deunx, eleven; centesima, twelve; double centesimae, twenty-four; triple, thirty-six; quadruple, forty-eight; quintuple, sixty.

1088. Whether usury is licit? Usury is prohibited by natural, divine, and ecclesiastical law. - By natural law. "For the evidence of this, it must be known that there are certain things whose use is the consumption of the things themselves; as we consume wine by using it for drink, and we consume wheat by using it for food. Hence in such things the use of the thing ought not to be counted separately from the thing itself; but to whomever the use is granted, by this very fact the thing is granted; and on account of this, in such things ownership is transferred by mutuum. Therefore if someone should wish separately to sell wine, and should wish separately to sell the use of wine, he would sell the same thing twice, or he would sell what does not exist; whence he would manifestly sin by injustice. And by a similar reason he commits injustice who lends wine or wheat, asking that two recompenses be given to him: one, indeed, the restitution of an equal thing; but the other, the price of the use, which is called usury. But there are certain things whose use is not the very consumption of the thing, as the use of a house is habitation, but not its destruction. And therefore in such things each can be granted separately, as when someone hands over to another ownership of a house, reserving to himself the use for some time; or conversely, when someone grants to another the use of a house, reserving its ownership to himself. And on account of this a man can licitly receive a price for the use of a house, and besides this demand back the house lent, as is clear in the hire and lease of a house. But money, according to the Philosopher in Ethics 5, ch. 5, middle, and Politics 1, chs. 5 and 6, was principally invented for making exchanges; and thus the proper and principal use of money is its consumption or alienation, according as it is expended in exchanges. And on account of this, in itself it is illicit to receive a price for the use of lent money, which is called usury; and just as a man is bound to restore other things unjustly acquired, so he is bound to restore the money which he has received through usury." St. Thomas 2. 2. q. 78. art. 1; Quodl. 3. a. 19. "It is certain," says St. Alphonsus 759, "that usury is illicit even by natural law." "But a certain modern author in a recently published book laboriously attempted to prove that money of itself is not sterile and unfruitful, as other things consumable by use are; since, as he asserts, from the common commerce of men we observe very many profits to arise from money. Hence he infers that, apart from the just titles of danger, loss, etc., something can licitly be demanded from a loan of money beyond the principal, provided the profit is moderate, and provided the borrower is rich and expends that money in increasing his goods. But deservedly this new opinion was interdicted by Benedict XIV in the Encyclical Letter Vix pervenit. The certain reason is that the profit which is received from money arises entirely not from the money itself, which, since it is altogether sterile, cannot bear fruit, but arises from the mere industry of men. Nor, because my money will profit another through his industry, can I demand from him anything beyond the principal." L. 758; Collectan. S. C. de P. F. n. 2130.

By divine and ecclesiastical law. Thus Ezekiel 18:10, 13 said: "If he has begotten a son who is a robber, shedding blood ... giving at usury and receiving more, shall he live? He shall not live ... since

he has done these detestable things, he shall die by death; his blood shall be upon him." And "the Lateran Council, sess. 10 under Leo X, condemns as usury any profit perceived from an unfruitful thing, with the title of labor, or expense, or danger, however, excluded. When, namely, in the words of the Council, from the use of a thing which does not germinate, with no labor, no expense, or no danger, profit and fruit are sought to be acquired." L. 765. Whence it is evidently clear that usury is not condemned because it is exorbitant, or because it is demanded even from the poor, or for another similar extrinsic reason, but because it is usury. Thus Benedict XIV also openly pronounces illicit any profit arising from a mutuum by reason and force of that same mutuum, in his celebrated Encyclical Vix pervenit ad aures. Add the whole title de Usuris in the Corpus of Canon Law, from which also the usurer, if he is public and notorious, is kept from Communion, is deprived of absolution for the forum of penance, is regarded as infamous, and, if he dies impenitent without having made satisfaction, is deprived of ecclesiastical burial. Add propositions 41 and 42 condemned by Innocent XI, and 42 condemned by Alexander VII. - Benedict XIV, de Syn. 1. 10. c. 4; Catech. Rom. 11; E. M. Hence "the usury of money which we receive is not in the fruit, because it is not from the body itself, but from another cause, that is, a new obligation." L. 121 de Verbor. signif. Nor indeed, for the intrinsic licitness of usury, is it valid to say that he who gives money as a loan furnishes a benefit which is worthy of a fee; that he himself undergoes a burden while he deprives himself of his thing, which again is estimable by price; that mutuum in reality is nothing other than the lease of money, since in money not the body but the value is considered, and ownership of this always remains with the lender; whence it is that the borrower is truly said to be and is burdened with another's money; that finally, with attention to the present increased commerce of things, constant and always progressing in modern Society, by the force precisely of money, and of the incredible facility of transmitting and exchanging it, money in reality today can no longer be called sterile and unfruitful, but fruitful and most fruitful. But all these things are worth only as much as nothing. For to a benefit considered formally a fee is not owed, but gratitude of spirit. But the benefit here considered materially is worth no more than the lent thing itself; therefore, when this has been restored in the same quantity and quality, all things return to the equality which commutative justice intends and makes. Likewise deprivation of one's thing is estimated not at more, but at as much as the thing itself of which one is deprived is estimated. Therefore, when it is restored, that burden is entirely compensated according to equality. Otherwise it would have to be said that in the sale of a thing, besides the price of the thing itself, the seller would have to receive another price equivalent to the deprivation of his thing; and since this deprivation in sale is forever, he would have to receive not only a doubled or tripled price, but one multiplied several times, so that perpetual deprivation of the thing might be compensated. If the borrower were not truly owner of the money, not only materially but also formally considered, he certainly could not expend it according to its monetary value. The formal value of money is in reality inseparable from the money itself materially considered. And if this formal value did not pertain to the borrower himself, but to the lender, the borrower could enter into no onerous contract in his own name from the money. But that he is said to be burdened with another's money certainly does not mean that the borrowed money is not his, but that it is not his absolutely, namely without the obligation also of restoring as much. Another's money has never indeed signified stolen money, deposited money, leased money, etc., but has signified and does signify debts to be paid, from whatever source those debts arise, whether from mutuum, or from another contract, or from another title. That present commerce of things has not rendered money fruitful is

as true as it is true that present commerce is governed more by credit, as they say, than by material money; and credit is from one's own industry, talent, labor, and trust acquired among public merchants, especially from honesty of life. Moreover, especially at present, it is seen that poor workers, laborious and industrious, in a short time gather enormous riches; on the contrary, very wealthy noble men, because of defect of labor and due industry, are reduced to extreme poverty. Therefore it is not money which is fruitful, but one's own labor and one's own industry. - Nor indeed are business and commerce something new; but ancient, most ancient; and nevertheless usury had always previously been regarded as illicit from its nature. Increased business and increased commerce could not change the intrinsic nature of things. L. 758, 759, 764; St. Thomas 2. 2. q. 78. a. 2, q. 106; De Malo q. 13. a. 4; Gousset 815 ff.; Collectan. S. C. de P. F. n. 2119, 2121, 2122, 2124, 2133; C. B. 138.

1089. He resolves: Both the usurer and his cooperators are obliged to restitution of the usury received. For a usurious contract is altogether null; and the bare delivery of the thing does not transfer ownership. L. 761, 783, 791 ff.; St. Thomas 2. 2. q. 78. a. 3.

1090. In doubt whether the borrower gave something above the principal gratuitously or not, can you retain it? Resp. Affirmatively, with the common and more probable opinion, if you accepted it in good faith and the doubt supervenes; negatively, if you accepted it with negative doubt. But if with positive doubt, or with probability, you are bound to restore, commonly speaking; since in doubt the borrower ought to be presumed, speaking per se, to have given under compulsion, not gratuitously; for men with difficulty lavish their own things gratuitously. But you are by no means bound to restitution if from the circumstances a donation can truly be presumed. - According to C. H. 1256, a borrower who has paid interest not in the least stipulated can neither reclaim it nor impute it to the principal. L. 761.

1091. Whether the lender can retain what the borrower gave from fear lest otherwise a loan be denied to him? - Resp. More probably affirmatively. The reason is that for usury it is required that it be given by force of a pact, or as something owed by justice. Thus more commonly. L. 763; St. Thomas 2. 2. q. 78. a. 2.

1092. Whether a donation of antidoron, or one which is made from a grateful spirit, can be brought into a pact? - Resp. Negatively. The reason is that from pacts a title of justice necessarily arises, but not a donation merely given from a grateful spirit. L. 764; St. Thomas 2. 2. q. 78. a. 2.

1093. Whether for an obligation to which the lender would submit himself, of not demanding back the loan except after a long time, he can demand something beyond the principal, even if no inconvenience comes to him from the delay? There are three opinions. The first common opinion denies, and Lessius, Viva, Laymann, and Lugo hold this; they call the contrary opinion most false and commonly rejected by others. The reason is that such an obligation is intrinsically annexed to mutuum, that it not be demanded back at once; therefore, just as something cannot be demanded because payment is awaited for some time, so neither for such a long time; otherwise, they say, in this way usury could easily be disguised many times by demanding it not for the mutuum, but for the obligation of awaiting payment. And the condemnation of proposition 42 proscribed by Alexander VII seems to favor this. The second opinion says that, although in mutuum there is an obligation of awaiting payment for some time, nevertheless when the obligation is of not demanding it back except after a long time, say for three years, then, since that is not intrinsic to mutuum, something can

licitly be demanded. Thus Medina, Serra, and Ledesma apud Salm. n. 25; and there Trullench, Henriquez, and Bassaeus think it probable, and Sporer thinks it not improbable. And this opinion truly does not seem to lack its probability. For if he who is obliged to give a mutuum after a long time can licitly demand something, as the doctors more commonly teach with Molina apud Viva on the condemned proposition 42, n. 5, why cannot he who is obliged not to demand back his own except after a lengthy time? See what will soon be said below. The third opinion, not much unlike this second opinion, which the Salmanticenses hold with Banez, etc., says that, although, by adhering to the first opinion, to demand something precisely for time is usury, nevertheless, since it is morally impossible that, by waiting for a long time, the lender should not suffer some danger, loss, or inconvenience, or at least not be impeded from exercising some act of liberality or another decent operation, for that reason he can receive and contract for something beyond the principal. To any mutuum there is indeed intrinsic the obligation of waiting for some ordinary time; nevertheless to a particular mutuum, with a pact of waiting for an extraordinary time, such an obligation is not intrinsic, but altogether extrinsic; and therefore that obligation does not proceed from liberality, but from justice, which obliges him to wait for so much time. Hence, if the lender receives something for such an obligation, he receives it rightly, not by reason of the convenience of which he is deprived, but by reason of the burden imposed on him by the pact, which burden indeed is estimable by price. L. 760.

This intrinsic and extrinsic obligation of not demanding the principal back for some certain time can be declared from another title, namely from danger to the principal, which likewise can be intrinsic and extrinsic to the mutuum; whence from it some increase beyond the principal is illicitly or licitly perceived. Cf. Instruct. S. C. de P. F. part II. Quaeri nunc potest. - C. B. 609; E. M.

1094. What are Montes pietatis, and are they usurious? - Resp. To the 1st: Montes pietatis are certain treasuries, whether public or private, which were instituted so that the needy might have recourse to them as to a mountain of refuge, to receive money on loan for a pledge, lest they be compelled to receive money from usurers with greater damage to themselves; yet in such a way that they must leave a certain profit to the Monte pietatis, and unless, e.g., within a year they redeem the pledge, it falls into the ownership of the Monte itself.

Resp. To the 2nd: Montes pietatis, duly instituted, are not usurious. This is clear from the authority of Leo X, who in the Lateran Council, sess. 10, by the Bull Cum inter nonnullos, approved such Montes pietatis as licit and free from the stain of usury. But the reason of the response is that the moderate profit which the borrower must leave to similar Montes or public treasuries is not demanded under the title of mutuum, but for paying the salaries of officials and conserving a similar treasury; and accordingly such profit is not usurious. - Duly instituted.

For 1. that profit which is received must be moderate and proportionate to the expenses to be made for the ministers of that Monte, whose labor is truly estimable by price. 2. Sufficient time must be conceded to borrowers so that they can redeem the pledges and not be compelled to abandon them. 3. An equivalent pledge, or one not greatly exceeding the thing lent, should be demanded; for since those pledges, unless, e.g., they are redeemed within a year, fall under the ownership of the Monte, disguised usury would intervene if those pledges were appraised at too cheap a price and then sold for much more, without any refund made to the pledger. L. 765; Benedict XIV, de Syn. 1. 10. c. 5; A. S. S. v. 4. p. 27 ff.; E. M.

1095. What is the just interest of the lender? - In mutuum, usury is one thing, fenus, just interest or the just interest of the lender, another: for usury properly exists when the lender immediately because of the mutuum demands something beyond the principal; but the just interest of the lender exists when he, from another just extrinsic title, which accidentally occurs in the mutuum, demands something beyond the principal in compensation for such title, or cause estimable by price. For this reason that increase which is demanded is not demanded by force of the contract of mutuum, but by force of another contract annexed to the mutuum. This interest can also be called usury, but less properly and only in a broad signification, insofar as it is beyond the principal. But a contract must intervene; otherwise, although a just title of demanding something is present, nothing can be justly demanded. Thus expressly C. H. 1755, and it is clearly deduced from C. I. 1829, 1830; C. G. 1902, 1903; C. A. 984; C. B. 608. L. 765, 773; E. M.

1096. Whether it is lawful for a lender to demand his interest because of the title of emergent loss or ceasing profit? Resp. Affirmatively. For in two ways, says the Angelic Doctor 2. 2. q. 62. a. 4, someone can be damaged: in one way, by taking away from him what he actually has, and this is called emergent loss; in another way, by impeding him from acquiring what he was on the way to having, and this is called ceasing profit. Moreover, both because of emergent loss and because of ceasing profit it is lawful for the lender to demand from the borrower what concerns his interest on account of the loan, if the due conditions are present. The same Angelic Doctor gives the reason, 2. 2. q. 78. a. 2 ad 1, teaching that this is not to sell the use of money, but to avoid loss. And certainly equity does not allow that someone lose profit or suffer loss from conferring a benefit: in the Law it is read, No one ought to suffer expense from that from which he seems to have deserved a reward. Add that this is expressly approved by Benedict XIV in the Encyclical Letter on usuries.

If the due conditions are present. The conditions are: 1. That the interest be brought into the pact from the beginning, though not demanded immediately, with the borrower also warned concerning the title of emergent loss and ceasing profit, or another title, if any exists, for which he wishes to demand something beyond the principal; for after the contract the lender can no longer demand anything, even if he had forgotten emergent loss and ceasing profit; for an interpretative or conditional will does not suffice for a contract, but an actual or virtual will is required, or at least one sometime had and not retracted: he ought to have provided for himself, says the Angelic Doctor, q. 3 De Malo a. 4, concerning the lender in such a case, lest he incur detriment; nor ought he who receives the mutuum to incur loss from the foolishness of the lender.

Nevertheless, even if emergent loss was not brought into the contract, if the borrower culpably delays payment beyond the established term, he is bound to repair to the lender whatever damage arises from such delay; for according to Rule 25 in 6: His own delay is harmful to each person. 2. That the lender not demand more than the loss which he suffers, or the profit which he hopes for from another licit contract, according to the estimation of hope and danger, and with expenses deducted; for this is the whole reason for the exaction.

Hence interest cannot be demanded for the whole quantity of profit which the lender could hope for; for this profit, since it can often be impeded, must be estimated at less; indeed the lender would have had to concur toward it through his own labor, the lack of which likewise is estimable by some price. Whence the value of ceasing profit must be estimated according to the judgment of prudent men; and this is well to be observed. - 3.

That the mutuum is actually the cause of the emergent loss or of the ceasing profit. Whence, if someone had no occasion at all of making some profit by business, or even when the occasion was given did not wish to engage in business, he could not demand interest precisely from the title of ceasing profit, although he could from other titles. L. 768, 799; St. Thomas 2. 2. q. 62. a. 4; Gousset 819; Collectan. S. C. de P. F. n. 2133; E. M.

1097. Whether the lender can demand compensation for emergent loss if he himself freely offers to give the mutuum? Resp. More probably affirmatively. "The reason is that the lender then does not offer the loan absolutely, but under the condition that ceasing profit be compensated to him; and thus the borrower, by accepting the loan, is the true cause of the cessation of profit, and truly impedes the lender from justly making profit from his own money." L. 760, 807; E. M.

1098. Whether it is lawful for the lender to make an agreement from the beginning about a certain profit to be perceived, if the emergent loss is only probably future? It is common that something can still be demanded above the principal, while nevertheless the proportion between the fear of loss or hope of profit and the increase which would be received in the hypothesis is considered and carefully preserved. The reason is that due equality is already preserved thence; for just as, if the loss does not occur, the lender would profit, so on the contrary, if it does occur, the borrower would profit. Nor does it matter that the foreseen loss does not occur; for the pact concerning the increase is not made for the loss, but for the danger of it, which is actually supposed and is estimable by price. A fisherman who sells the cast of a net does not indeed sell the fish, which perhaps will not be caught at all, but sells the probable hope of them, which actually exists and is estimable by price. L. 770; E. M.

1099. Whether you can demand something by reason of ceasing profit because of a loan of money, if you keep other idle money? Resp. Affirmatively, "if you had reserved that other money for the use of the family ... because you are not bound by reason of the loan to neglect your own providence." Also probably affirmatively, if without such inconvenience you can substitute other money for the money destined to business. For, with this posited, that you had determined to destine this money alone to business, you can licitly ask ceasing profit; "because the lending is truly the cause that the hoped-for profit from that money ceases for you." L. 771, 772.

1100. Whether it is licit to demand something above the principal by reason of the danger of losing it? Resp. Affirmatively. The reason is that the lender is not bound to give a loan with danger of losing the principal, and such probable danger is estimable by price; just as the labors perhaps necessarily to be undertaken and expenses to be made for recovering the principal are also estimable by price, if, e.g., it is later necessary to go to the judge. And accordingly, if proportionate interest is demanded because of this danger, such a contract is contrary neither to the virtue of liberality nor to justice. St. Thomas 2. 2. q. 78. a. 2; L. 765. Exception: 1. If the borrower is poor, because then the precept of lending from charity urges. 2. If the borrower secures the principal by pledge, because thus the danger ceases. E. M.; Collectan. S. C. de P. F. n. 2135.

1101. What conditions must be observed in the aforesaid title? - In order that interest be just from this title, two things must be attended to: 1. The danger of losing the principal must not be precisely possible, but also probably future; either by reason of the borrower, who is not sufficiently known, or is of doubtful faith, or conducts dangerous business; or by reason of the principal, which is to be carried elsewhere with danger to the lender. 2. The quantity of the interest itself must be

proportionate to the quantity of the danger. Each is clear from the response of the S. C. de P. F., which in the year 1645, having been questioned by Missionaries from the Chinese Kingdom in a similar doubt, and having been convoked by mandate of Innocent X, responded: "They judged that by reason of mutuum immediately and precisely, nothing is to be accepted beyond the principal sum; but if they accept something by reason of danger probably arising, as in the case, they are not to be disturbed, provided account is taken of the quality of the danger and of its probability, and proportion is preserved between the danger and that which is accepted." La-Croix n. 856; L. 765.

1102. Whether in a mutuum it is licit to make an agreement about a penalty to be paid by the borrower if he does not return the principal at the defined time? Resp. Affirmatively.

The reason is that in this way provision is made for the firmness of the contract, and at the same time the negligence of the borrower is guarded against. L. 766. Nevertheless it must be observed that this pact is not licit unless 1. the delay of the debtor is notable and culpable; notable, for some delay is intrinsic to mutuum; culpable, for he who has not sinned is not to be punished. 2. The intention of profiting through that attached penalty is absent; and this is presumed to be present if the debtor is burdened with the obligation of restoring the principal at that time at which it is certainly known that he is by no means able to pay. 3. The penalty is moderate and proportionate to the fault; otherwise it would be unjust. But more probably it is owed before the sentence, for it has more the nature of a pact than of a penalty, although it also is a penalty. L. 44 de Usur.; L. 766, 767, 775.

1103. Whether civil law supplies a just title for demanding something above the principal, even with any other title excluded? - C. I. 1829; C. G. 1905. Resp. Affirmatively. And, when written law is lacking, legitimate existing custom, which has the force of law, supplies. - Proof: 1. For since ordinarily in a mutuum an extrinsic title of just interest is not lacking, by reason of danger to the principal, ceasing profit, and emergent loss, civil authority can well determine by law the increase which can justly be demanded, to impede the unjust extortions of wicked men, to render the contract of mutuum easier for all, and also to impede lawsuits and controversies, not without grave damage to the parties. - 2. Public authority can, by reason of the common good, transfer the ownership of private persons, as is seen in the law of prescription. Therefore the same authority can transfer ownership of an increase above the principal, which in this case is freely and willingly given by all, by reason of the public and private good, to which, as has been discovered by experience itself, facility of lending especially contributes. 3. The same is evinced from the Responses of the Sacred Congregations, namely that those who accept the profit conceded by law, even without any other title, are not to be disturbed. Collect. cit. 2141; E. M. Legal interest or fenus of this kind is in the manner of civil fruits, L. 34 de Usur. et fruct., and can also be called usury, but less properly and in a broad signification. Cf. 1086, 1095. As civil law, so consequently legitimate custom, and as the S. Penitentiary has it, April 18, 1889, the common practice observed by men of fearful conscience in their respective places and times, can determine the just interest to be received from mutuum. E. M.

1104. What kind is the fenus, or interest, constituted by positive laws?

According to C. I. 1831; C. G. 1907 and the Law of Sept. 3, 1807, one interest is legal, another conventional. Legal interest is five per cent in civil matter, six per cent in commercial matter; or civil usuries are quincunces, mercantile are semisses. Nevertheless by the Law of June 22, 1904 in Italy, and the Law of Apr. 7, 1900 in France, legal interest is four per cent in civil matter and five per cent in commercial matter. Conventional interest according to the cited French Law cannot exceed the

aforesaid quantity; according to C. I. it depends on the judgment of the contracting parties; but if it exceeds legal interest, it must be established by a written act; otherwise no interest is owed. Nevertheless the debtor after five years from the contract can always restore the sums accepted with interest to be paid exceeding the legal, notwithstanding any contrary pact, but with written notice given six months before. C. I. 1832. Cf. 1833. According to C. H. 1100, 1109, in civil matter likewise one interest is legal, another conventional. Legal interest is six per cent. In commercial matter one must stand by the Commercial Code. But in it commercial contracts are treated, arts. 50-63. According to C. L. likewise one interest is conventional, another legal, and this is five per cent, art. 1640. According to C. A. 994, 995, one interest is legal, another conventional. The first is four per cent, and among merchants six per cent. The other cannot exceed five per cent in a loan with pledge, and six per cent in a loan without pledge. But by the Law of June 14, 1868, the predefined limits for conventional interest of this kind were abrogated. C. B. 246, 247. Legal interest is four per cent. Conventional interest can exceed this quantity. But if it exceeds six per cent, the debtor can restore the capital after six months, with a prior delay of notice of six months. As regards Roman Law, cf. L. 36. E. M. de Usur. C.

1105. Whether from positive laws interest also from interest, anatocism, is constituted? - According to Roman law it is prohibited. L. 29 de Usur.; L. 27 de Re iud.; L. 28 de Usur. C. - According to C. I. 1232, 1233; C. G. 1154, 1155, interest from interest is owed after a year, if the creditor juridically seeks it, or by a particular agreement, after the prior interest has already become due. But it can also be demanded from the beginning from revenues of estates, perpetual or life-long. Gousset Cod. comm. on art. 1154. According to C. H. 1109, legal interest from interest is likewise owed after this is owed and the former is juridically sought. According to C. A. 998, only interest which is owed from two or more years can, by means of an agreement, constitute a new capital. Likewise according to C. L. 1642, cf. C. A. 1335, it is required that interest already owed be constituted as capital by a new contract. According to C. B. 248, an agreement made in advance that interest which is owed should be productive of new interest is null. - E. M.

1106. Whether legal interest is sometimes to be paid even without agreement? Civil law itself, apart from every agreement, establishes legal interest to be paid sometimes by reason of delay and loss; sometimes by reason of fault and injury; sometimes by reason of natural equity. By reason of delay, e.g., of a debtor who does not restore at its time money credited to him, C. I. 1231; C. G. 1153; C. B. 288; by reason of fault and injury, e.g., of a guardian who did not invest the money of a ward, C. I. 291; of a mandatory or depositary who used another's sum, C. H. 1724, 1770; C. B. 698, etc. This interest is in the manner of a penalty, and accordingly before the sentence of the judge it is not owed; after it, it is owed even in the forum of conscience, even if because of only civil fault.

By reason of natural equity, e.g., if a dowry has been constituted in counted money, if the buyer of a house or estate does not pay the price on the established day, and the thing sold and handed over produces fruits, etc. C. I. 1397, 1509; C. G. 1548, 1652. This interest does not need the sentence of a judge in order to be owed. Cf. n. 1114. 2, 3. The cases in which, according to C. I., legal interest is owed by the law itself are: 1. The remaining sum owed by the guardian, once accounts have been rendered, C. I. 308. 2. The dowry owed by those promising from the day of marriage, C. I. 1397. 3. The dowry to be restored from the day of the dissolved marriage, C. I. 1415. - 4.

The sum owed by a partner of a partnership, C. I. 1710. 5. The sum which the surety paid, C. I. 1915; C. H. 1838. 6. Advances made by a mandatory, C. I. 1755. 7. A legacy from the death of the testator, if it is a legacy of a farm, capital, or a fruitful thing, C. I. 865. 8. Whenever a sold thing produces fruits, the price not yet having been paid, C. I. 1509. 9. Whenever an agent of affairs has made expenses for the utility of another, C. I. 1144. 10. Whenever someone in bad faith has received what was not owed, C. I. 1147. 11. Whenever reduction of a donation is juridically sought as regards the excess of the disposable part, C. I. 1094. C. B. 256, 288, 289, 290, 291, 347, 452, 641, 668, 698, 849, 1834; C. H. 1724, 1770.

1107. Whether a borrower paying interest not owed can reclaim it according to positive laws? - Although in the Law there is generally given a reclaiming of what was not owed, C. I. 1237; C. G. 1235; C. H. 1895, nevertheless here it is not given. C. I. 1830; C. G. 1906; C. H. 1756. Wherefore the borrower who pays interest which was not agreed upon, or beyond what was agreed upon, cannot reclaim it, nor impute it to the principal.

1108. To whom is it lawful to receive 5 or 6 per 100, by reason of commerce, according to civil laws? It is certainly lawful for merchants lending money to other merchants, because it is altogether a matter of commerce. It is also lawful for merchants with respect to others who are not merchants, because the law intends to favor commerce; but it favors it by permitting merchants to receive a greater rate from lent money. If it concerns others who are not merchants with respect to merchants, it is disputed. More commonly they deny that it is lawful, and report that such is the decision of tribunals. The reason is that the law which intends to favor merchants would rather be harmful to them, if they had to pay greater interest. Nevertheless several, even among jurists, affirm it. Their reason is: 1. Because the words of the law are general: in matter of commerce; nor is it established what the genuine sense of those words is. 2. Because it is expedient for commerce that the law be so understood: for thus merchants much more easily find money with greater utility to themselves and to commerce.

1109. Whether it is lawful to exceed the legal rate in a mutuum by reason of emergent loss or ceasing profit? - Resp. Negatively, with respect to the poor or others who seek a loan in necessity, and who would be oppressed by a greater increase. Nevertheless you do not seem to be bound, with great inconvenience to yourself, to grant them a loan. Charity does not oblige with grave inconvenience.

If money is handed over for the utility, but not for the necessity, of another, it is disputed, and a twofold opinion is given. The first opinion affirms by reason of indemnity or just compensation. The second opinion denies. The reason is that compensations for losses arising from a pecuniary obligation can be demanded according to the legal rate. This opinion indeed can have place if the lender compels or obliges another to receive a loan from himself; otherwise the reason does not appear why the lender should undergo the detriment of emergent loss for the favor of another. In many places, from the common practice even of the timorous, the legal rate is exceeded; nor for that reason is it believed that sin is committed. For emergent loss, ceasing profit, and the danger of losing the principal must be estimated variously from the various circumstances of places, things, and persons. Hence generally in great cities it is thought to be less than in small towns; and in the former semis usuries, six per cent, and in the latter septunx usuries, seven per cent, are often tolerated. Those which exceed these must be judged from particular circumstances. But those which exceed the decunx, ten per cent, seem immoderate, regularly speaking, and to be rejected. And since

Governments themselves rather reduce legal interest, and in titles of public debt in reality pay only three and four per cent and even less, private interest among themselves of a dextans or ten per cent now seems excessive also, speaking per se, at present. Cf. 1087.

1110. Whether it is lawful to receive the legal increase where it exceeds 5 or 6 per 100? Resp. Affirmatively, if the law, after all circumstances have been weighed, and especially the practice and custom of the timorous, seems just, that is, if equality appears between the profit permitted by law and the value of the use of money or the dangers to the principal, etc. For no absolute rate can be established, but attention must be paid to the various circumstances of places, and also to the dearness of money, from which its price and therefore its use increases, as in Africa, in India, etc.

1111. What must be said of institutions which are commonly called Savings Banks or Banks of Thrift? Not only are institutions of this kind to be tolerated, but they are also to be praised, since they assist widows, servants, maids, and the poor, while their modest money is accepted by loan and proportionate interest is paid back to them.

XI. On Mandate and on Quasi-contract

1112. What is mandate, and what is its nature? - Mandate, insofar as it is a contract, can be defined: a contract by which one of the contracting parties commits to the other the management of some business to be performed in his name. The management of business; otherwise, not mandate, but hire of work is had. In his name; for, if not in his name, then the other executes his command, as a servant does when sweeping the house. Hence mandatories are agents, commonly agenti, fattori; brokers, commonly sensali; procurators for conducting lawsuits. Inst. 1. 3. t. 27 de Mandato § 1 ff.; C. I. 1737; C. G. 1984; C. H. 1709; C. L. 1318; C. A. 1004.

According to Roman and German Law, mandate is a contract per se gratuitous. L. 1 § 4 Dig. Mandati; Inst. l.c. § 13; C. B. 662. According to C. I. 1739; C. G. 1986; C. H. 1711, mandate is gratuitous unless it has been agreed otherwise. Per se gratuitous: otherwise it is rather hire of work, although it will always remain true that the lessor does not act as a mandatory in the name of another. - Mandate can be express and tacit; acceptance likewise can be express and tacit. The mandate is tacit if someone sees something being done for his own favor and does not prohibit it.

Acceptance is tacit if the mandatory executes the thing. L. 6 § 2 Dig. Mandati; C. I. 1738; C. G. 1985; C. H. 1701. - If the Mandate is against good morals, it is null. Hence there is no civil action of the mandatory against the mandator. Inst. l.c. § 7. Nevertheless, if the mandatory has really suffered loss by fault of the mandator, a natural action against the mandator is not denied to him. L. 825 par. Quid.; C. L. 1319 ff. Assignment is reduced to mandate, by which someone remits to another a title by which he mandates a third party to credit money or another thing to him. C. B. 783 ff.; C. A. 1403 ff.

1113. Who can be mandator and mandatory? In order that mandate can be contracted, it is required that the mandator be per se capable of doing those things which he mandates another to do; and that the mandatory be capable by natural law of contracting obligation, although he is incapable by positive law. The reason is that the mandatory acts not in his own name, but in the name of the mandator. But in managing business, according to C. I. 1743; C. G. 1990; C. H. 1716, an emancipated minor can undertake the office of mandatory, but the mandator does not have an action against him

except according to the general prescriptions of the obligations and contracts of minors. A wife cannot undertake a mandate without the authority of her husband. C. L. 1332 ff.

1114. What are the obligations of the mandatory? 1. It is free to anyone not to undertake a mandate; but once undertaken, it must be completed, or renounced as soon as possible. But in managing the business the mandatory must not exceed the limits of the mandate; otherwise he no longer acts in the name of the mandator, but in his own. Inst. l.c. §§ 8, 11; C. I. 1742, 1751; C. G. 1989, 1997; C. H. 1714, 1715, 1718; C. A. 1007; C. B. 663, 665; C. L. 1335. 2. The mandatory is bound to use due diligence in managing the matter, and to render an account of his execution, and also to return to the mandator all that which he received by force of the mandate, although it was not owed to the mandator. And thus, if he received the mandate of giving money by loan without legal interest, and gave it with this interest, he will restore this also to the mandator. C. I. 1747; C. G. 1993; C. H. 1719, 1720; C. B. 666, 667. By force of the mandate; not if beyond the mandate he himself furnished something else.

C. L. 1336 ff. 3. Moreover he owes interest on the money which he applied to his own use from the day of such use. Likewise he owes interest on money of which he is debtor, from the day on which he is constituted in delay. C. I. 1750; C. G. 1996; C. H. 1724; C. B. 668. 4. The mandatory is liable only for grave fault if the mandate is gratuitous, Laymann 1. 3. tr. 4. c. 26. n. 1; but if it is not gratuitous, the matter will be just as in this hire of work. Inst. l.c. § 13. According to C. I. 1745, 1746; C. G. 1991, 1992; C. H. 1726, the mandatory is liable for losses arising from a mandate not fulfilled. Moreover he is liable not only for fraud, but also for fault committed in execution of the mandate. As regards fault, he is liable with less rigor when the mandate is gratuitous than when he has received a stipend for it. C. B. 164 ff., 181, 664; C. L. 1336 ff.; L. 23 de Divers. Reg. Iur. ant. ff.

1115. What are the obligations of the mandator? 1. The mandator is bound to ratify what was done in his name within the limits of the mandate, and to execute the obligations contracted by the mandatory. C. I. 1752; C. G. 1998; C. H. 1727; C. L. 1350 ff. 2. He must preserve the mandatory indemnified, and accordingly must compensate the expenses made, even if the matter has succeeded badly and he himself would have spent less. He must likewise furnish interest on the sums which the mandatory expended, from the day on which he expended them. He must also compensate losses which happened to the mandatory by cause and occasion of the mandate, which otherwise he would not have suffered. Whether the mandator is also liable for the fortuitous loss of the mandatory? If the mandate was for an agreed price, he is not liable; if gratuitous, it is disputed. C. I. 1753 ff.; C. G. 1999 ff.; C. H. 1723-1730; C. B. 669, 670; C. L. 1344 ff.

1116. When does mandate cease? 1. When the matter is still intact, mandate ceases by revocation of the mandator, renunciation of the mandatory, death, interdiction, or cession of goods of either party. Inst. l.c. §§ 9, 10, 11; C. I. 1757; C. G. 2003; C. H. 1732; and according to C. I. l.c., from the renounced incapacity either of the mandatory or of the mandator as regards only those things which they cannot undertake in their own name without a curator. Exception: if the mandate was to hand over a dowry to a girl, and the mandator dies, it must be handed over even after his death, and this in favor of the dowry; if the mandate is for pious causes, which do not depend upon the civil power, Laymann 1. 3. tr. 4. c. 26. n. 6; if the mandate is about some matter which is to be effected only after the death of the mandator. 2.

If the matter has already been begun, and it is in the interest of the mandatory or the mandator that it be completed, the mandator cannot revoke the mandate, nor the mandatory renounce the mandate, unless compensation is made for that which concerns the interest of the mandator or mandatory. Hence the right or obligation of the other passes to the heirs. C. I. 1758, 1761, 1763; C. G. 2004, 2007, 2010; C. H. 1718, 1736, 1737; C. B. 671 ff. 3.

If the mandatory, ignorant of the death of the mandator or of another cause of the cessation of the mandate, executed the mandate in good faith, the deed is approved, and an action is given to him against the heirs of the mandator. Inst. l.c. § 10; C. I. 1762; C. G. 2008, 2009; C. A. 1026; C. H. 1738. But if the mandatory dies, his heirs must warn the mandator, and meanwhile, as the circumstances require, they must provide for the utility of the mandator. C. I. 1763; C. G. 2010; C. H. 1739; C. 33 de Rescript.; Clem. un. de Renunt.

1117. What is ratihabition? Ratihabition is compared in law to mandate; by it the act of another, done in one's own name, is held ratified. In one's own name; otherwise it can be an approval of the work, not ratihabition. R. 9, 10 de R. I. in 6; Lugo d. 3. n. 146; d. 19. n. 34; C. B. 177 ff.

1118. What is management of affairs? Management of affairs is a quasi-contract by which someone usefully undertakes the affairs of an absent and ignorant person to be managed for him. Inst. 1. 3. t. 28 de Obligat. quae quasi ex contr. nascuntur § 1. Quasi-contract. For although quasi-contract is often confused with an implicit or virtual contract, cf. 932, nevertheless it is distinguished from this. For by quasi-contract is understood a merely honest deed, from which, apart from an agreement, even implicit or tacit, with another who is entirely ignorant of the matter, an obligation arises. In Roman Law multiple quasi-contracts are listed: management of affairs, administration of a common thing or of a common inheritance, entry upon an inheritance, guardianship, payment of what is not owed.

Inst. l.c. More recent Laws list only two quasi-contracts: management of affairs and payment of what is not owed. For administration of a common thing, or of a common inheritance, the undertaking of guardianship, and entry upon an inheritance can easily be reduced to management of affairs. C. H. 1887; C. I. 1140; C. G. 1371. Of an absent and ignorant person. Otherwise, if the owner is present and knows the matter, although he is silent, not management of affairs but mandate is had. - He usefully undertakes the affairs to be managed for him. For not for the sake of his own profit, but for the utility of the owner, in his name, he undertakes the management of his business. Hence if someone redeemed another's thing from a thief for the owner, he demands the price of the same thing from the owner, if indeed he redeemed it for the owner, not if he bought it for himself.

1119. What are the obligations and rights of the manager and of the owner of the managed matter? - According to Roman Law: 1. If the goods of another were abandoned, and someone spontaneously undertakes to administer them, he furnishes against fraud and grave fault, which is equated with fraud. L. Ait Praetor § 9 Dig. h.t. Moreover the manager is liable not only for fraud, but also for fault, even slight fault, indeed very slight fault, in the hypothesis that there was another who would have administered the business more diligently. Inst. l.c. 2. To the manager of affairs an action belongs against the owner, namely so that whatever he has expended from his own may be furnished to him, and so that he may be compensated for losses, if he managed the business prudently, even without a happy outcome. L. 10 Sed an § 1 Dig. de Neg. gest.; Inst. l.c. An action is likewise granted to the owner against the manager, so that he may render an account of what was managed and of the utility

neglected. Inst. l.c. Therefore whatever the manager of affairs gains or expends, he gains and expends in the name of the owner.

According to C. I. 1143; C. G. 1374; C. H. 1889-1891, one who spontaneously manages another's affairs is bound: 1. In his administration to take care as a good paterfamilias. Nevertheless the judge can moderate the damages which have arisen from the fault or negligence of the administrator, all circumstances of the matter being considered. Gousset 920. 2. He who spontaneously undertakes to manage another's business must pursue the management and bring it to completion, until he whose interest is concerned can by himself look after the business; and if he whose interest is concerned dies, he must pursue the management until the heir can take up its administration. C. I. 1141, 1142; C. G. 1372, 1373; C. H. 1888. 3. The manager must suffer those things which follow from the business itself, and be subject to those obligations which would exist if he had undertaken the matter to be managed by mandate. But the owner, if the business has been rightly managed, must satisfy the obligations which the manager contracted in his name, preserve the manager immune from those which he contracted personally, and compensate all expenses made, both necessary and useful, together with their fruits, to be computed from the day on which they were made. C. I. 1141, 1144; C. G. 1372, 1375; C. H. 1893 ff.; C. A. 1037; C. B. 177 ff., 677 ff.

1120. What are the obligations and rights from guardianship? "Guardians also, who are held by the judgment of guardianship, are not understood to be obligated properly from contract. For no business is contracted between guardian and ward. But, since they are certainly not held from wrongdoing, they seem to be held as though from contract. But in this case the actions are mutual. For not only does the ward have the action of guardianship against the guardian, but on the contrary the guardian has the contrary action of guardianship against the ward, if he has either expended something on the matter of the ward, or has been obligated for him, or has obligated his own thing to his creditors." Inst. l.c. § 2. The action of guardianship, namely so that he may render an account of his administration, both of what was done and of what was not done. L. 917. Cf. here 684 ff.

1121. What are the obligations and rights from communion of a thing? - "Likewise, if among some persons a thing is common without partnership, as if it had equally been bequeathed or donated to them, and one of them is therefore held to the other by the judgment for dividing common property because he alone received fruits from that thing, or because his partner alone made necessary expenses on that thing: he is not understood to be obligated properly from contract, since they contracted nothing among themselves; but because he is not held from wrongdoing, he seems to be held as though from contract." Inst. l.c. § 3. Cf. 1241 ff.; C. He. 646-654.

1122. What are the obligations and rights from communion of inheritance? - "The same right applies to him who is obligated to a coheir by the judgment for dividing the family property from these causes." Inst. l.c. § 4; C. B. 2032 ff., 2058 ff. To be obligated for the cause of dividing the family property is to be obligated to the division of the goods of the family. According to C. He. 602 ff., when the deceased leaves several heirs, a communion of rights and obligations arises among them, from the opened inheritance until its division; and they answer in solidum for the debts of succession, just as in common they are owners and dispose of the rights inhering in the succession, unless by law or contract the faculty of representation and administration is reserved to one of them. But any coheir can always seek division of the inheritance, unless by contract or law he is bound to remain in communion. Cf. here 1241 ff.

1123. What are the obligations and rights from entry upon an inheritance? "The heir also, by the title of legacies, is not understood to be obligated properly from contract. For neither with the heir nor with the deceased can the legatee properly be said to have conducted any business; and nevertheless, because he is not obligated from wrongdoing, he is understood to owe as though from contract." Inst. l.c. § 5. By the very fact of entering upon an inheritance which contains legacies, the heir is held from the will of the deceased toward the legatees, and the legatees in turn are obligated toward the heir, so that they receive the legacy from no one other than the heir. Likewise he is held by the will of the deceased to execute his other commands. And, because the deceased and the heir are judged one and the same person, he is also bound to satisfy the hereditary creditors. - Cf. 1052.

1124. What are the obligations and rights from payment of what is not owed? - "Likewise he to whom someone by error has paid what was not owed seems to owe as though from contract. For he is so little understood to be obligated properly from contract that, if we follow the more certain reasoning, he could be said to be obligated more from a dissolution of contract than from a contract. For he who gives money with the intention of paying seems to give it in this, that he may rather dissolve the business than contract it. But nevertheless he who accepted is obligated just as if a mutuum were given to him, and therefore he is held by condiction." Inst. l.c. § 6.

According to C. I. 1145-1150; C. G. 1376-1381; C. H. 1895 ff., he who either by error or knowingly receives that which is not owed to him is bound to restore it to him from whom he unduly received it. He who, when by error he thought himself a debtor, paid, has no right of reclaiming except against him only to whom he paid. Nevertheless this right ceases if the creditor, because of this payment, in good faith deprived himself of the title of the credit and of the securities pertaining to it; in which case recourse against the true debtor is free to him who paid. - He who received the payment in bad faith must restore both the capital and the fruits running from the day of payment. He who unduly received some thing must restore it in the individual, if it still exists.

But if it does not exist or has suffered detriment, he who accepted in bad faith must return its value, even if the thing has perished fortuitously or has been made worse; but he who accepted in good faith is not bound to restore except what has been turned to his own matter. - He who sold a thing accepted in good faith is bound only to restitution of the price, or to ceding the action for its recovery. He to whom the thing is restored must compensate the possessor, even one in bad faith, for expenses made which were necessary for preservation of the thing, and also useful ones. Gousset 921; C. A. 1431, 1436. According to C. B. 812 ff., what someone has unduly received he is bound to restore. Nevertheless reclaiming of what was paid is not admitted if he who paid knew that he was not obligated, or if the paid prestation corresponded to a moral obligation or propriety. But together with the thing must be restored everything which that thing produced and by which he became richer. Cf. 1341.

1125. Note: The obligation of restoring from payment of what is not owed arises both from quasi-contract and from another's thing accepted. Cf. the exception of the Law in mutuum, n. 1107.

XII. On Sale and Purchase

1126. What is the nature of sale and purchase? - Purchase is an agreement of price for merchandise; but sale is an agreement of merchandise for price. Purchase and sale, therefore, are two correlatives,

and in reality a single contract, constituted by the consent of each contracting party, namely of giving merchandise for a determined price and the price for determined merchandise. Agreement, and accordingly the obligation of giving merchandise for price, and the obligation of giving price for merchandise. Under the name of merchandise are understood all things, both immovable and movable, which are commonly sold among men. But under the name of price is understood how much a thing is worth in coin or money; for when for one saleable thing another saleable thing is given, it is not purchase and sale, but rather exchange. Money therefore is as it were the instrument, measure, and price, instituted by public authority, of all things which come into exchange. But when money is given for money, exchange is had. Of price for merchandise; therefore what is given to a creditor in payment of a debt is not purchase and sale, but giving in payment. But as sale is not understood without merchandise, so purchase is not without price. The merchandise must be certain, and the price likewise must be certain; if the merchandise is uncertain, e.g., I sell you one horse out of a hundred; if the price is uncertain, e.g., I buy for as much as it will be appraised, sale and purchase are not yet understood. - Inst. 1. 9. t. 24. § 1; L. Pacta conventa Dig. de Contrahenda emptione, etc.; C. I. 1447, 1454; C. G. 1582, 1591, 1592; C. B. 433; C. H. 1445, 1446; C. L. 1544; L. 793; St. Thomas 2. 2. q. 77. a. 1. Cf. in this whole contract Troplong della Vendita.

1127. To whom do ownership of the thing, danger, and advantage pertain according to Roman Law? This contract is perfected before delivery of the thing or of the price. Inst. 1. 9. t. 24 init.; L. Sicut Dig. de Rer. permutat. § 2. Nevertheless for it there is required determination of the price; if this is remitted to the buyer himself, the contract is null. L. Quod saepe ff. de contrahenda emptione. Otherwise, if it is remitted to a third party. L. ult. C. e.t. And just as the price, so also the thing must be determined, at least in hope. L. 794. Although this contract is perfected by consent alone, so that no writing is per se required, nevertheless it can be agreed that it not be valid unless a writing has been made. Inst. 1. 3. tt. 23, 24; L. 795.

To the seller and buyer is brought forth a right to the thing, but not a right in the thing, unless delivery has been made, by which ownership is transferred. Inst. l.c. § 3. Indeed although the thing has already been handed over to the buyer, it still remains under the ownership of the seller until either the price has been paid, or satisfaction has been made to the seller in another way, e.g., by pledge, or the seller has trusted the buyer concerning the price. Inst. 1. 2. tit. 1. § 41; L. 795, 796.

It is special in this contract that, although the contract is perfected, before delivery of the thing the seller is still owner of the thing, and nevertheless the danger of the thing, like its advantage and fruits, pertains to the buyer, unless, as regards danger, it perishes by fault of the seller, and unless the sold thing is determined only as to genus, such as so many modii of wheat, or even if it is determined in species, is nevertheless a thing which is still to be measured, or counted, or tasted beforehand; since then the sale is not yet judged perfected. Inst. 1. 3. t. 24. § 3; L. Quod si neque, L. Illud Dig. de Periculo et commodo rei venditae; L. Quod saepe Dig. de Contrahenda emptione; Laymann de Emptione et Vendit. n. 18; L. 797, 798, 838. The buyer transfers the price, or ownership of the money, to the seller; but the seller transfers empty possession of the thing to the buyer.

If the seller was truly owner of the thing, ownership of the thing is transferred to the buyer. If on the contrary the seller was not owner of the thing, then he is bound to furnish eviction to the buyer. L. Ex empto § 2 Dig. de Actionibus empti et venditi; L. Servus § 1 ib. Namely, if the owner of the thing evinces that the thing is his, then the seller of this thing is bound to return the price to the buyer,

and as much as it was of interest to him that the thing had not been evicted. L. Si quaestio C. de Evictionibus; L. Evicta re Dig. de Evictionibus, etc.

For this reason, even if another's thing or a stolen thing is sold to an ignorant buyer, the contract is valid, ownership of the price is transferred to the seller, and the buyer acquires the right to eviction, by which the seller is obligated to the buyer. L. Rem alienam, L. Si in emptione Dig. de Contrahenda emptione; L. Ex empto Dig. de Action. empti et venditi; L. 48 Qui vas Dig. de Furt. § ult. Certainly according to Roman Law purchase and sale are perfected by the obligation of paying the price on the part of the buyer and the obligation on the part of the seller of effecting that the buyer acquire ownership of the thing, which can well be done even if the thing is not the seller's, for he will be able to acquire it. But a thing bought with another's money belongs to the buyer if he buys in his own name. L. Si eo C. de Rei vindicatione. Exception: if the money belongs to the church, a minor, or a soldier; because then the thing is acquired for them. L. 799, 800; Lugo Resp. Mor. 1. 6. d. 14.

1128. To whom do ownership of the thing, danger, and advantage pertain according to more recent Law? According to C. I. 1125, 1448, 1450-1452; C. G. 1138, 1583, 1585-1587; C. L. 1549, 1550, 1551, 1575, once an agreement has been made concerning the thing and the price, the contract is perfected, even if the thing has not yet been handed over, nor the price paid, and ownership of the thing, before delivery, is with the buyer. Therefore if the whole thing is bought in gross or by the body, commonly in bulk, for one price, ownership, danger, and advantage of the thing are immediately with the buyer. - But if it concerns things which are sold by weight, number, or measure, or which are usually tasted beforehand, the contract is not judged perfected before the thing has been defined according to weight, number, or measure, or tasted beforehand. The reason is that the thing must be determined. Hence according to the same C. I. 1470; C. G. 1614, from the day of sale all fruits of the thing pertain to the buyer; and C. I. 1480, 1125; C. G. 1624, 1138 say that the danger of a thing not yet delivered pertains to the buyer. "Just as the danger of the thing pertains to the buyer, so its fruits are owed to him, and civil laws opposed on this point have been reproved by Canon Law, as favorable to usurious profit, as the Salmanticenses say." L. H. A. tr. 10. n. 169. - L. 798.

According to C. I. 1454; C. G. 1591, 1592; C. H. 1447, 1449, the price must be determined by the contracting parties. It can be committed to the judgment of a third party. But if he cannot or will not define the price, the contract is null.

The sale of another's thing is null. C. I. 1459; C. G. 1599. This nullity cannot be opposed by the seller. C. I. ib. But the commercial sale of another's thing is valid. It obliges the seller to acquire it and to hand it over to the buyer under penalty of reparation of damage. C. I. Comm. 59. According to C. I. 1314, under penalty of nullity, agreements which transfer ownership of immovables, or of other goods, or of rights capable of mortgage, must be made by public instrument or private writing. Almost the same according to C. L. 1589 ff. According to C. G. 1341, 1583, any sale is perfected by consent alone of the parties without any legal formality. When the sale exceeds the sum of 150 francs, in order that it can be proved in the external forum, an authentic or private writing is required. According to C. H. 1445, 1450, 1452, 1453, 1468, sale is perfected by the agreement itself, before delivery of the thing, without any legal formality. But only a right to the thing is acquired. Loss of the thing is imputed to the seller if he is constituted in delay in handing it over, and if the sale of a fungible thing is made in a body, commonly in bulk, which happens when merchandise is sold for one and a certain price, without account being taken of weight, number, and measure; or if account is

indeed taken of weight, number, and measure, but only for the effect of determining the price. But if fungible things are sold for a fixed price in relation to weight, number, and measure, loss is not imputed to the buyer if the thing has not first been weighed, counted, and measured, and unless he is constituted in delay. If things are sold which before they are bought are usually sampled, such as wine, oil, etc., or if they have been bought under this condition, the sale is presumed to have been made under a suspensive condition. The fruits of the sold thing pertain to the buyer from the day of the perfected contract.

According to C. A. 1053, 1054, 1056, 1063, 1064, 1066, 1080, 1081, 1083, 1084, by sale and purchase only a right to the thing is acquired; wherefore the seller preserves ownership of the thing before its delivery. The price must consist in counted money, and cannot be indeterminate or contrary to the laws. Nevertheless it can be remitted to the decision of a third person. Once the thing has been handed over, even with the price not yet paid, ownership of it passes to the buyer. The danger and advantage of the thing pertain to its possessor, as also in exchange, with which sale has common laws where special ones are wanting. In the purchase and sale of a thing for testing, the bought thing does not pass into ownership of the buyer unless the price has been paid; and during the testing of the thing, the buyer is as a borrower, and before the time of testing has elapsed he can withdraw from the purchase. In the purchase and sale of a thing under reservation, unless another buyer within a determined time offers a greater price, if the thing has not been handed over, the efficacy of the contract is delayed until verification of the condition. But if it has been handed over, the contract is perfected, but once the condition has been verified, it is resolved. According to C. B. 433, 446, by sale and purchase only a right to the thing is had; wherefore delivery of the sold thing transfers to the buyer the danger, deterioration, fruits, and burdens of the thing. As regards immovable things, these effects are produced from the inscription of the owner in the land register. Cf. arts. 494, 496.

1129. What force do arrhae add to sale? What force does a promise of sale have? According to Roman Law: If arrhae are added only to a promise of sale, they do not confirm the contract, but each of the contracting parties can withdraw. But in this case, if he who handed over the arrhae to the other withdraws, he simply loses them; if he who received them withdraws, he must restore double, that is, the arrhae received, and in addition a value equal to them. - If they are added to the sale itself, they do not make it conditional, but are an argument of the contracted sale; for they are computed as part of the price, or are given as security of payment; whence neither of the contracting parties, against the will of the other, can withdraw.

In doubt whether they were added to the promise of the contract or to the contract itself, one must stand for the minimum, or they are judged to have been added only to the promise of sale. Inst. 1. 3. t. 24; L. 25 Dig. de Contrahenda emptione; L. Contractus C. de Fide instrumentorum.

According to C. G. 1589, 1590, a promise of selling is equivalent to sale whenever there is reciprocal consent of each party in the thing and the price. But if arrhae are joined to the promise, either contracting party can withdraw from the contract, so that they are lost by him who gave them; but he who received them returns them doubled. Hence it is clear that a promise of sale is not altogether to be confused, even according to C. G., with sale itself; since according to the same Code, by sale ownership of the thing is transferred, but by no means by promise of sale. Wherefore a promise of sale is equivalent to sale, not insofar as it transfers ownership, but insofar as the seller can be compelled, after receiving the price, or conversely the buyer, after receiving the thing, to fulfill it.

Gousset 833. According to C. H. 1451, 1454, a promise of sale and purchase gives to the contracting parties the right of claiming fulfillment of the contract. If in the contract of sale and purchase arrhae have been given and accepted, the contract can be rescinded if the buyer is content to lose them, or the seller to restore them doubled. Cf. C. L. 1548. As regards C. I., cf. 993.

Certainly, speaking per se, it is one thing to promise a thing, another to give it. C. B. 336 ff.; Lugo d. 26. n. 10; L. 794.

1130. Whether the purchase of a thing previously sold to another is valid? According to Roman Law:

A thing sold to one person, and not yet handed over to him, is in the ownership of the seller, who therefore can validly sell and hand it over to another. For when delivery has followed, it becomes the second buyer's. The same must be said if, although the thing has been handed over to the buyer, nevertheless the price has not yet been paid by him, or is not yet regarded as paid. For then ownership of the thing has not yet been acquired for the buyer. But although the second purchase is valid, delivery having followed, nevertheless it is not licit. Hence if a thing has been sold to two persons and not yet handed over, it must be handed over to the first buyer. But if it has already been handed over to the second buyer, who has already paid the price, he acquires ownership of the thing, but the first buyer has a right and personal action against the seller as regards interest and damages. L. Qui tibi C. de Heredit. vel actione vendita; L. Si ancillam C. de Action. empti et vend. But if the thing has already been handed over to the second buyer, but the price has not yet been paid, or regarded as paid, the thing must be handed over to the first buyer, since it is still in the ownership of the seller. Although the thing has been handed over to the later buyer, and he has paid the price, if the second buyer was conscious of the prior sale, he can be condemned, at least by natural law, to hand over the thing to the first buyer. But, since the contract is valid, he is not bound to restore it before the sentence of the judge, but is bound only to reparation of the damage; if nevertheless the thing has been mortgaged to the first buyer in security of the contract, since he already has some right in the thing, the thing must be restored to him. L. Si creditor § ult. Dig. de Distract. pignorum. Likewise, if the later buyer has received the thing by lucrative title, e.g., by donation, the first buyer will be able to evince the thing from him. L. Ignoti C. de Revocandis his, quae in fraudem creditorum alienata sunt. And this has place even if the second was ignorant of the fraud. If the first buyer is the Church, or a pious place, or a City, although the thing has then been handed over to another and the price has been paid by him, the thing must be restored to the first buyer; because the Church, or pious place, or City, even without delivery, has already acquired ownership. L. 827; Lugo d. 20, n. 112, 116; Molina d. 369. n. 9; Lessius 1. 2. c. 21. n. 142.

According to C. G. 1138, 1583, 1599, after perfected consent of each party, the sold thing passes into the ownership of the buyer before delivery itself. But the sale of another's thing is null. No one can transfer to another more right than he himself would have. L. 54 Dig. de Reg. Iur. Nevertheless, it gives place to reparation of damage; and if afterward the thing has become the seller's, he is then obligated to fulfill the sale. Hence it follows that the right is always with the first buyer to evince the thing from the second. Nevertheless according to the same C. G. 1141, if the thing which someone has obligated himself to give or hand over to two successive persons is movable, that person who possesses is preferred and obtains ownership, even if his title is later in time, provided nevertheless that he possesses in good faith. The same is held according to C. I. 1448, 1459, 1126, whether it is a movable thing or a title to bearer. Cf. here 1128. According to C. H. 1473, whether the thing is

movable or immovable, the first possessor in good faith is preferred. By natural law the first buyer always retains the right to reparation of damage, if he truly suffered it from the second sale. Cf. C. L. 1578 ff.

1131. What are the obligations of the seller and buyer? 1. The seller is bound to hand over at once the thing and its accessories, free from another's possession and from other unusual burdens, not defective, and entire, unless something else has been agreed; and he is bound to furnish eviction for the thing handed over. C. I. 1462, 1471; C. G. 1603, 1625, 1615; C. L. 1568, 1583. The buyer also, unless something else has been established by pact, must hand over the price at once. Likewise, unless something else has been established by agreement, both the thing and the price must be handed over in the place where the contract is made, and in that mode concerning which agreement was made in the contract. The expenses of delivery are owed by the seller. C. I. 1467, 1468, 1482, 1507, 1508; C. G. 1608, 1609, 1626, 1650, 1651; C. H. 1461, 1465, 1474, 1500; C. L. 1546, 1570, 1572. - The contract of sale and purchase is in equality. For purchase and sale was introduced for the common utility of each contracting party, while one needs the thing of the other and conversely; and accordingly it ought not to be more burdensome to one than to the other. If equality between price and merchandise is not preserved, injustice is committed, and in the forum of conscience there is an obligation of restitution, or reparation of damage, grave or light according to the measure of the damage itself. St. Thomas 2. 2. q. 77. a. 1; C. H. 1466-1468; C. Si venditori 7 de Empt. et vendit.; Rogron on a. 1604. When the price has not yet been paid, the seller is not bound to hand over the thing. C. I. 1469; C. G. 1612; C. L. 1574. If the buyer fears trouble in possession of the thing, he can meanwhile suspend payment of the price. C. I. 1510.

2. Moreover the buyer is bound to pay interest for the unpaid price from the day on which he possesses the thing, if the thing is fruitful, although accidentally it has given no fruits from the time of the sale, unless the seller has given delay for paying; because it is not equitable that the buyer have both the thing and the price at the same time. But if the thing is not fruitful, he is not bound to pay interest unless he was in culpable delay, nor unless it was otherwise agreed. C. I. 1509; C. G. 1652; C. H. 1051; C. L. 1573. 3. In addition, the buyer is bound to pay expenses made for carrying away the sold thing, for writings or authentic acts, likewise for expenses necessary for preservation of the thing from the day of sale, unless it has been agreed in another way. C. I. 1455, 1467; C. G. 1593; C. L. 1552. Cf. C. H. 1455, 1465; C. B. 433 ff., 459 ff.

1132. When is sale resolved by reason of the price? - Concerning Roman Law: In the external forum, so that lawsuits not be multiplied too much, an action against the author of damage is not conceded unless one buying more dearly or selling more cheaply has been deceived beyond half of the price. L. 2 de Rescindenda venditione. And this is also valid by Canon Law. L. 805. From the more recent Laws: If a commissory agreement has been expressly made, so that, when the price has not been paid at its time, or the thing not handed over or accepted, or any other attached condition not fulfilled, the thing would become unbought, the sale is resolved by the law itself, or rather the thing is vindicated for its owner. Resolution of sale is the rescission of a valid sale. Vindication, however, is an action into one's own thing, by taking it to oneself. But if such an express pact has not been made, but only a tacit one has been present, it is resolved only by the office of the judge. C. I. 1511, 1165; C. G. 1654; C. H. 1124, 1503. Cf. C. L. 1585. - Commissory: the lex commissoria is an exception added to a

contract; if either of the contracting parties acts against it, he incurs the fine concerning which agreement was made. Cf. the whole title de Lege commissoria in the Digest. Nevertheless, the sale of movable things is resolved by the law itself if the buyer does not come on the defined day of delivery; or if the buyer delays in paying; for then it is in the power of the seller, if the thing has not yet been handed over, immediately to withdraw from the purchase, unless delay has been conceded. C. I. 1512; C. H. 1505; C. G. 1657.

But if the thing has already been handed over, the seller will be able to claim or vindicate the thing, unless again delay for paying has been conceded to the buyer. C. I. 1512, 1513; C. G. 1657. But he will be able to vindicate within fifteen days to be computed from delivery, provided the thing is with the buyer, and has neither been changed, nor obligated to an ignorant lessor. C. I. 1512, 1523. Cf. C. A. 1062. - And in the sale of immovables, by full right, the contract is not resolved unless first, after the time for payment of the price has elapsed, an intimation of payment has been made by the seller to the buyer, who is then constituted in delay. C. G. 1656; C. H. 1504. The seller injured beyond half of the just price, according to C. I. and C. A., beyond seven twelfths parts according to C. G., in the sale of an immovable thing, has the right of demanding rescission of the contract, even if he expressly renounced this right in the contract and declared that he donated the excess. C. I. 1529; C. G. 1674. It is otherwise, however, according to C. A. 935. Rescission of sale by reason of lesion belongs to the seller alone, and only in the sale of an immovable thing, in the external forum; but it is in the power of the buyer either to withdraw from the sale or to supply how much more the thing is worth. This rescission ends in two years. C. I. 1529, 1531, 1534, 1536; C. G. 1674, 1676, 1681, 1683. Cf. C. A. 934, 935, 1060. In the forum of conscience, the action of rescission by reason of lesion belongs per se both to the seller and to the buyer, whether it concerns an immovable thing or a movable, whether the thing was bought beyond the highest price or below the lowest. According to C. A. 1060, the action by reason of lesion likewise belongs to each, namely both to seller and buyer. - Once sale has been resolved, together with the thing, its fruits are consequently also to be restored. - C. B. 454, 455; L. 805, 819; L. 2 de Rescind. vendit. C.; C. 3, 6 de Empt. et vendit.; St. Thomas 2. 2. q. 77. a. 1 ad 1; Gousset 839; Troplong on a. 1654. The action of rescission of the sale of immovables because of lesion is prescribed after two years have been completed from the day of sale. And this term runs even against wives, absentees, interdicted persons, minors, representing persons constituted in greater age who sold. And this term also runs likewise and is not suspended as long as the time agreed by the pact of withdrawal runs. C. G. 1676; C. I. 1531. When rescission has been admitted, if the buyer prefers to retain the thing, besides the supplement of the price he must also pay interest of this supplement from the day of the petition of rescission. If he restores the thing and receives the price, he also returns the fruits from the day of petition. But interest on the price is owed to him from the day of petition or from the day of payment, if he did not gather fruits. C. G. 1681, 1682; C. I. 1534, 1535.

1133. When is purchase resolved by reason of the thing? - If a defective thing has been handed over, the buyer can proceed, within the time established by the laws, by redhibitory or estimatory action. To redhibit is to cause the seller to have again what he had had. To estimate is to cause the excess of the price to be restored according to the estimation of the thing, by how much less it ought to have been sold. C. I. 1478, 1501, 1505; C. G. 1644, 1648; C. H. 1486, 1491, 1492; C. L. 1582; C. A. 933; C. B. 462 ff.; L. 819; Rogron on a. 1625. If the thing has not been handed over whole, because a part

of it perished, the buyer can either withdraw from the contract or diminish the price proportionately. C. I. 1461; C. G. 1601; C. H. 1460; C. L. 1576, 1577.

But if after delivery the buyer has suffered eviction of a part, it is lawful for him to withdraw from the purchase if that part is of such kind or so great that, had he known, he would not have bought it. C. I. 1492; C. G. 1636; C. H. 1479; C. B. 468 ff. If the purchase is not rescinded, the value of the evicted part is compensated to the buyer according to its estimation at the time of eviction. C. I. 1423; C. G. 1637. Cf. Troplong on this article. If an error has intervened in the measure of an immovable thing, the quantity having been brought into the contract, it is indeed not lawful for the seller to withdraw from the sale; but it is lawful for the buyer if an excess greater than a twentieth part is found, but not if lesser.

If one does not withdraw from the sale, and there is excess or defect as to quantity, the price will have to be increased or diminished according to the measure of the quantity. But an action of this kind ends in a year. C. I. 1473-1479; C. G. 1617-1623; cf. C. H. 1469-1472. According to C. A. 1059, 1060, when it concerns merchandise for which a rate has been established, the buyer can juridically seek compensation for any very small lesion. Outside this case, purchase and sale can be impugned both by the buyer and by the seller only under the title of lesion beyond half.

1134. Whether the seller is bound to manifest defects of the thing? Defects are substantial, or only accidental; hidden, or manifest; moreover either the seller is questioned about them, or not. Hence: In every case the seller is bound to manifest all substantial defects of the thing, both in itself and relatively to the known end of the buyer, or all those things which make the thing another thing, or render it harmful or notably useless; otherwise he is liable for the price and for the damage. Thus according to every Law. A seller who is questioned is bound to manifest all hidden defects, even if they do not render the thing harmful or useless; otherwise he would commit fraud. Consequently, if fraud was the true cause of the purchase, the contract is rescindable. But if the fraud was only incidental, so that the buyer, knowing the defect, would still have bought, but not at so much, the seller must restore only as much as the buyer would have bought it for less; because otherwise almost no sale could be made. But if the seller is not questioned, and the hidden defect does not render the thing useless, he must diminish the price by reason of the defect. The reason is that otherwise the thing would be sold for more than it is worth. The seller is not bound per se to show accidental defects of the thing which are of themselves manifest, provided he diminishes the price in proportion to the defect. The reason is that then no injury is done to the buyer, neither by reason of the price, which is diminished, nor by reason of the defect, which, if the buyer has not seen it, he must impute to himself. Exception, however, unless the buyer is very rude, because with respect to him the defect is judged hidden. Exception also if the seller is specially questioned about such a defect. If the seller protests that he does not wish to give an account of any defect, even the most hidden, he is bound to nothing, provided the thing is not sold beyond the just price, at least the highest, with account taken of that hidden defect. L. 818, 819, 823, 824; St. Thomas 2. 2. q. 77. aa. 2, 3; Quodl. 2. a. 10; C. I. 1481, 1494, 1498 ff.; C. H. 1484 ff.; C. G. 1623, 1638, 1641 ff.; C. B. 439, 442, 459-461, 463, 464, 475, etc.; C. A. 869, 871, 872.

1135. Whether the seller is liable for all damages following from a defect of the sold thing? - He is liable only for foreseen damages; because he could not undertake an obligation as to those things which he did not foresee even in confused fashion.

1136. To what is the seller bound if the thing perishes before or after delivery? He is bound to nothing if the thing perishes before delivery from a fortuitous event. The reason is, according to C. I. 1480, 1226, 1298, 1299, 1504; C. G. 1624, 1138, 1183, 1302, 1647; C. L. 1549, that a thing perishes for its owner, that is, the buyer. So also, unless it has been agreed otherwise, this must be held according to C. H. 1182, 1445, and according to Roman Law, although the seller preserves ownership of the thing until it has been handed over. L. 828. - If the thing perishes before delivery from fault of the seller, he is liable for the price and expenses of the contract, and also for what was of interest to the buyer, because he ought to have guarded the thing as his own, and he is liable for the damage inflicted.

C. I. 1140, 1219, 1224, 1504; C. G. 1137, 1138, 1182, 1302, 1647. - If the thing perishes after delivery from an intrinsic defect which existed at the time of delivery, he is likewise bound to restore to the buyer the accepted price, and to pay the expenses of the contract, if there are any, and likewise to compensate that which was of interest to the buyer. The reason is that he sold a useless thing, or a thing of no value; therefore there was in the buyer an error concerning the substance of the contract; therefore the contract is null by defect of consent and of the matter itself, which was estimable by no price. Moreover he himself was the cause of the buyer's loss. C. I. 1504; C. G. 1647. Cf. C. H. 1460, 1094 ff., 1487, 1488, 1497; C. A. 1061.

1137. When is the seller liable for eviction of the thing? He who handed over a thing to another from an onerous cause, or the author, if that person is deprived of that thing, must furnish eviction to him; for to evince is to take away something by overcoming. Hence the seller is liable for eviction whenever the buyer is juridically disturbed from possession of the bought thing. Exception, unless it was otherwise agreed in the contract. The reason is that the seller then cannot transfer ownership of the thing. - He is also bound to refund the price to the buyer when it is discovered that the sold thing certainly pertains to a third party, here and now claiming it. The reason is the same; for the seller could not transfer ownership of a thing which he himself did not have. But he is not bound to this in conscience before the sentence of the judge, unless it is altogether certain to him that the thing truly belongs to that third party; nor is he bound easily to give faith to others asserting that it is so, since presumption favors him and no sentence of the judge has otherwise intervened. - But when place is made for eviction, the author is bound to defend the defendant at his own expense, and, when the thing has been evicted, to furnish him indemnity. Wherefore he must restore to him what he received from him for the thing, refund to him the expenses of litigation made, and that which is of interest. For eviction must be furnished from a certain tacit contract between giver and receiver. And thus, if the value of the evicted thing has increased, its increased price is owed. C. I.

1481 ff.; C. G. 1626 ff.; C. A. 928 ff.; C. A. 1474 ff.; C. L. 1581; Troplong della Vendita c. 4 on arts. 1626, 1633. In a redhibitory action the buyer is liable for deteriorations; in eviction he is not liable for deteriorations even occurring by his fault after the sale. In a redhibitory action the buyer must restore fruits; in eviction he is not bound to give an account of consumed fruits. In a redhibitory action the buyer is bound to restore improvements and accessions; in eviction the buyer retains for himself everything which increases the thing. Troplong della Vendita cap. 4, a. 1647, num. 572.

1138. Who can sell and buy? All can sell and buy who generally can contract and are not specially prohibited in the Law. C. I. 1456; C. G. 1594; C. H. 1457; C. L. 1559, 1560, 1567. By Canon Law, rectors of churches, beneficiaries, regular men, and all religious women can sell ecclesiastical goods,

immovable and precious movable goods, neither licitly nor validly. Lugo Resp. Mor. 1. 4. d. 31; E. M. By Roman Law, judges and their officials are specially prohibited from buying in the place where they exercise jurisdiction, except things necessary for food, clothing, and daily use. Likewise guardians, curators, and persons subject to them cannot buy the goods of those who are under their care or guardianship, under penalty of nullity.

Purchases are also prohibited to all public administrators; just as the same cannot receive donations. L. unic. C. de Contract. iud.; L. Praesides Dig. Si certum petatur; L. Non licet, L. Si in emptione § ult. de Contrah. empt. By the more recent Laws the following are prohibited: Debtors from selling those immovable goods of their own which have begun to be proscribed by creditors, after the transcribed mandate, commonly precetto, for payment, namely insofar as the creditors' interest is concerned. C. I. 2085; C. G. 686. - Those who have made cession in court; indeed alienations made from the day of cessation of payments are invalidated according to C. I. Comm. 709; and those made within the ten preceding days before cessation of payments are null according to C. G. Comm. 446.

Those who administer goods of a Community or of any public Institute; and those who, in an office, ministry, or public duty, provide authority for goods to be sold, or are present for it; guardians, protutors, curators; parents as regards buying the goods of children who are subject to their power; procurators to whom someone has committed something to be sold in his name; all these, under penalty of nullity, are prohibited from buying the aforesaid goods, even under auction. C. I. 1457; C. G. 1596; C. H. 1459; C. L. 1562, 1565.

Those who, because of office, act in court, as magistrates, clerks, advocates, procurators, indeed also notaries, are prohibited from buying back, likewise under penalty of nullity, lawsuits and litigated rights whose cognition pertains to the curia, tribunal, or praetorship of which they are part, or in whose jurisdiction they exercise office. C. I. 1458; C. G. 1597; C. H. 1459; C. L. 1562, 1563. Cf. C. A. 879; C. B. 456 ff. The purchase and sale of immovables is prohibited to minors, wives, and interdicted persons without the formalities prescribed by law. - Purchase and sale is specially forbidden between spouses, except in a few cases, according to C. G. 1595; and according to C. L. 1564, and C. H. 1458, unless they were separated as regards goods. Sometimes the right of preemption can be reserved for someone. C. B. 1094 ff. Then others cannot buy.

1139. What things can be sold? Sacred things cannot be sold. Cf. 508 ff. Things of public right also, such as public roads and a public forum, cannot be sold. Inst. 1. 3. t. 24. § 4. But by the very Natural Law, the sale of those things is prohibited which by their nature can serve only for evil, e.g., defamatory pamphlets, lascivious pictures, etc. Nevertheless, the sale of these things, although prohibited, is not for that reason null; whence the seller is not bound to restitution. Gousset 836. By Roman Law anyone can sell all his own goods, both present and future, even together, even those which are had in hope, such as future fruits of a field. The things of another can also be sold, e.g., by reason of pledge, mortgage, etc. But no one validly buys his own thing, unless the seller has some right in it. L. Suae rei, L. Si in emptione § rei suae Dig. de Contrah. empt.

By the more recent Laws whatever is in commerce, that is, in the patrimony of individuals or of moral bodies, can be sold; for commerce is the reciprocal right of alienating and acquiring; provided that a particular law has not prohibited alienation of some thing. C. G. 1598. Future things also, such as fruits, grains, offspring, can be sold; whether the right to them is sold, and the sale is aleatory, which is at once valid; or the body, or fruits to be born, are sold, and the sale is under condition,

which then will be valid when the fruits are born. Nevertheless the succession of a person still living cannot be sold, even with that person consenting.

C. I. 954, 1460; C. G. 1600. Purchase and sale also is prohibited of the goods of minors, wives, absentees, and interdicted persons, when the formalities prescribed by law have not been observed. Gousset on a. 1598. But incorporeal rights can be sold by Positive Law itself, or also transmitted by any other title, such as promissory notes, credits, servitude, usufruct, right to an opened inheritance; delivery of these is made by remitting the promissory notes or other authentic writings. But if litigated rights are sold, it is lawful for the debtor to redeem them from the buyer, with the price expended restored to him with interest. C. I. 1538 ff.; C. G. 1689 ff.; C. B. 433. Finally an inheritance already devolved to an heir can be sold; and for a sale of this kind there are special positive laws to be observed. Already devolved to an heir; for there is no inheritance of a living person. C. B. 2371 ff. Cf. here 1337. - C. I. 426, 427, 430, 433, 435, 2113, 2114; C. G. 538, 2226, 2227; C. L. 1553 ff.; L. 7 de Haered. vel act. vend. Ecclesiastical goods, as has already been said, cannot be sold without Apostolic beneplacitum. E. M.

1140. What is price, and of how many kinds is it? Price is how much something is worth to all. This saleable value is determined from the suitability of the thing, so that it can be exchanged with other things in human commerce. To all, i.e., commonly, not individually to each person. - One price is legal, another common, another conventional. Legal price is that which has been established by the public authority of the Prince or magistrate, so that it not be exceeded; whence this price is said to consist in the indivisible, since it excludes both increase and decrease as long as the law lasts. Common, or natural, price is that which is imposed on things by the common judgment of intelligent men, the diverse circumstances of things having been weighed.

Hence common price does not consist in the indivisible, but admits a certain latitude. Common price is subdivided into highest, middle, and lowest. Here it must be noted "that the price of cheap things has a lesser latitude than that of precious things; for wine, or something similar, which is worth five, can be sold for six or four; or if it is worth ten, it can be sold for twelve or eight; or if it is worth one hundred, it can be sold for one hundred five and ninety-five." L. 804. But since price, especially common price, depends on several circumstances according to which it is usually judged, the aforesaid rule for defining highest, middle, and lowest price seems somewhat severe and scrupulous. Conventional price is that which is determined by the free agreement of the contracting parties. - L. Si servum 33 Ad leg. Aquil.; C. A. 1058, 1059; Lugo d. 26. n. 38, 39; St. Thomas 1. 2. q. 96. a. 1 ad 3; 2. 2. q. 77. a. 1 ad 1, a. 2 ad 2.

1141. From what causes does the price of things usually increase or decrease? - Resp. To the 1st: The price of things generally is taken from their utility in order to human uses, and according as this utility is esteemed in society or the community. But specifically the price, even just price, is usually increased from the following causes: From scarcity of merchandise, or of some thing, e.g., wine, grain, etc.; for the rarer something is, the dearer it is, according to the common axiom. From the common superabundance of money; for the more something is superfluous, the less it is esteemed.

From the multitude of buyers; for the more numerous the buyers are, the more necessary and useful the merchandise is esteemed. - From greater labor and danger in acquiring merchandise, or greater expenses; for all these things are estimable by price. - From greater labor in selling merchandise, as, e.g., if someone must sell something in small retail portions; for the greater labor in weighing,

measuring, etc., is estimable by price. - The price can also increase from the seller's own affection for some thing; and this is called the price of affection. A fortiori it can increase because of the convenience which the seller receives from it; because, as affection, so also convenience is truly estimable by price, since deprivation of the thing is then greater for him. But by no means can it increase, at least according to the common opinion, because of the special affection or utility of the buyer; otherwise what is not one's own would be sold. St. Thomas 2. 2. q. 77. a. 1. Moreover, if it were lawful to increase the price because of the buyer's utility, then contrary to the doctrine of Benedict XIV it would also be lawful to demand usury from a loan because of the borrower's utility. Moreover, if from the circumstances it is established that the thing is commonly esteemed at more because of that special utility which it will bring to the buyer, it will be lawful to seek a greater price. Thus sometimes a little field, which in itself is worth little and offers almost no utility to the owner, is of very great value to the owner of a neighboring estate; and therefore it is justly sold at that price which seems equitable to most people, that matter being considered. The price can increase because of delay of payment, provided nevertheless that it is contained within the latitude of the just price, or the legal rate for mutuum is not exceeded, or there is reason of some title of emergent loss, ceasing profit, danger of the principal, frequency of buyers who are increased thereby, custom of the place, etc. The reason is clear from what was said above concerning just interest. - Likewise a thing can be sold more dearly if the seller is going to sell it for more at another time, or if the price is to be handed over by the buyer at a time when the thing will be worth more. Finally, a thing cannot be sold beyond the just price for this reason, that the seller from his own ignorance or imprudence, or even from a fortuitous event, bought it at a greater price, or underwent greater expenses than others commonly pay or undergo. The reason is that prices of things do not increase or decrease from what happens to one person or another, but from what commonly happens. Nor, from the fact that some private merchant has suffered theft or shipwreck, is the price of things usually increased in the estimation of the people; just as the price of grain is not usually increased because one or another farmer has lost the fruits of his fields by fatal hail. But it would have to be said otherwise if many merchants had lost their merchandise in shipwreck, because the merchandise, having become rarer, would by that very fact increase in price. Ithur. Cas. 4. n. 11; Elbel 587; L. 768, 801-811, 829; Gousset 840.

Resp. To the 2nd: The price of things usually consequently decreases from opposite causes: From abundance of merchandise; for, as has been said, the more something is superfluous, the less it is esteemed. From scarcity of money, for the rarer this is, the dearer. From scarcity of buyers, and accordingly it is lawful to buy more cheaply in favor of a seller who is seeking a buyer; because voluntary things become cheap according to common estimation. Hence at least probably it is also lawful to buy more cheaply where merchandise is sold because of poverty; for the seller's need does not cause common estimation to change. From the intrinsic cheapness of things, or from greater ease in acquiring or preserving them, or from the danger to which things are exposed, e.g., with war or shipwreck threatening, etc. From lesser labor in selling things, as, e.g., when things are bought in gross, i.e., a great quantity of things is bought together and in a heap for one price. It can also be bought more cheaply if the thing is to be handed over at a time when it will be worth less; or if the buyer is going to acquire it at another time for less.

From represented, commonly anticipated, payment of the price, a thing can likewise be bought more cheaply, provided one remains within the latitude of the just price, because present money, like

present merchandise, is esteemed more than what is hoped for; or provided legal interest is not exceeded, for it is a certain virtual mutuum.

Hence the price of the same thing, because of diverse extrinsic circumstances, is usually raised and lowered within a short time, as is clear from the daily practice even of sellers and buyers. Ithur. Cas. 4; L. 801-811; St. Thomas 2. 2. q. 77. aa. 1, 2.

1142. What price must be observed in sale and purchase? - In sale and purchase, speaking per se, the legitimate price must be observed; and, in defect of this, the just common price. The 1st reason is: because that which is established by public authority by office and for equity must also be observed in conscience. But legitimate, or taxed, price is something of this kind. Whence, if someone sells something to an ignorant buyer above the taxed price, he sins not only against legal justice, or obedience owed to the Prince, but also against commutative justice, and is bound in conscience before the sentence of the judge to restore the excess. But those who sell below such a price, if the price is taxed by law in favor of sellers, sin against legal justice and charity, insofar as damage to other merchants follows from this. The 2nd reason is: because, when authoritative taxation by the Prince and magistrate is lacking, there is no better measure of the price of things than the common estimation of men. Moreover, since common price is threefold within the limits of justice, namely highest, middle, and lowest, it is lawful to sell and buy at any one of these. - Speaking per se; for sometimes it is lawful to exceed the legal price, namely: 1. If it is not observed by the greater part of men, while the Prince knows and is silent; for then he tacitly approves. 2. If things are notably changed; for then the rate becomes unjust. 3. If merchandise is notably more precious or worse than usual; for the law touches things of ordinary goodness. Ithur. Cas. 4. n. 9; Elbel n. 500; L. 803; St. Thomas 2. 2. q. 77. a. 1, a. 2 ad 4.

If not only legal price is lacking, but also common price, because it concerns things not necessary for common living, such as jewels, precious paintings, ancient things, ancient codices, etc., more probably they are to be estimated according to the judgment of experts in that matter, with attention to the circumstances and regard for the novelty, antiquity, rarity, etc., of the thing. The reason is that they are regarded as suitable judges in things of this kind, as the people are in common things. "Nevertheless I except from these," says St. Alphonsus 808, "the use of an honest woman, which, since it is inestimable by price, she will be able without injustice to accept very much for it." Yet the opposite opinion appears probable to others, because in that case the just price seems to be that concerning which the contracting parties agree. The probability of this latter opinion can be admitted by limiting it to the case in which it is not a matter, on the one hand, of a thing which among experts has in reality great value, and, on the other, of a price altogether cheap; for then there is error in the very substance of the contract. Whence St. Alphonsus asserts that the buyer is bound to supply the price if, e.g., he buys for a few asses a precious gem which is regarded as glass. L. 819. Nevertheless, as the same St. Alphonsus notes ib., that price must be regarded as just concerning which each party agrees, if because of ignorance of the value he commits himself to the danger of lot. Moreover such things, which are not necessary for common living, admit a very great latitude of price. - L. 735, 801, 811; Ithur. Cas. 4. n. 10; Sporer de Matr. 583.

1143. He resolves: For this reason an honest woman can by right demand even marriage with a most noble and most wealthy man, even a Prince, which, unless another stronger reason stands in the way, is consequently owed by right. An honest woman, and a fortiori a virgin; for a prostitute, since she is

prepared to prostitute herself with all, does not herself greatly esteem, nor do others commonly greatly esteem, the loss of her honesty; whence she cannot demand a greater price than what is commonly given. Lugo d. 18. n. 47; d. 26. n. 49.

1144. Whether it is lawful to buy below the lowest price precisely by reason of anticipated payment, before the merchandise is handed over? Resp. Affirmatively, by reason of various titles which are accustomed to come extrinsically to mutuum, if they are truly present and due equality of price is preserved with respect to titles of this kind. For it is in reality a certain mutuum. - Resp. Affirmatively, by reason of the proper nature of this mode of selling; since this manner of selling brings about rarity of buyers, multitude of sellers, and brings great convenience to sellers on the part of the buyers themselves. Lessius 1. 2. c. 21. n. 62; L. 811.

1145. He resolves: Hence it is also lawful to sell more dearly because of delayed payment of the price, on account of the same reason of mutuum, and because this manner of selling, since on the contrary it brings about a multitude of buyers and rarity of sellers, increases the price of the thing according to common estimation. L. 811; Less. l.c. n. 57; Gousset 841.

1146. Whether names of debts or credits can be bought more cheaply because of certain and anticipated payment? Resp. Negatively as regards "promissory notes, which are commonly called fides crediti, for which no moral danger is present, provided that, because of distance, collection would not be inconvenient or dangerous for oneself, on account of him who must be sent to collect." L. H.

A. tr. 10. n. 179. - Resp. Affirmatively, if the credit is uncertain or of difficult collection, "even if it is easy for the buyer to collect it whole; because price is taken from common estimation, not from the circumstance of the particular buyer." If the credit is liquid, it is disputed. The first opinion denies. The reason: "because an action to a liquid credit, in reality, when no danger or expense for recovering it is present, is worth as much as the money owed itself." The second opinion affirms. The reason is that, since in practice these credits are commonly liable to dangers and inconveniences of this kind, they decrease in price according to common estimation. "But in purchase, only the estimation of men constitutes the just price of things, and here provides the title of buying for less." L. 829, 830. Moreover, "because they are equivalent to money lent, therefore from the same reason as in mutuum, it is lawful to perceive moderate profit, according to the legal rate."

Gur. 894. This sale is perfected as soon as buyer and seller have agreed concerning it as regards the credit, or any other right whatsoever, and as regards the price. But, so that it may be valid with respect to third parties, it must be announced to the debtor, or accepted by him by authentic act. Therefore the debtor is freed if before this he has paid the prior creditor. C. I. 1538-1540; C. G. 1689-1691; C. H. 1327; Lugo Resp. Mor. 1. 6. d. 18.

1147. Whether you can sell at the current price a thing which you know will soon be worth less? Resp. More probably and more truly, affirmatively. The reason is that the present price is just and not yet changed, provided nevertheless that this knowledge is private; for if it were common, the price would already be changed. Sometimes, however, you can sin against charity, if, e.g., by such a sale the buyer would be reduced to extreme or grave necessity; for just as charity commands that we assist a neighbor gravely in need, so it forbids that he be reduced to poverty so that we may acquire riches for ourselves. Nevertheless, where it concerns only grave necessity of a neighbor, it is not sufficiently

established whether the sin against charity is always grave, because charity does not forbid someone to consult for himself by using his own right, even if damage accidentally comes to another from this.

Molina, however, excepts the case in which someone, knowing a law that has been framed which diminishes the price, but not yet promulgated, would sell his goods for more because of that knowledge, or would sell at the current price, or would by no means sell. The reason is that public law ought to be equal and common to all subjects; and a Prince would sin against justice if, before it was promulgated to all, he manifested it to certain persons, who, anticipating the promulgation, would profit on the occasion of it with loss to others; and by the same reason, he who used knowledge of it to the prejudice of others, in whatever way that knowledge had come to him, would sin against justice, with the burden of restoring damages which came to neighbors by that way." But handing down the difference between this case and the other case, in which someone knew that other merchandise of the same kind would soon arrive, while the buyers were ignorant of it, he adds: "He who uses knowledge of a law before it is promulgated to enrich himself with loss to others uses knowledge of a thing which ought to be common to all, to the detriment of others, and consequently does injury to them; but he who, for the same effect, uses knowledge that merchandise is arriving does not use knowledge of a thing which ought to be common to all; rather, this pertains to the industry, art, and event of fortune of merchants." De Iust. et Iur. t. 2. d. 354. n. 5. - But others deny this. For abuse of power is one thing, if, e.g., for this reason the Prince or magistrates should defer promulgation of the law until they themselves could sell their merchandise or money, for the Prince and public magistrates do not have power except for the common good of subjects; but mere use of knowledge is another thing, which the Prince and other magistrates legitimately have, and which they can legitimately use, if from some reasonable cause the promulgation of the law must be deferred. - L. 824; St. Thomas 2. 2. q. 77. a. 3; Lessius 45-48; Lugo 140-143; Gur. Cas. 90; Struggl tr. 3. q. 1. n. 16.

1148. Whether you can sell at the current price a thing mixed with another cheaper thing? - These are the words of Molina, de Iust. et Iur. t. 3 d. 353. n. 33: "When the price is not taxed by law, and something is admixed to the things which are sold, as water to wine, or some unusual things to medicines, a distinction must be made. For if the mixtures can bring harm, then those selling things mixed in that way are bound for all subsequent damages, and likewise to restitution of that by which those things are worth less to the buyer than what he gave for them.

But if they do not bring harm, yet the things are less useful for that for which they are bought, then those selling are bound to restore what they are worth less to the buyers for that for which they are bought; wherefore, if they conduce nothing to that, they are bound to restore the whole price; as if a medicine because of the mixture is rendered useless for that for which it is bought. But if the things mixed in this way are useful for that for which they are bought, and as much is deducted from the price as is fair because of the mixture, then those selling are not bound to restitution, because they have not exceeded the just price; nevertheless they sin, unless compelled by necessity to do this, as because otherwise they cannot draw out the just price of the thing, for example, of wine, unless they mix a little water with it; or unless the thing with that mixture truly is worth what is given for it, and the buyer would not buy a better one for that price. Nevertheless sellers must be kept away from frauds and deceptions of this kind." The same must be said if artificial things are sold as natural, e.g., artificial wine, artificial butter, as natural wine and natural butter.

If the artificial thing is equally useful as the natural, and the price is suitably diminished, and the buyer does not declare that he wishes to acquire for himself a natural thing, not an artificial one, the contract is valid, and there is no obligation of restitution. - L. 820, 821; St. Thomas 2. 2. q. 77. a. 2. Nevertheless to substitute artificial wine for natural in sale is per se injustice. And the same is per se true in any other thing, since there is substantial error; and any buyer would reasonably be unwilling if he knew of the substitution.

1149. Whether merchants are bound to restitution who by fraud or lie induce buyers to buy their merchandise at a greater price than they would have bought it, although they do not exceed the highest price? Resp. As regards fraud, affirmatively. The reason is that fraud is the efficacious and unjust cause of the damage which the buyer suffers; but each person has a strict right not to be induced by fraud or deceit to suffer any damage. - As regards a lie, per se the same would have to be said, since it also is of itself an unjust cause of damage. Nevertheless it must be noted "that commonly faith is not given to the lies of sellers, since these are sufficiently known to be common stratagems; whence they are regularly not bound on account of this to restitution.... I said regularly, because if sometimes the seller certainly noticed that the buyer believed the lies, and therefore bought for more, then indeed he is not to be excused from injustice." L. 805. Wherefore he is bound to restitution if by lies and frauds of this kind the seller truly induced the buyer to buy merchandise at a greater price, although he does not exceed the highest price. 1 Thess. 4:6. - St. Thomas, Quodl. 2. a. 10.

1150. Whether or how do merchants sin who, when questioned about the price of merchandise, notably exaggerate it? If they truly intend to sell at this price, they sin against justice by wickedly desiring another's property; and they are bound to restitution if in fact that price is paid to them. But if they intend only to give the buyer a place for offering his own price, so that thus they may come to the just price, they are excused, because it is known and customary for merchants to speak in this way, so that they may bring buyers to the just price.

1151. Whether those who diminish or adulterate a thing sold at the lowest price before delivery sin against justice? Resp. Affirmatively, because they act against the pact entered into with the buyer. For although it is lawful to sell at the highest price, nevertheless it is not lawful for a merchant who sells at the lowest or middle price secretly to acquire for himself a middle or highest price by diminishing the quality of the merchandise, or by subtracting from the measure or weight; otherwise agreements would be entirely useless. Lev. 19:35; Prov. 20:23. Exception: if the price either has been taxed by law, or is unjust by the malice of conspiring buyers. For equality is the essential property of this contract. Hence then it is not injustice to compensate oneself by diminishing the quantity of merchandise. Lugo 137; L. 822.

1152. Whether European merchants sin against justice who sell knives, mirrors, and other things of this kind among Indians at the highest price, which among us are held to be of cheaper price? Resp. Negatively, because although these things are cheaper in our regions, nevertheless they are commonly esteemed highly by Indians or Chinese, etc.; but common price is determined from the common estimation of men of the region. - L. 804, 808.

1153. Whether those sin against justice who buy precious things for a cheap price when they are exposed for sale among secondhand sellers, commonly rigattieri? Resp. Negatively, because those things are judged to have lost the old price and to receive another by custom, or by agreement of the

contracting parties. Whence things of this kind receive very great latitude with respect to price. Thus sometimes books are bought for a few asses which could have been sold for five or ten francs. The same must be said of the purchase of old furniture, because these things are commonly held to be of lesser value. - L. 807.

1154. Whether conventional retraction, or a pact of retro-sale in favor of the seller, is licit, namely so that at a certain time, or whenever he wills, the buyer is bound to resell the thing to the seller? Resp. Affirmatively. And this is established from the law of Lev. 25; L. 7 de Pact. inter empt. et vend. comp. C.; L. 2 ib.; Less. 1. 2. c. 21. n. 113; Lugo d. 184. The reason is that the owner of the thing can dispose of his thing as he himself wishes, provided justice is preserved. Therefore, with due diminution of the price made for the burden imposed on the buyer, a pact of this kind is licit. How great ought such diminution to be?

Some wish a third part of the price; others hold that a fourth part of the price must be deducted; others more truly think that the matter must be defined from the judgment of prudent men, all circumstances having been duly weighed. C. Ad nostram 5 de Empt. et vendit.; L. 812. But the buyer, in redemption of the thing on the part of the prior seller, can demand that a greater price be paid to him than that which he himself paid. "Because by the very fact that the thing is sold with a pact of retro-sale in favor of the seller, it must be sold at a lower price below the just price because of that added burden. But when it is afterward sold to the same seller, it is given without any burden. Therefore it must then be bought at the full just price. Therefore the buyer cannot be compelled afterward to resell at a lower price without injustice."

Hence a buyer who bought a thing at the lowest price can demand the highest price from the prior seller. For one selling his own thing can demand the just price which the thing is then worth. And at least he can demand that the price now be increased as much as it had been diminished in the prior purchase. Lugo ib. n. 192, 199. - But since the buyer meanwhile enjoys that portion of diminished price, and the convenience and fruits of the thing, he can indeed in the pact of retro-sale also demand by pact that the thing cannot be redeemed by the owner at a price lower than that at which he himself had bought the same from him, but he absolutely cannot demand by pact that it be redeemed by the owner only at a greater price.

For absolutely, to preserve justice, it suffices that the owner, redeeming his own thing, pay a just price; and the just price in the case is not always necessarily a greater price. But a pact is licit that the seller can redeem his own thing by restoring the same price which he received. For then it is a certain simple dissolution of the sale from the mutual will of the contracting parties. Moreover, there is no injustice in the buyer receiving only as much from the prior seller as he himself gave to him. For if this price is just, the matter is clear; if it is less than just, it can be sufficiently compensated to the buyer by the convenience and fruits of the thing meanwhile received by him.

C. I. 1515; C. G. 1659; C. H. 1507; C. A. 1068; C. B. 497. Moreover, in order that a pact of retro-sale be licit, it is necessary that the danger of the thing sold not be with the seller, unless the price is increased by a just estimation of the danger. But the thing to be restored by the buyer is understood to be such as it was when accepted by him, without deterioration or new burden. L. 812; C. H. 1519, 1520; C. I. 1528; C. G. 1673; C. A. 1069; E. M. Therefore the buyer, as true owner of the thing, receives all its fruits and exercises all rights inhering in the thing meanwhile, until the seller exercises his right of redeeming the thing. C. G. 1665.

Retro-sale is had as soon as the seller offers the price to his buyer. Nor is it necessary that the price here and now actually be given. As sale is perfected by simple consent, so also retro-sale. Hence the prior sale is immediately dissolved, and the seller can vindicate his own thing from any possessor. Cf. Troplong on a. 1662. But together with the thing, the increase made to it by alluvion must be restored. Likewise the part of a treasure found in a field must be restored. For the former accedes to the thing and follows the thing; the latter likewise by right of the soil is owed to the owner of the thing. But the buyer's ownership, while the condition of retraction is pending, seems to remain suspended. Cf. Troplong on a. 1673, n. 766 seq.

1155. Whether a pact of repurchasing at the judgment of the buyer is licit? - "The first opinion denies ... because in reality the thing does not seem to be sold, but only given in pledge, so that the buyer perceives fruits from his money, which he can recover at his own pleasure.... The second and most common opinion affirms.... I certainly think this more probable, yet with these conditions: 1. That there be a true intention of buying and selling. 2. That the buyer pay a greater price, according to the estimation of this burden which he imposes on the seller. 3. That the seller not be obligated to repurchase at the same greater price which he receives.... Hence I judge that in such a contract the buyer cannot oblige the seller except to paying only the price according to the value of the thing at the time of repurchase; and conversely, if the thing increases, it increases for the seller, H. A. tr. 10. n. 181; for the excess of the just price given to the seller pertains wholly to him, by reason of the burden imposed on him of repurchasing at the judgment of the buyer. With these conditions preserved ... the burdens are compensated on each side." L. 813; E. M.

1156. He resolves: Consequently a pact of retro-sale in favor of both seller and buyer at the same time is licit, provided due equality of price is preserved, so that it is less than the price which would be demanded if the pact were in favor of the buyer alone, but greater than the price which would be paid if the pact were in favor of the seller alone. Wherefore, since burden is compensated by burden, it suffices to sell the thing at the ordinary price.

1157. What is established by more recent laws concerning retro-sale? According to C. L. 1587, retro-sale is prohibited. According to C. I. 1515, 1516, 1520, 1528; C. G. 1659, 1660, 1664, 1673; C. H. 1507, 1508, 1510, 1518, 1520, a pact of redemption or recovery in favor of the seller alone is lawful, yet in such a way that the faculty of recovering his own thing is not extended beyond five years, according to C. H. beyond four years or beyond ten years; once this time has elapsed, the thing irrevocably becomes the buyer's.

Within this time the seller can pursue his own thing even with another who has acquired it from the buyer. - The seller seeking back his own thing must not only restore the principal price, but also pay expenses for the contract of sale, and those which the buyer underwent for necessary repairs of the thing, and likewise those which increased the value of the estate. Unless he has satisfied all these things, he cannot obtain possession of the thing. But when he returns into possession of the estate, he receives it immune from any burden and mortgage by which it was burdened by the buyer; nevertheless he is bound to observe the contracts of lease which the buyer entered into without fraud; and according to C. I., if they were not constituted beyond three years.

According to C. A. 1068-1071, a pact is permitted of repurchasing at the judgment of the seller, and of reselling at the judgment of the buyer. The thing and the price are to be restored in each case, unless the thing has been made better or worse; for then compensation is owed. According to C. B.

497 ff., a pact of repurchase at the judgment of the seller is permitted at the same price of sale, unless meanwhile the thing has become better or worse. The right of repurchasing can last up to thirty years for estates, up to three years for the remaining things. But since these laws were passed for the cause of public utility, therefore they have force even in the forum of conscience. Cf. C. H. 1521 ff.; C. A. 1068 ff., 1072 ff.

1158. What is mohatra, and is it licit? The contract mohatra is that by which someone buys merchandise at a greater price on credit, with an explicit or implicit pact that the same thing be immediately sold back to the seller at a lower price and for counted money. - Such a contract is altogether illicit.

This is established 1. from proposition 40 condemned by Innocent XI. 2. Because it is disguised usury; for the burden is imposed on the buyer of immediately selling back at a cheap price without any compensation and without any just title which is otherwise found in mutuum. - If nevertheless the thing is sold back without a prior pact, even for less and to the same seller, provided every usurious intention is absent, of itself it will be licit; because then no burden is imposed against natural equity. And, if the excess which is demanded is a suitable profit by reason of mutuum, then no illicit usury is had in it. - L. 813; E. M.

1159. What is sale by auction; is it licit; what is its nature? Sale by auction, or through bidding, is that which is made by a herald, and in which the thing is ascribed to the final bid. Sale by auction is licit, whether it is made with the consent of the owner or against his will, or by public authority; whether it is bought below the lowest price or sold above the highest. The reason is that in the first case there is a conventional price, but in the other "public power approves as just that price which is proved publicly by the concurrence of buyers." L. 808; C. G. 1686. Hence, if buyers concur, the thing becomes more estimable; if they do not concur, it is held cheaper since the thing is offered voluntarily; and it can be sold for as much more, bought for as much less. Consequently, in it there is no place for rescission under title of lesion, nor for redhibition. C. I. 1308, 1506, 1534; C. G. 1649, 1684. But eviction does not cease in it; and, when the thing has been evicted, the price must be restored to the buyer in forced sales, not by the debtor whose thing was sold and to whom it profited by payment, but by his creditor, because it was paid to him without cause. C. I. 1237; C. G. 1377; C. B. 156.

The price which is determined by the concurrence of buyers also has place in the lease of work and labor, e.g., in building a house, in conducting business.

1160. Whether the seller can withdraw his own thing once bidding has begun, if a lower price is offered? Resp. Negatively per se. The reason is that buyers publicly summoned to an auction acquire a certain right to the saleable thing, insofar as a tacit stipulation is made that it yield to the one offering more. Nevertheless the rigor of this doctrine must be tempered if a contrary custom is in force, by force of which the contracting parties consent to this, that the seller withdraw his own thing if it would be sold below the lowest price. But this inconvenience is prevented by establishing from the beginning the lowest price at which bidding should begin.

1161. Whether the seller can send fictitious bidders so that the price of the thing may increase? - Resp. Negatively. The reason is that this is fraudulent, especially if it is done with money offered to them, since it tends toward increasing the price, and thus toward deceiving sincere buyers, and

accordingly does injury to them, since they are the cause that the price increases from that fraud, and not from the natural concurrence of things, namely from the free concurrence of buyers. Wherefore then restitution in integrum belongs from fraud. With money offered; this is permitted to the buyer, so that he may redeem the unjust vexation of other bidders; whence it is also permitted to the seller to draw other buyers in this way to the bidding, to redeem unjust vexation, so that his things may be sold at least at the lowest price. Much less is it lawful to feign wanting to participate in bidding, so that someone may extort something from true bidders. It is evident deceit and fraud.

1162. Whether he whose goods are sold in favor of creditors can send friends to buy them in his name? Resp. Affirmatively, if the bidding is forced, or if it is made by public authority; for he whose goods are sold ought not to be of worse condition. Besides, he himself is not properly selling, since the sale is made against his will. Therefore. - Resp. Affirmatively also if the bidding is voluntary, because, as the buyer can turn away other bidders by using a request, so the seller, by using the same request, can summon other bidders; and if these, though not asked, could bid in favor of the seller, why could they not do the same when asked, provided that all fraud is absent in this matter, namely if they buy in their own and true name; and, if they buy in the name of the seller, by law or by custom he can withdraw his own thing when the thing would not obtain at least the lowest price. For if he can then withdraw it, he can also buy in this way.

1163. Whether a buyer can make a pact with others that they not bid, or not offer more? St. Alphonsus denies it "at least in the case in which by sentence of the judge a thing is exposed to auction. The reason is that then the owner of the thing is altogether bound to hand over the thing to the one offering more; and therefore the buyer inflicts injury on him if, by offering only the lowest or middle price, he impedes the seller from the attainment of the highest price, to which he has a right, namely that he not be impeded from attaining it."

L. 808. - Several, however, except the case if the buyers are joined by partnership, or as though joined, as brothers, friends, etc., because they make as it were one moral person, and it cannot be demanded that they bid against themselves. Others also probably except if the custom is in force that the seller withdraw his own thing when a lower price is offered to him; because if he himself can impede the price from being too small, equity also requires that he not complain that buyers agree lest the price be increased too much. - Others, however, affirm absolutely. Reason 1: because in any sale by auction per se the owner is bound to hand over the thing to the one offering more. 2. By making a pact with someone, the buyer does not impede the owner from obtaining the highest price of the thing, for others can concur and offer. 3.

The seller does not have a right that someone not be impeded in any way whatever from concurring, but that he not be impeded by force and fraud; otherwise he could not be impeded even by requests. 4. As anyone can freely not concur at auction, so he can freely oblige himself not to concur. Nevertheless civil laws approve this in no way. C. I. Poen. 299; C. H. Poen. 555. - Gousset 843.

1164. What is monopoly, and whether it is licit? - Monopoly, as to the name, is the same as the sale by one. As to the thing, it is the power of selling existing in the hands of one or of a few. Monopoly can occur in four ways: 1. If the Prince, for a just cause, grants a privilege to someone that he alone sell some kind of merchandise; and this certainly is licit, namely when it contributes to the common good, with a legitimate price fixed. Others, however, sin against justice if they themselves make and sell similar merchandise. 2. If a merchant by force and fraud prevents other goods from being brought

in, so that he may sell his own goods to the damage of the commonwealth; and this certainly is illicit, and he is bound to restitution of the damage, e.g., if he spreads false news that ships have been sunk, or similar lies. 3. If one or a few buy all the goods so that afterward they may sell them at as high a price as possible. And this is illicit if the things are useful and necessary for life, and do not pertain only to luxury and delicacies, and if the highest price is that which results from the very fact of monopoly. 4. If sellers conspire among themselves about the price, so that they do not sell for less; and if the price is just, this of itself is not illicit. L. 814, 815.

This question of monopoly, as to its various cases, can easily be extended to the workers themselves, and the various resolutions can also be applied to them. But this question, as regards workers, is quite different from the other question of ceasing from work and labor, which, after a freely entered contract for the hiring of work, is not only illicit, but also unjust of itself, and very harmful to the good of private persons and to the good of the state.

1165. Whether merchants sin against justice, or against charity, who, at the time of harvest or vintage, buy all the wheat or wine of a region at a very low price, so that afterward they may sell it more dearly? It is certain that this is licit if the goods bought are not necessary for the sustenance of life, or for the common condition of the commonwealth, such as precious gems, noble horses, women's adornments, and the like. L. 816. But if the discussion concerns things necessary for the sustenance of life, the negative answer is more probable, as it seems, with respect to justice, provided they do not sell above the highest price which would prevail apart from monopoly. The reason is that they violate no one's right. The negative answer is also more probable with respect to charity, provided they do not induce others to sell more dearly, nor themselves sell above the highest price which would have place apart from monopoly; because they use their own right. For no one is bound to neglect his own advantage in order to avoid another's damage which he is not bound to avert. - L. 816, 833; Lugo 176; Less. 150-152; Molina d. 345, n. 7. - 19.

1166. Whether merchants sin against justice and against charity who conspire not to sell their goods except at the highest, although just, price?

As regards justice, there is no sin, since the highest price is still a just price. The highest price, namely, which would exist apart from monopoly. For a price cannot be judged just which arises from this conspiracy. The justice of a price cannot depend on the mere judgment of the seller and buyer. Thus likewise workers sin who agree among themselves not to hire out their work except at a price exceeding the highest; the highest, that is, with this agreement excluded. But as regards charity, the answer is affirmative, because although charity does not oblige one to sell below the highest price, nevertheless it seems to oblige one not to dissuade others from selling at a lower price. This would certainly be grave where the matter concerns things useful and necessary for life, and grave for the poor; indeed also for those who are not poor. Thus, although charity does not oblige you to give alms, nevertheless it obliges you not to dissuade others who are willing to give alms. But it would be against charity and against justice if other merchants were prevented by fraud and force from selling goods at a cheaper price. An injury would be done to them and to the buyers. Lugo 173, 175; L. 817.

1167. Whether, once a monopoly has been made by merchants concerning an unjust price, it is licit for others to sell goods at the same price? The first opinion affirms, because the just price is that which commonly runs, from whatever source this comes. The second opinion, which seems better to

St. Alphonsus, 817, denies. "The reason is that a price increased through injustice is always and of itself unjust, and must be brought back to justice."

1168. What is sale through brokers, commonly sensali? - Sale through brokers is that which is made not immediately by him to whom the things belong, but through others by commission; and these are called brokers. Brokers can be either merely friends, or hired for this by a special wage, or hired for various works at an annual price.

1169. Whether a broker who sells above, or buys below, the price designated to him, can retain the excess of the price for himself? Resp. Negatively, generally speaking. The reason is that he has no title for retaining anything. For 1. not by reason of the thing, because it is not his, but the owner's. 2. Nor by reason of labor and industry, at least by a strict title of justice owed, because if he has been hired for a stipend, he has a right to nothing else; but if he gives his industry gratuitously, he has already renounced wages. 3. Nor by reason of the price designated; for the designation of the price made by the owner is commonly understood to mean that he is not to sell below that price, but by no means that he is not to sell above it. - Except: 1. If by extraordinary and undue labor, or by wholly special industry or diligence, he has made the thing better. 2. If the owner has expressly or equivalently declared that he requires nothing beyond the determined price; for then the excess can be retained. 3. If the owner knows the broker's manner of acting and ratifies it. L. 825;

C. A. 1086.

1170. Whether a broker can buy for himself a thing to be sold at the price determined for him, and afterward sell the same thing as his own at a greater price? - Resp. Affirmatively, with two conditions in place, namely: 1. That, after employing moral diligence, he does not find a buyer who offers more; otherwise he would act against his office and the will of the mandator. For that price is determined, at least regularly, not so that he may not sell for more, but so that he may not sell for less. 2. That he buy the thing for himself not fictitiously, but truly, so that he undergoes its risk; and if by chance he does not sell it for so much, nevertheless he pays the determined price; otherwise equity is not preserved. Cf. 1137; L. 825; C. A. 1087, 1088; C. B. 181, 456-458.

1171. Whether a broker can retain for himself those things which the seller gives gratuitously with regard only to him? Resp. Affirmatively, if there is certainty of a true donation, because, speaking absolutely, a merchant can yield something from his own profit to some broker so that he may bring him to his shop. But for this it is required that he truly be disposed to sell to any other person at the higher price, and that in fact he ordinarily sell in this way. The confessor, however, ought not easily give credence to brokers who assert that such donations have been made to them. L. 825; H. A. 189. Thus, concerning cases of this kind, St. Lig., 826: "It must cautiously be permitted to tailors buying cloth for others to retain something from the price; for sometimes merchants rather pretend to give to them than actually give, so that, if the owner himself were to approach, he would obtain the thing for the same price. Moreover, if the tailor faithfully conducts the owner's business, and the merchant truly gives something to him gratuitously, because he frequents his shop, or in order to attract him to frequent his shop, the tailor could licitly retain what was given, provided he has employed moral diligence to buy from other merchants at a lower price."

1172. What is exchange, and what are its properties? According to Roman Law, exchange is a real contract, and therefore it takes its beginning only from the delivery of the thing. Wherefore it does

not follow all the laws of sale and purchase. Inst. l. 3, t. 24, § 2. According to C. I. 1549 ff.; C. G. 1702 ff., exchange is a contract by which each party obliges himself to give a thing, that he may have another. It is perfected by consent alone, as sale is. Wherefore at once the ownership and risk of the thing pass reciprocally to the other.

When one thing has been evicted, it is in the power of him who has suffered eviction either to demand compensation for the damage, or to reclaim the thing given, that is, to seek the restitution of his own thing. Nevertheless, according to C. I., rights acquired by a third party over immovables before the transcription of the petition for rescission remain safe. It can be perfected by private act, and even verbally. Yet in this contract there is no place, in the external forum, for rescission on account of lesion. But in the forum of conscience there is the same reason of compensation as in sale and purchase. Gousset, Cod. comm., art. 1706.

According to C. H. 1538-1541, he who has received another's thing by exchange cannot be obliged to hand over the thing which he promised in turn. He satisfies by restoring the thing received. He who has suffered eviction of a thing received by exchange can either demand the restitution of his own thing, or compensation for damages. In the rest, exchange is ruled by the same laws as sale. According to C. A. 1045 ff., the effective delivery of the thing is not necessary for the essence of this contract, yet it is required for its fulfillment and for acquiring ownership. He who does not fulfill the contracted obligation is bound concerning loss incurred and profit ceasing.

If meanwhile the thing wholly or beyond half perishes by fortuitous event, the exchange is held as not having been made. Other deteriorations are to the loss of the possessor. But if the thing has been exchanged in body, and individual things perish by chance, but not beyond half, they perish to the loss of the one accepting. The useful things of the thing, however, pertain to the possessor until its delivery. According to C. L. 1594, and according to C. B. 515, dispositions for sale are applied by analogy to exchange. For the difference concerns the price, in place of which there is another thing.

1173. "1. Whether for alienations of bearer securities belonging to ecclesiastical entities, or to pious causes subject to the guardianship of the Church, the Apostolic beneplacitum is necessary, just as for alienations of immovable goods and precious things? 2. Whether the same faculty is required for exchanging the same into other titles or securities, even immovable ones? 3. Whether sellers and acquirers are subject to the ecclesiastical penalties sanctioned by Trent, c. 11, s. 22, de R., and by the Extravagant Ambitiosae, as well as by the Constitution Apostolicae Sedis? Resp. To the 1st: Affirmatively. - To the 2nd: Affirmatively, except in the case of urgent necessity, in which there is danger in delay and time is lacking to have recourse to the Holy See, the beneplacitum of the Ordinary nevertheless having been had in these circumstances, and under the law that the exchange be made into titles as safe as possible. - To the 3rd: Affirmatively as regards the penalties established in the Extravagant Ambitiosae and in the Constitution Apostolicae Sedis." S. C. C., Jan. 17, 1906. - E. M.

1174. What is exchange of money? - Exchange of money is: the exchange of money with money, with some profit to the money-changer. Generally, he who deals in money and seeks profit is called a banker. But the one from whom exchange is sought is called the money-changer; the one who seeks it, the exchange-seeker. That emolument which the money-changer receives from the exchange of money with money is commonly called aggio. Exchange of money differs from sale, because in sale merchandise is exchanged for money, but in exchange money is exchanged for money. C. A. 1046.

Ownership of the money is immediately acquired by the one accepting, before he has rendered what he owes, even according to Roman Law, since by this Law in exchange ownership is immediately acquired before the contract is completed from the other side. L. Cum precibus C. de Rerum permut.; L. 850.

1175. How many kinds of exchange of money are there? - Exchange of money is one kind real, another dry. Dry exchange is fictitious exchange, e.g., when money to be handed over to another is feigned to be carried from place to place, so that thus something can be demanded for the transfer, although in truth it is not transferred. Real exchange is true exchange, by which money is truly and really exchanged for money; for instance, if gold is given for silver. Real exchange is one kind small or manual, when present money of one form or material is exchanged with money of another form or material; another kind is local, when present money is exchanged with absent money. This is done either when the money-changer receives money in this place to be restored by him in another place, or when the money-changer gives money in this place to be restored by the exchange-seeker in another place, e.g., at Paris. This exchange is ordinarily made through exchange letters, commonly cambiali. The money-changer drawing at Rome, the exchange-seeker also remitting at Rome, and the one who will pay at Paris, is called the drawee. And if a surety is added to those letters of exchange, this is called aval. - L. 851-854.

1176. Whether dry or fictitious exchange of money is licit? - Resp. Negatively, of itself. The reason is that in it there is no title for receiving profit, since it is not true exchange, but a fiction of exchange. Hence St. Pius V, in the bull In eam, 1571, expressly declared it usurious; for it is disguised usury. It is said of itself, for by reason of mutuum there is licit profit, that which is licit in mutuum. E. M.

1177. Whether real exchange of money, both manual and local, is licit?

Resp. Affirmatively, provided the profit does not exceed the price determined by law or by the custom of places. The reason is that there are several just titles for such profit: 1. The hiring of labor and office for seeking out, counting, and transmitting money. 2. Expenses in retaining a toll. 3. Insurance of the money up to the place where the money is to be paid. 4. Profit ceasing, loss incurred, and risk of the capital from the misfortunes of debtors. 5. The varying value of money in various places, whence it happens that money is worth more in that place in which it is to be restored by the money-changer than in that in which it is received by the money-changer. But if the contrary were the case, namely if the money were worth more in the place in which it is received than in the place in which it is restored, then by this title nothing would be licitly received; indeed compensation would have to be made up to equality. L. 851-854.

1178. Whether the Frankfort exchange is licit, in which, namely, the money-changer gives money to be restored at the next fairs, so that a greater profit is demanded for a greater delay? Resp. Affirmatively, if there is the title of loss incurred, or another similar title. Affirmatively again, by reason of mutuum, if the legal rate is not exceeded. - Negatively, if it is demanded precisely by reason of delay; for it is usury. L. 855.

1179. Whether exchange is licit for those who do not have the public office of exchanging money? Resp. Affirmatively. The reason is that they provide a thing useful to another. L. 851.

1180. Whether a servant receiving gold money from his master, in order to satisfy the master's creditors, can make a profit by exchanging it with other money? "It is affirmed, because it is the fruit

of industry, unless it is against the express or tacit will of the master." L. 856.

1181. Whether one who receives counterfeit money can spend it? Resp. Negatively. The reason is, "because a defective thing cannot be handed over to another when the defect has not been disclosed. Nor from the fact that he himself was deceived can he deceive others, since the action by which he was deceived gives him no right to this." But if you have already spent it in good faith, you are bound to restitution "by force of the contract itself, by which you are obliged to pay the just price for the thing bought." L. 855. Yet you are bound to nothing if the other also has already spent it in good faith, since he has suffered no damage. But after that money has passed to others, now, practically speaking, it is morally impossible to know who has suffered damage, and therefore regularly no obligation of restitution is imposed; and when the matter concerns money of small value, for this reason also the penitent should not be disturbed. C. I. Poen. 440;

Lugo d. 28, s. 2, n. 6.

1182. What can money-changers receive by reason of mutuum? They can receive 5 or 6 per 100 according to the legal rate for merchants, because they practice commerce in money. Indeed, it is permitted to them to receive 6 or 7 per 100 because of the dangers, expenses, and labors which they must undergo. For ordinarily money-changers need much money and many assistants in order to be able to discharge such an office, and they are exposed to many dangers. Cf. 1104.

1183. What of the Bull of St. Pius V concerning exchanges? St. Pius V placed various restrictions to remove usury; nevertheless they testify that these no longer have force in most places. Lessius 93; Lugo d. 28, n. 107; L. 852; Benedict XIV, de Syn., l. 10, c. 5.

1184. What is commerce? - It is properly when someone procures a thing for himself with the intention that, by selling it entire and unchanged at a higher price, or by exchanging it, he may gain profit. L. 831; St. Thomas, 2. 2, q. 77, a. 4, ad 2; Lugo d. 28, n. 20.

1185. How many kinds of commerce are there? - There are three: economic commerce, artificial commerce or handiwork, and commerce properly and strictly such. Molina, d. 339, n. 2, says this: "A threefold kind of buying and selling is commonly distinguished. For one kind is that by which each person buys those things which are necessary for the sustenance of himself and his family, while superfluous things are sold.... Another is that by which something is bought so that, changed by industry, it may be sold.... To this kind pertains not only if someone buys wool so that from it he may make cloth, which he sells, or iron so that he may sell swords which he makes from it; but also if he buys birds or horses so that, after he has raised them and accustomed them to something, he may sell them. To this kind of commerce also pertains that by which a thing not bought, but from one's own goods or lands, changed into a better form, is sold. Finally, another buying and selling is that by which something is bought so that, unchanged, it may be sold more dearly for profit; and this is commerce in the most proper sense."

1186. Whether commerce is licit? The first species of commerce is licit. "This," says Molina, l.c., "is as it were natural, and of itself is good and licit. Indeed it is ordered not to profit, but to suitable sustenance, and it pertains to householders and statesmen, not to merchants taken strictly." The other species of commerce is also licit. "This," says Molina, l.c., "is not mere commerce, because the thing thus bought is rendered better through industry and art." Wherefore there is sold not only the

thing bought, but at the same time one's own industry and one's own work. Men of this kind are called rather workmen and artisans than traders or merchants.

Therefore there is no injustice in it, no illicitness, since it is very useful to private and public good. The third commerce also is of itself licit, since it too is very useful to private and public good, and from no other source does it necessarily, or of itself, contain any injustice or dishonesty. For as regards justice, it suffices that one in buying and selling remain within the limits of the lowest and highest price; and moreover the prices of things are accustomed to be diminished and increased according to the various circumstances of times and places. There is added besides the labor of these merchants, and likewise the enormous expenses to be made by them, so that they may always have necessary goods prepared for all. But the profit which is intended can be intended in an ordered and moderate way for a good and even pious end, and therefore neither from this head is there necessarily and of itself any baseness. St. Thomas, 2. 2, q. 77, a. 4.

XIII. On Census

1187. What is a census? - A census is a contract by which someone reserves to himself or buys the right of receiving an annual pension. - The one buying is called the censualist, censitor, buyer, creditor. But the one selling is the censuary, seller, debtor. The pension itself is called the canon, or revenue, because it returns and is rendered each year. A census, as is clear, differs essentially from mutuum; for in the latter the borrower is principally debtor of the capital itself, but in the former the censuary is not debtor of the capital, but of the revenue, the right of which he has sold for the price of the capital itself. - C. I. 1778; C. H. 1604; C. L. 1644, 1645, 1706, 1707; C. G. 1909; Gousset in h. a.; L. 839.

1188. How many kinds of census are there? - Census is manifold: 1. Reservative, by which the censualist transfers his own thing to another under a gratuitous or onerous title, e.g., he gives or sells it to another, with an annual pension reserved to himself from that thing. C. I. 1778, 1780; C. G. 530; C. H. 1607. - 2. Consignative, by which the censualist buys the right of receiving a pension from another's thing, whether movable or immovable; or from the person himself who obliges himself to provide an annual pension from his own art, commerce, or office. C. I. 1782; C. G. 1909; C. H. 1606; C. L. 1645. According to C. He. 782, 790, a land charge subjects the actual owner of the land to a payment in favor of the one having the right, for which he is answerable by the land alone. Land charges are not prescribed. Individual payments are prescribed. Hence 3. census is distinguished into real, personal, and mixed, according as it is immediately constituted in some fruitful thing, or in the labor and industry of a person, or in both, insofar as immediately and directly only the person is obliged, though for security some things of the debtor are obliged, yet when these perish, the person remains obliged. Therefore in a real census, the thing is obliged to whomever it may come, and, when the thing perishes, the census perishes, C. H. 1624, 1625; in a personal census the person is obliged, and, when the person's industry perishes, the census perishes, unless the census was constituted independently of any industry whatever, and only in the mere obligation of the person to pay. In a mixed census, when the person's industry perishes, the thing as though mortgaged is obliged, and, when the thing perishes, the person is still obliged. Cf. L. 841, 846, 847. 4.

Temporary, or perpetual, or for life, according as it is constituted for a time, e.g., for 10 years, or in perpetuity, or for the life of a man. C. I. 1779; C. G. 1910; C. A. 1284; C. H. 1802. 5. Redeemable or

irredeemable, according as it can or cannot be redeemed through restitution of the capital or price. - C. B. 1105 ff.; 1199 ff.; Lugo d. 27, n. 4; E. M.

1189. Resolutions: A censuary is not freed from paying the pension on account of accidental sterility of the land and loss of fruits. C. H. 1624. - Land subject to a census, coming into the hands of others, passes with its own real burden. Lugo, Resp. Mor., l. 6, d. 12.

1190. Note: According to more recent laws, when revenue is the price of alienation or the condition of cession of immovables, whether under an onerous or gratuitous title, the revenue is called praedial or land revenue. Such a cession of immovables, however, transfers full ownership to the cessionary, notwithstanding any contrary clause. But revenue constituted by means of capital is called simple revenue or census. C. I. 1778, 1782; C. G. 530, 1909. Cf. C. A. 1125, 1147. - According to C. I. 1782, census properly so called is not permitted except by means of a special mortgage on a determined estate. That is to say, not every census is permitted, but a mixed or real census. Otherwise, the capital can be claimed back.

A perpetual or long-term census is numbered by Canon Law among immovable goods. Clem. Exivi de Verbor. signif.; Lugo n. 8. According to C. I. 418; C. G. 529, life or perpetual revenues which are owed by the State or by private persons are counted among movables.

1191. Whether a reservative census is licit? - Resp. Affirmatively. The reason is that anyone selling or giving his own thing to another can reserve to himself a right to part of the fruits of that thing, provided nevertheless that, in proportion to the reservation, the price is diminished in a sale, and, in a donation, the census corresponds to the fruits of the estate. L. 839. According to C. L. 1707, a reservative census is prohibited.

1192. Whether a real consignative census is licit? - Resp. Affirmatively. For anyone, by the admission of all, can give to another the right of receiving an annual pension from his own fruitful thing; therefore he can also sell this right. Nor does it matter that in the course of time the pensions to be received exceed the price paid; this also happens in the sale of a fruitful thing, and yet it is not illicit. Hence a real census is licit, whether perpetual or temporary. For if due equality is preserved between the price and the perpetual or temporary right of pension, no injustice indeed appears. That is had as a just price for which, in the place of the contract, censuses of this kind are customarily sold and bought. C. Regimini, l. 2, de Empt. et vend., Extr. comm.; L. 839; E. M.

1193. Whether a personal consignative census is licit? - By natural law: "The first opinion denies it ... because a person cannot be sold.... The second opinion, more common and more probable, teaches that it is licit ... because if each person can hire out his services, he can also sell them. But in such a contract the person is not properly bought, but improperly; for properly the right over the industry of the person is bought." L. 840. By Canon Law, where this has force, this census is prohibited by the Bull of St. Pius V Cum onus, 1568. L. 840, 846, 848. "But the Bull of St. Pius V," says St. Alphonsus, 849, "has not been received in the two kingdoms of Sicily, nor has it been received in Spain, nor in Belgium, nor in Germany, nor in France, nor is it observed even at Rome." Cf. Collectan. S. C. de P. F. 2132. According to C. I. 1628; C. G. 1780, no one can oblige his services except for a time, or for a determined business. - Benedict XIV, de Syn., l. 10, c. 5.

1194. Whether a life census is licit? Resp. Affirmatively. For it is an aleatory contract, in which both the censualist and the censuary expose themselves to equal risk: the former of receiving more or less,

the latter of paying less or more. Moreover, civil law approves it both under an onerous title, for money, or for a movable thing, or for an immovable thing, and under the gratuitous title of a donation inter vivos or of a testament. C. I. 1789 ff.; C. G. 1910, 1968, 1969. That it is licit is also drawn from Canon Law, Clem. Monasteriorum de Reb. Eccl. non alien. But to establish the just price of a life census, if the question concerns a life census from an onerous title, account must be taken of age and health, as well as of the danger to which someone is exposed by his manner of living, art, or office. Ordinarily they say that 15 per 100 can be demanded. A life census is distinguished from an ordinary census in this: that in the latter, when the censualist has died, the right to the canon remains in the heir; but in the former no right to the canon remains after the censualist has died. L. 844; C. A. 1285; C. H. 1802, 1803.

A life census is null unless the one for whom it is stipulated is alive, C. I. 1795; C. G. 1974. And if he for whom the life census was stipulated dies immediately, according to C. I. the contract is not invalidated. According to C. G. 1975, it is otherwise if the person, when the contract was made, was suffering from that illness by which afterward he died within the space of twenty days.

According to C. G. 1976 and according to C. I., by whatever price it has been constituted, it is valid. According to C. B. 761, the contract of a life revenue cannot be valid unless it is established in writing. C. G. 1969; C. I. 1790: if a life census is constituted under a gratuitous title, by donation or testament, it must be made in legal form.

1195. Whether a redeemable real census is licit? - Resp. Affirmatively by natural law, whether on the part of the censuary, or even on the part of the censualist. For in census there is a true sale, in which redemption is also licit on either side. - By Canon Law, according to the cited Bull of St. Pius V, it is always indeed permitted to the censuary that he be able to redeem the census, after giving notice for two months; but not to the censualist. According to C. I. 1783; C. H. 1608; C. L. 1648, census is redeemable by its essence; according to C. G. 1911, perpetual census is essentially redeemable. But the census cannot be redeemed by the censualist so long as the censuary observes the agreements. C. I. 1783, 1785 ff.; C. G. 530, 1911 ff. On the contrary, it can be redeemed by the censuary at any time. C. I. 1783; C. G. 530, 1911; and a pact that he cannot redeem the census is null. C. I. 1783; C. G. 530. Nevertheless it can be agreed that it not be redeemed as long as the censualist lives, or before a certain time which in reservative or land censuses cannot exceed thirty years, and in consignative censuses cannot exceed ten years, or only after the censualist has been forewarned beforehand at a legitimate time. C. I. 1783; C. G. 530, 1911. Cf. C. H. 1608, 1609, 1658, 1662; C. L. 1648.

But a life census is irredeemable, both on the part of the creditor, if the debtor has been in delay in paying, and on the part of the debtor, if by chance he has begun to be burdened by it beyond equity. Yet the creditor will be able to rescind the contract if the debtor has not furnished the promised securities for execution. C. I. 1785, 1796-1798; C. G. 1912, 1971, 1977, 1978, 1979. Cf. C. H. 1805; L. 843, 847.

1196. Whether an irredeemable or perpetual real census is licit? - Resp. Affirmatively by natural law. For as a right of pension or revenue of this kind is acquired by a certain thing or sum of money, with which the seller will be able to trade, buy a field, a house, etc., and so gain profit indefinitely, so also those pensions or revenues are to be received indefinitely. And if due proportion of price is preserved in the contract, they can well be equivalent, as to the utility and emolument to be received therefrom, to the thing or sum of money handed over as the price. But in sale and purchase, equality must be

preserved precisely in this, between the price and the merchandise, namely as to the utility and emolument to be received on each side, with attention to law, custom, and common estimation. Tambur., de Contr., tr. 2, c. 2, § 3, n. 3; Lugo d. 27, n. 20, 158. The S. C. de P. F., Feb. 20, 1819, Collect. n. 2129, declared licit a perpetual census irredeemable on the part of the buyer, but redeemable on the part of the seller.

1197. Whether a redeemable personal census is licit? Resp. Affirmatively, whether on the part of the seller or on the part of the buyer. For as a real census rests upon a thing, so a personal census rests upon the industry of a person. But the industry of a person can be sold as a thing. Therefore, as a redeemable real census is licit, so also a redeemable personal census is licit, if due proportion is preserved for the burden imposed. - Benedict XIV, de Syn., l. 10, c. 5, n. 4, 5; L. 840, 843.

1198. Whether it is licit to buy the right of an annual pension by the mere transfer of ownership of money, without that right being constituted in some fruitful movable or immovable thing, or in some determined industry of a person? - Resp. Affirmatively. It is established 1. from the almost universal practice of God-fearing men themselves. For annual pensions are everywhere bought with money, like other merchandise, whether for a time or for one's whole life, and no scruple is raised about this matter. 2. For a census of this kind, merely pecuniary, is a most true sale, which certainly is licit: for on one side that right of an annual pension is appreciable by a price; on the other side money, the ownership of which is transferred absolutely, and not with the burden of restoring the same amount as in mutuum, is truly the price of that right. C. I. 1778; C. G. 1909.

1199. Note: This merely pecuniary census has this proper to itself, that it is constituted in no fruitful thing, but is a most true sale, and consequently, although the censuary loses the capital of money received, nevertheless he is always bound to pay the constituted census. The same would have place if someone, in place of money as the price of the right to that pension, were to hand over a movable or immovable thing, without consigning the right of that pension in it and attaching it to it. Such a contract, by its proper name in the new Law, is called the constitution of revenue. And indeed C. I. 1778 ff. and C. G. 530, 1909 ff., 1968 ff., seem to recognize not properly census, but this constitution of revenue. Annual revenues constituted in government securities can be brought back to censuses, namely when money is placed in public loans, in public debt; likewise monetary or banking, commercial, and industrial shares, whose sale and purchase is licit as that of other things; and the price, as of other merchandise, has increase and decrease from day to day. Hence it is licit to buy at the current price annual censuses constituted in the Government, or shares from a public banker. For they are sold and bought as ordinary merchandise, and their price increases or decreases according to the common estimation of men judging that there is greater or lesser danger in them.

1200. What conditions are required for the licit constitution of census? - "By natural law only two conditions are desired: 1. That there be equality between the census and the price. 2. That pacts added beyond the nature of census be justly compensated." L. 845. By Canon Law several conditions are required, but by almost universal custom derogation has been made from them. L. 845-849. But we have already enumerated the principal dispositions of civil law. Since census is a true sale and purchase, those conditions and modifications can be added to the contract of census which are not repugnant to sale and purchase. The price likewise, as in buying and selling, can vary according to the various circumstances of things. Tambur., de Contr., tr. 2, c. 4, n. 1, 2; Lugo, Resp. Mor., l. 6, d. 15.

1201. Whether a life census runs divisibly with time; or whether it is owed only after the constituted time, for example after a year has elapsed, so that, if the censualist dies beforehand, the censuary is not bound to pay the pension to the heirs in proportion to the elapsed time? Resp. Affirmatively. For a life census is for the food and pension of life; for one placing his money wishes to live from the pension. Therefore it is equitable that the pension run in proportion to the life which must be sustained, and is sustained from the day of the constituted census. Therefore the censualist dying has acquired a right to the pension for the preceding time; moreover the right then acquired by him, when he dies, passes to the heirs. Wherefore a pension also assigned to a cleric, for food and the sustenance of life, although it is personal for sustenance and is ended by the death of the pensioner, is owed to the heir, when the pensioner has died, in proportion to the elapsed time. - La Croix 1023; Gur. Cas. 1005. According to C. I. 481; C. G. 586, civil fruits accrue day by day. Cf. C. B. 101. According to C. I. 1799; C. G. 1980, in a life census, pensions accrue day by day; but if it has been agreed that they be furnished in advance at the beginning of each year or month, once that time comes, the whole of the entire year or month is immediately owed. Likewise according to C. I. 482, 867, the usufruct of a life revenue gives the usufructuary the right of demanding pensions from day to day, and a legacy under the title of food can be demanded from the beginning. According to C. A. 1285.

1418, a life revenue, in doubt, is paid in advance each quarter; but food payments are furnished in advance at least by the month. According to C. B., a life revenue must be paid in advance each quarter, and the right to the whole revenue remains, even if at the beginning of the quarter he to whom the revenue is owed dies. According to C. H., the revenue corresponding to the year in which he who enjoys the life revenue dies is to be paid in proportion to the days which he lived, and, if it was to be paid in advance, the whole is owed. Cf. art. 880. According to the Constitution of St. Pius V Cum onus, § 3, Feb. 16, 1569, "payments which they commonly call anticipated" are prohibited from being made or brought into pact.

1202. How is census extinguished and rescinded? Census is extinguished: 1. By redemption on the part of the censuary, C. I. 1783; C. G. 1911; and, if it is for life, by the death of him for whose life it was constituted, C. I. 1801; C. G. 1982; C. A. 1285. 2. By the office of the judge, in cases determined by law, C. I. 1785, 1786; C. G. 1912, 1913; C. L. 1649. - A reservative census can be rescinded, like any other sale and purchase, e.g., if the censualist, as seller, has been injured beyond half of the just price; or if, as donor, he afterward has children.

A census can also be rescinded if the censuary has ceded his goods, or has ceased to be solvent. But where the debtor, before he cedes his goods or ceases to be solvent, has alienated the land, the creditor cannot demand redemption of the census if the possessor of the land is prepared to pay the canon and give securities for it. C. I. 1786. Cf. C. G. 1913. When a census has been dissolved because the conditions were not fulfilled, or rescinded because children have been had, rights acquired by a third party over immovable goods remain intact, just as in sale and exchange. C. I. 1787. Census is not extinguished by the civil death of the censualist, but passes to his heirs until his natural death, C. I. 1801; C. G. 1982, 1983.

XIV. On Hiring and Leasing

1203. What is hiring and leasing? - It is a contract by which someone obliges himself to grant a thing to another for use or usufruct for a certain time and for a price, and the other obliges himself to accept it. C. A. 1090, 1091; C. L. 1595. - He obliges himself, for it is a consensual contract, L. 1, Dig. Locati conducti; C. I. 1569, 1570; C. G. 1709, 1710; C. A. 1094. Cf. C. L. 1619 ff. A thing, that is, one not fungible by use, whether a thing properly so called, or a person; wherefore an immovable thing can be leased, as an estate; a movable thing, as a flock; a person, as a worker or servant as to the services to be furnished, e.g., service, the transporting of things and persons, etc., or as to a work to be produced, e.g., a house to be built, a statue to be made, etc.

C. H. 1542; C. L. 1596. For use, as a house; for usufruct, as a vineyard. C. H. 1545. For a certain time, with regard namely to positive law, by which no perpetual lease is admitted. C. H. 1543, 1544; C. A. 1090. For a price; if gratuitously, there is not leasing but commodatum, L. 46, Dig. Locati et conducti. Cf. Vinnius, de Inst. de Locatione, § 1; C. L. 1603. For a price, that is, for money, Inst. l. 3, t. 25, init. and §§ 4, 5; L. Depositum § 9, Dig. Depositi vel contra; L. Naturalis § 2, Dig. de Praescriptis verbis, etc. If a thing is given for use or usufruct not for money, but for another thing, according to positive law there is another contract, but not hiring and leasing.

According to Positive Law, for by natural law the distinction is not essential. Italian Law, 1569, and French Law, 1709, agree with Roman Law. Therefore, as regards rural estates, L. Si merces § 4, Dig. Locati etc.; C. A. 1103; C. H. 1579, if the tenant farmer is a sharecropper, namely one who pays the owner not money but part of the fruits, the contract is said to be one of partnership. But if the tenant farmer has leased for counted money, there is a true lease. The same must be said concerning partnership or lease of animals. According to C. I. 1665; C. G. 1711, under lease is numbered the contract by which one person hands over animals to another, so that the fruits may be divided between the owner and him to whom they are handed over.

Likewise C. I. 1647 ff.; C. G. 1711, 1763: when the tenant farmer is a sharecropper, there is still a lease. - For a price: in order that there be a true lease, it is necessary that the price be determined when the agreement is made. If an agreement is made that the price be determined afterward, the contract will be innominate: I do that you may give, Vinnius l.c. - That which is repaid by the lessee takes the name of wage, and likewise of pension when immovables are leased. Inst. l.c.; L. Locatio 2, L. Si tibi 5, L. Ex conducto 15 § 4, L. Si merces 25, Dig. Locati conducti; C. A. 1092. But the one who grants is called the lessor, and the one who accepts is called the lessee, and, if he accepts a rural estate, a tenant farmer. C. H. 1546; C. B. 535; L. 857.

1204. Note: The wage must be just. Hiring and leasing is a certain sale and purchase, and as in the latter so also in the former the price can be increased and diminished according to various circumstances. And this also is to be attended to, that in leasing, especially of rural estates, the thing is subject to chance, and therefore account must be taken, in establishing the wage, of the dangers which the lessor or lessee undergoes. Since the object of this contract is the use of the thing, not the thing itself, but this is presupposed, if the thing leased perishes before delivery, or is evicted from the lessor, the contract is dissolved and the lessee is freed. The same must be said if, during the lease, apart from the fault of the lessee, the whole thing perishes. If the thing perishes only in part, the pension will at least have to be diminished; and if that part is notable, the lessee will be able either to

seek a diminution of the pension, or even to dissolve the contract. C. I. 1580, 1595; C. G. 1741. Cf. C. L. 1612, 1613.

If the thing itself does not perish, yet the lessee is impeded from the use or cultivation of the thing, apart from his fault, e.g., if a field is overwhelmed by a lasting inundation, occupied by a hostile army, etc., the lessee is freed from paying the pension. L. Si fundus, L. Perinde, L. Et haec, L. Habitatores § 1, Dig. Locati etc. - The contract of lease of itself is dissolved neither by the death of the lessor nor by that of the lessee, C. I. 1596; C. G. 1742, but by the lapse of the time defined in the contract. C. A. 1190 ff.; C. H. 1565 ff. Otherwise C. B. 569. Cf. C. L. 1619 ff. - L. 857. The lease and hiring of immovables, as to time, cannot be constituted beyond thirty years. The dwelling of a house can be leased for the whole life of the tenant and for a full two years after his death. Uncultivated estates can be leased up to one hundred years for their cultivation. C. I. 1571. The goods of those who are under tutelage or care may not be leased beyond nine years. C. I. 1572; C. G. 1748. The lease of dotal and usufructuary goods cannot endure beyond the current five-year period from the cessation of the usufruct and dowry, C. I. 493, 1408; beyond nine years C. G. 595, 1429. Finally, ecclesiastical goods cannot be leased beyond three years without the beneplacitum of the Holy See. If no time has been defined in the lease with regard to rural and urban estates, with regard to furnished apartments, appartamento mobiliato, the time is determined by the law itself. And the owner cannot expel the tenant without having first warned him according to the custom of places. C. I. 1607, 1609, 1622; C. G. 1736, 1757, 1758, 1774. If the lease was made for an indefinite time, or according to C. G. and C. B. without writings, it can end at the judgment either of the lessor or of the lessee, provided nevertheless the end of the lease has first been declared, according to the custom or laws of the place, C. I. 1609.

But if it was made for a definite time, or in writings according to C. G. and C. B., once this has been fulfilled, it ends, without there being need to declare the end of the lease, dare la licenza, C. I. 1591; C. G. 1737; C. A. 1113; C. B. 566. Nevertheless it is necessary to declare the end of the lease at the opportune time whenever it is in the power of the owner whether he wishes or does not wish to dismiss the lessee, C. I. 1597 ff., 1613.

And if the lessor allows the lessee, after the time has elapsed, to remain in the lease, he is understood to lease again, but indefinitely. C. I. 1592; C. G. 1738; C. B. 564 ff., 595 ff., 620 ff.; C. L. 1618, 1623 ff., 1628, 1629. A sharecropping tenancy, defined by no certain time, is understood to last for a year. However entered into, it never ceases by law itself, but its cessation must be announced at an opportune time. C. I. 1651, 1664. A lease of animals, with no defined time, ends after three years, whether it was a simple lease or in equal shares, a metà, C. I. 1681, 1686; C. G. 1815, 1820. - C. B. 595 ff.

1205. Who can lease and hire, and whether hiring and leasing passes to heirs? - Whoever can sell and buy, the same can lease and hire. And whoever generally can contract, can lease and hire; lease, that is, if they are owners of the thing, or usufructuaries, or administrators. Cf. C. I. 300; C. G. 450; C. L. 1597, 1598, 1599. Indeed one can also lease another's thing which he unjustly possesses; and someone can also licitly, speaking of itself, hire it, if no damage to the owner comes from this, because by the hiring no right is taken away from or diminished for the owner. According to C. I. 1572, a lease beyond nine years is not permitted to those who have simple administration. Cf. C. H.

1548; C. L. 1600, 1601, 1602. The lessee can sublease the thing leased to another. L. Cum in plures, Dig. Locati et conducti, and L. Nemo C. de locato; C. I. 1373; C. G. 1717; C. H. 1550; C. L. 1605.

Moreover the contract of hiring and leasing passes to the heirs of both, so long as the predefined time of the lease lasts, unless otherwise agreed. Inst. l. 3, t. 24, § 6. So also according to C. I. 1596; C. G. 1742. - Likewise it passes if work has been leased for something which can be fulfilled by another, L. Veteris C. de contrahendo et committenda stipulatione; otherwise, if the work is such that it cannot be fulfilled by another. C. I. 1642, 1643; C. G. 1795, 1796: the contract of hiring work is dissolved by the death of the worker who had hired out his labor. But he who commissioned the work is bound to pay the heirs of that man the price both of the labor performed and of the material prepared, if these can be useful to the one commissioning it. - E. M.

1206. What can be leased and hired; what in particular concerning wages for services? - Resp. To the 1st: all things can be leased which come into commerce, provided they are not consumable by use, and can and are accustomed to be estimated by a wage. Wherefore both immovables and movables can be leased; likewise service and work, as to carry someone elsewhere, paint a picture, etc.; and incorporeal rights, as usufruct, habitation, tolls, etc. C. A.

1092, 1093; C. B. 535, 581, 611, 631, 652. A work differs from service. A work is that which is made by working; service is the action by which the work is made, the action of the worker, the office, industry, ministry of the one doing something. He who furnishes services is the lessor; he to whom they are furnished is the lessee. As regards work, material and craftsmanship must be distinguished in it. If the lessor furnishes the material and the lessee the craftsmanship, it is hiring-leasing. But if he furnishes both, it is disputed whether it is a lease or a sale. A work, however, must be furnished by one's own labor if it requires one's own expertise. C. B. 613. Moreover the service of a surveyor is regarded as a benefit; and therefore, according to the older authors, hiring and leasing is not entered into with such a person, and consequently there is not a wage, but remuneration and honorarium. The same must be said concerning the service of an advocate, physician, and others who furnish us labor by intelligence, speech, trustworthiness, etc. But remuneration owed to servants and workers is commonly called salary and stipend. Remuneration; for service proceeding from human liberty is something nobler than merchandise, and puts on the character of merit, and of a right to a reward. Cf. Encyclical of Leo XIII, Rerum novarum; S. O. Cas. Consc., ed. 6, num. 77, 5. Therefore the salary which is given to workers for their service furnished is not, as it were, an exchange of thing with thing, nor consequently is it given only for the service itself furnished for another's utility; but it is given also for the person himself, for the necessity of the person, for the merit of the person. According to C. I. 1571-1696, as regards the things which can be leased, special mention is made only of a rural estate, a house for dwelling, and animals. As regards services, three principal species of the hiring of works and industry are said to exist. The first, by which someone obliges his services into another's service; the second, by which carriers both by land and by water oblige themselves to transfer persons or things; the third, by which contractors of works oblige themselves to make works. Cf. C. H. 1575 ff.; C. A. 1151 ff.

Resp. To the 2nd: Therefore the wage for services must suffice to support the worker, from the very intention of nature, which supplies industry and labor to man for seeking those things which are necessary to him for life. From this, the justice of the wage is principally to be estimated; and consequently, since it must suffice for daily sustenance, it supposes a daily office on the part of the

worker. Daily sustenance is certainly not to be taken strictly, as for an animal, but more broadly and suitably, as for a man, so that there be included in it, in due proportion, with regard to the whole time of human life and to the condition of workers in civil society, both food, and dwelling, and clothing, and other things entirely indispensable for life itself in the various necessities occurring in human life, from illness, from old age, etc. And these, moreover, are to be estimated with due moderation; for the worker is supposed not to be vicious and wasteful, but of good conduct and frugal. But the daily office is to be understood only morally, and likewise suitably to the very labor to be exercised, harder or lighter. Hence, as it certainly does not comprehend the 24 hours of the day, so neither is it restricted to one or another hour. But since those things which are necessary for life have a varying price according to varying time and place, hence the just salary of workers will also vary according to the various circumstances of times and places. But from this again it is clear that the service of man is not properly merchandise, nor is the wage of that service properly a price. Nevertheless there is no doubt that that service is also as it were merchandise, considered in itself, and not in relation to the person whose act it is; and consequently its wage is accepted as though a price. Hence the wage for services is also estimated in various ways from this head, according to the various customs of regions, from the works themselves, that is, from their intrinsic excellence, general necessity, utility, labor, danger. Hence it is estimated in one way in physicians, teachers, painters; in another in architects, masons, diggers. But it is by no means estimated from their peculiar necessity and utility; for this pertains to the lessee, e.g., if a boy to be instructed is endowed with great talent. Therefore, as the prices of things, so again the wages of services can be increased and diminished. They are increased and diminished from those same causes by which the prices of things grow and decrease: from the fact that there are many who furnish services and few who hire them; from their daily duration, longer or shorter; from the labor spent in them; from the danger which is incurred in them; from the required expertise; from their voluntary offering. Consequently the wage for services will be just if it at least reaches the lowest wage which is accustomed to be given to such workers in such a place and time. - And if one furnishing his services furnishes them to another or to others as though as a partner, it is equitable that he himself also receive something from the profits. But the wage for services can by no means be increased or diminished from the various conditions either of the person to whom they are furnished, or of the person who furnishes them. For justice regards equality of thing to thing, not the various circumstances of persons. And thus a greater wage is not to be paid because a less skilled lessor furnishes them with greater labor, time, danger, than others; or because he is in want, has a wife, and also has children. Hence that absurd family wage is rejected. Moreover it is also rejected from the very established breadth of the just wage of workers, if namely they are of good conduct and frugal, and live with due economy, which indeed is necessary at the beginning, and afterward ends in a small patrimony to be acquired, entirely sufficient for the ordinary necessities of life. If, on the contrary, someone furnishes the same entire service to several at the same time, by right he can, for the opposite reason, demand an entire wage from all; for it is not worth less to each one because it is also equally useful to others. And therefore he who demands one hundred gold pieces to bring the son of Titius to Rome will be able to demand another hundred gold pieces from Caius so that he may also bring his son to Rome. The same is consequently to be said of the surveyor, of the advocate, of the physician, who go somewhere to measure the fields of several, plead the causes of several, assist several sick persons with salutary care. C. B. 612, 614, 632, 653; E. M.

As regards the work which someone undertakes to be made, e.g., to build a house, to sculpt a statue, once the price has been fixed at the beginning, it is thereafter neither increased nor diminished, although the prices of things and of services have increased or decreased. But if the expenses to be made are notably increased from an unforeseen case, e.g., an inundation of a river, earthquake, etc., equitable compensation is to be made; for contracts of this kind are commonly made in such a way that the architect or contractor of works takes upon himself ordinary dangers, not those that are wholly unforeseen and extraordinary. A work leased by contract for a fixed price, or for one price, is not understood to have been delivered until it has been approved. A work leased for a price established according to its individual parts or measures is not judged to have been delivered until it has been measured or the part approved. Consequently it is at the risk of the lessee, not of the lessor. L. 36, 37, Locati conducti ff.; C. I. 1638, 1640; C. G. 1791, 1793. The lessor of a work can withdraw from the lease, reimbursing to the lessee the expenses made and the profit ceasing. For he who is obliged to some deed toward another is freed by furnishing the amount which is of interest to him. C. I. 1641; C. G. 1794.

1207. What are the obligations of the lessor? - 1. Once the agreement has been perfected, he must hand over the thing at the established time, and in that state in which the lessee can use it; and therefore he is bound to make the expenses necessary for this. Likewise he must take care that the lessee enjoy the thing peacefully, without any diminution of his right. L. Sed addes § 5, L. Ex conducto § 1, Dig. Locati, etc.; C. I. 1575, 1576, 1581; C. G. 1719, 1720, 1726; C. H. 1554; C. A. 1096, 1107; C. B. 536; C. L. 1606, 1610, 1611; L. 857.

2. The lessor must manifest the defects of the thing which render its use useless or harmful. L. cit. Sed addes § 1. According to C. I. 1577; C. G. 1721, the lessor must render the lessee immune from all faults and defects of the thing which would impede its use, even if the lessor was ignorant of them when the contract was entered into. But if damage comes to the lessee from faults or defects of this kind, the lessor is bound to compensate the damage, unless he demonstrates that he was ignorant of them. Cf. C. A. 1117; C. B. 537 ff.; C. L. 1606, 1611; L. 857.

3. The lessor cannot, before the predefined time, deprive an unwilling lessee of the thing hired, unless an unforeseen case occurs on account of which the house is necessary to the owner himself. C. I. 1612; C. G. 1761. The lessor cannot dissolve the contract, even if he declares that he wishes to inhabit the house, unless a contrary agreement was entered into.

4. C. I. 1579, 1580; C. G. 1724; C. H. 1557, 1558; C. A. 1118, 1119; C. B. 536, 537; C. L. 1606, 1612, 1613: the lessor cannot, during the lease, change the form of the thing leased. If necessary restorations of the thing leased are of such a kind that they prevent habitation of that part which is necessary to the lessee and his family, there is place, according to circumstances, for rescission of the contract and compensation of damages. C. Propter 3, de Loc. et cond.

5. C. I. 1584; C. G. 1729; C. H. 1569; C. B. 550: if the lessee uses the thing leased for a use other than that for which it is destined, so that the lessor can suffer damage from it, the latter, according to circumstances, can seek rescission of the contract. C. L. 1607.

6. C. I. 1165, 1595; C. G. 1741; C. H. 1556; C. A. 1096, 1117, 1118; C. B. 542, 543, 554; C. L. 1607, 1608: the contract of lease can be dissolved by one party if the other does not satisfy his principal obligations. The principal obligation of the lessor is that he furnish the leased thing fit for use and preserve it in that state. The principal obligation of the lessee is that he not ruin the thing hired, and that he pay the pension at the established time. In Canon Law, in the matter of the lease of an ecclesiastical thing, if the lease is beyond two years, the lessor must wait two years, nor can he before this time deprive an unwilling lessee of the thing hired if he does not pay the pension. C. cit. But this condition is neither of natural law, nor is it required by Roman Law in a non-ecclesiastical thing.

7. According to Roman Law, the universal successor, or heir, cannot expel the lessee before the completed time. But the partial successor, as a buyer, donee, legatee, etc., is not bound to stand by the contract of lease, nor is the lessee, unless nevertheless it has been otherwise agreed, e.g., that the thing leased not be alienated during the time of the lease. L. 9, C. de Locato, etc. Although the buyer is not bound to stand by the contract of lease, nevertheless the lessee, if he is expelled, can act against the lessor and his heirs to obtain his interest. L. Si merces § 1, Dig. Locati etc.; L. Qui fundum, ib.; L. 858, 859. - According to C. I. 1597 ff.; C. G. 1743 ff.; C. A. 1120, 1121, the buyer of a leased thing generally cannot expel the lessee, unless it was established in the contract of lease that, if the thing leased is sold, the buyer can dissolve the lease and expel the lessee. In this case the buyer is bound to warn the lessee at an opportune time. And if no stipulation intervened, according to C. I. and C. A. the lessor is bound to compensate the damages of the lessee; according to C. G., as regards damages and interest, the lessor, and failing him the buyer, is bound to keep the lessee indemnified. C. H. 1571; C. B. 571 ff.

8. "In works leased to two at the same time, it is fitting that the prior lessee be satisfied first." L. 26, Locati conducti ff.

1208. What are the obligations of the lessee? 1. He must pay the price at the established time. And therefore, as though to provide security, he is bound to furnish urban estates with sufficient household goods, rural estates with instruments and cattle, and to store the fruits in the place concerning which agreement was made. C. I. 1583, 1603, 1615, 1616; C. G. 1728, 1752, 1766, 1767; C. H. 1555; C. L. 1608.

2. He must use the thing for that end for which it has been given, and not for another. C. I. 1583; C. G. 1728; C. H. 1555; C. B. 550; C. L. 1608. - 3. He is bound to make lease expenses, namely expenses of lesser moment, pertaining to the restoration of a thing worn by use, defined by custom or law. C. I. 1604-1606, 1625; C. G. 1754-1756, 1777; C. A. 1096; C. B. 582. But taxes and other burdens the lessor, not he himself, is bound to pay, speaking of itself and excluding a special agreement. C. L. 1609. - 4. He must employ in the use of the thing that diligence which he employs in his own thing, lest the owner of the thing suffer detriment. C. I. 1583; C. G. 1728; C. H. 1555; C. L. 1608, 1627. - 5. He is bound to warn the owner of the thing if an outsider has tried by some act to injure his rights. C. I. 1587; C. G. 1768; C. L. 1608.

6. He is not prohibited from subleasing, unless something else was stipulated, or damage to the lessor comes from it, L. 11, C. h.t.; C. I. 1573; C. G. 1717; C. H. 1550; C. A. 1093. As regards

the wage to be paid, the sublessee is obliged to the owner himself of the thing leased, if the latter has ordered payment from him, and he has not yet paid the lessee. C. I. 1574, 1958; C. G. 1753. A sharecropping tenant farmer is prohibited from yielding his right to another or leasing out the estates. C. I. 1649; C. G. 1763. According to C. B. 549, sublease cannot be made without the permission of the lessor.

7. When the lease has ended, he must restore the thing in that state in which he received it, or according to its estimation, if the thing was leased, an inventory having been made, according to the estimation. The lessee cannot retain the thing by another right which he perhaps has against the lessor. C. A. 1109; C. H. 1561; C. I. 1585, 1588; C. G. 1732, 1735; C. B. 556, 586 ff.; C. L. 1608.

C. B. 551 ff. A tenant farmer can be such in two ways: a tenant farmer who has leased for counted money, and a sharecropping tenant farmer, who is partaker of profit and loss with the owner, and divides the fruits of the land with him as though by the right of a certain partnership. L. 25 § 6, Locati cond. D. A sharecropping tenancy is ruled partly by the law itself, partly by special agreements; when agreed pacts are lacking, and when local customs also are lacking, these are supplied by the law itself. C. I. 1654. A lease of animals is ruled by pacts, and, when these are lacking, by law, C. I. 1665, 1668; C. G. 1800, 1803. He who furnishes the cattle is called the lessor; he who accepts them is called the lessee. According to law, during the lease, neither the lessor nor the lessee can dispose of the animals. C. I. 1678, 1686; C. G. 1812, 1830. Those which perish by chance, however, perish to the owner alone. C. I. 1675. Cf. C. G. 1810. When the lease has ended, the lessor takes beforehand for himself as many animals as are equivalent to the price of the animals leased. And if those which remain do not suffice, the loss will be his. C. I. 1683, 1686, 1692, 1695; C. G. 1817, 1820, 1830. These are common to any lease of animals; other things which are special according to its various species must be taken from the proper laws. C. I. 1666, 1669 ff.; C. G. 1801, 1804 ff.

If the lessee could not use the thing leased by fortuitous event, he is not bound to pay the wage; e.g., if he could not inhabit a house because of an enemy incursion in war. Likewise, if he could not use it from a cause on the part of the lessor himself, he is not bound to pay the wage; e.g., if he could not inhabit a house because, on account of the lessor's enmities, it is exposed to the devastation of robbers and assassins. But if he could not use it from his own cause, he is bound to pay the wage; e.g., if he could not inhabit a house because, by adverse health, he was compelled to move elsewhere.

The same holds with regard to services. For if the lessor of service could not furnish it by fortuitous event, e.g., because of a storm, he himself cannot demand his wage, nor can the lessee demand the services. Likewise, if he does not furnish the service from his own cause, because, e.g., on account of a crime he is thrown into prison, he cannot demand the wage. But if he is impeded from furnishing it by a cause on the part of the lessee himself, e.g., because the latter fell ill, he can demand the wage; but if meanwhile he has leased his service to another, according to equity he must deduct as much as he received from that one. C. B. 615. Cf. ib. 616 ff.

Work begun and interrupted: if by fortuitous event, the wage is owed proportionally, and neither can the lessor demand the whole wage, nor can the lessee demand the whole service. If from the cause of the lessor, and that cause is just, the wage is owed to him proportionally, but not for the whole service not furnished; but if the cause is unjust, not even proportionally by strict right is the wage

owed to him; nevertheless according to equity a proportional wage belongs to him, insofar as that part of the service furnished was useful to the lessee. But if it has happened from the cause of the lessee, whether unjust or even just, the whole wage is owed by strict justice. L. 38, Locati conducti ff. Nevertheless, if meanwhile he finds another lessee, according to equity what he gains from another can be deducted. C. B. 617-619. A master dismissing a servant without sufficient cause is bound to compensate him for the loss thereby arising. According to C. H. 1584, beyond the stipend owed to him because of the service furnished, the stipend of fifteen days must be paid to him.

Finally, as regards work, if before its delivery it perishes by fortuitous event, since the thing perishes to the owner, the material perishes to the lessor, the craftsmanship to the lessee, and both to the latter if he furnished both. By fortuitous event; for if it perishes by the fault of either, the whole damage will belong either to the lessor or to the lessee, if the latter had to furnish the material and craftsmanship; otherwise the lessee owes the price of the material to the lessor, and the lessor owes the price of the craftsmanship to the lessee. Namely, he who is at fault furnishes the damage. C. I. 1636, 1637; C. G. 1788-1790. - C. B. 639 ff., 644, 645, 649.

1209. What as to the fault to be furnished? Since the contract of hiring and leasing is for the advantage both of the lessor and of the lessee, each furnishes only grave and light fault, not the very slightest. Lugo d. 29, n. 64; Molina d. 494, n. 1. Neither is held to fortuitous events, in which there is no fault. C. H. 1555, 1559. Consequently, the cab-driver, carriage-driver, boatman, are held concerning damage if by their fault the cab and carriage are overturned, the ship perishes by shipwreck, and the goods which they had hired themselves to carry perish. Likewise a fuller is held concerning damage if he accepted garments to be polished and mice gnawed them, or if he exchanged a cloak and gave one man's to another, even if he did it unknowingly, because he ought to have guarded against this thing. L. Item 13, Loc. cond. Dig.

1210. What if the thing leased perishes? From the general rule, if the thing leased perishes, and it is not known whether the thing perished by the fault or fraud of the lessee or custodian, or by chance, the lessee or custodian is obliged to prove both: that the thing perished, and that the thing perished without his fault or fraud. Cf. Molina d. 494, n. 13. Yet if a leased house perishes by fire, the lessee must be absolved, unless the lessor demonstrates the fault of the lessee. For often fire happens by the fault of servants, which the father of a household is not compelled to furnish. L. Si vendita, Dig. de Periculo et commodo rei venditae. Cf. Laymann n. 6; L. 585.

According to C. I. 1888, 1589, 1590; C. G. 1733, 1734, 1735, the lessee of a house or rural estate is held concerning fire, unless he demonstrates that the fire happened by fortuitous event, or by greater force, or from a fault of construction, or according to C. I. 1589 notwithstanding the diligence customarily employed by any diligent father of a household, or that the fire was communicated from a neighboring house. If there are several tenants, all are equally held, together with the lessor according to C. I. 1590; C. G., Law of Jan. 5, 1883, if he himself also inhabits it, and each one in proportion to the value of the part occupied by himself; unless he demonstrates that the fire began in the dwelling of one of them, in which hypothesis this one alone is obliged; or unless he demonstrates that the fire could not have begun from his place. And generally according to C. I. 1588; C. G. 1732, the lessee must furnish compensation for detriments and damages which occur in the time of his lease, unless he proves that they happened without his fault; and according to the same C. I. 1588, he must furnish the same for those of which the cause was someone from his family, or from his

sublessees. C. H. 1563, 1564, 1568; C. A. 1111, 1112; L. Siquis 9, L. Videamus 10, L. Item 13, Locati conducti Dig.

1211. Whether the lessor of fields is bound at least to remit part of the pension in the case of sterility because of hail, e.g., or another misfortune? "Of itself by natural law, speaking according to rigor, the lessor is never bound to remit to the tenant farmer the pension owed, because misfortunes naturally come upon him. For a thing which is destroyed by a fortuitous or extraordinary event perishes to the owner; but the lessee is the owner of the fruits to be gathered; therefore.... I said ... of itself, because by general agreement, confirmed by law, it has been introduced that if the loss is enormous, something be remitted; but if it is total, that the damage be divided between both, namely the lessor and the lessee. But if it had not been established thus, the lessee would pay a smaller rent." L. 860. Gur. Cas. 973.

1212. What if the tenant farmer indeed had a favorable harvest, but nevertheless lost all the fruits already gathered into the barn, whether by enemy plundering or by fire? - "In this case the tenant farmer cannot demand a diminution of the pension, as it seems, at least more probably. The reason is that when the fruits have already been gathered into the barn, by full right they are in the ownership of the lessee; nor do the agreements or laws, according to which a smaller rent must be paid when an extraordinary calamity comes upon him, seem to regard this case. Elbel n. 673; La-Croix l. 3, p. 2, n. 1049, against Lessius and others. In practice, certainly, the lessor before the sentence of a judge would be held to nothing." Gur. Cas. 976.

1213. What are the dispositions of Law as regards the preceding cases? According to C. Propter 3, de Loc. et cond., when great sterility occurs in the estates of the Church, there is remitted to the tenant farmer in proportion, "since sterility can be compensated by the abundance of the preceding or subsequent year." L. Ex conducto 15 § 2, Dig. Locati etc.: "If blight has occurred, and has taken away the whole fruit, it is not the damage of the tenant farmer, lest beyond the damage of the seed lost, he be compelled to furnish the rents of the field." Wherefore if the damage is immoderate, the lessee is freed from paying the pension. L. Si merces 25 § 6, e.t.: "Greater force ... ought not be damaging to the lessee, if the fruits have been injured more than can be tolerated."

Hence, if sterility is great, but not complete, the pension is remitted proportionally. L. 860. C. I. 1620, 1621; C. G. 1772, 1773; C. A. 1104, 1106: the tenant farmer can, by explicit agreement, subject himself to fortuitous events. Such an agreement, however, is not understood except for ordinary fortuitous events, such as hail, lightning, frost; not for extraordinary cases, such as devastation of war, or inundation to which a region is not usually subject, unless the tenant farmer has subjected himself to all fortuitous events, foreseen and not foreseen. C. I. 1617; C. G. 1769.

If the lease is for several years, and during it the totality or half of the fruits of some year perishes fortuitously, the tenant farmer can request a certain remission of the price, unless this is compensated by what he gathered in the preceding years. If this compensation is absent, the remission of the price is determined at the end of the lease, the fruits of all the years of the lease being computed. C. I. 1618; C. G. 1770. If the lease is for one year, and the totality, or at least half of the fruits, has perished, a proportional remission of the price is made to the lessee, who cannot demand any remission if the loss is less than half. Cf. C. A. 1105.

C. I. 1619; C. G. 1771: the tenant farmer cannot obtain remission if the loss of the fruits happened after they had been separated from the soil, unless the contract grants to the lessor a certain part of the fruits, in which hypothesis the lessor will undergo the loss of his part, provided the fault or delay of the lessee did not intervene in handing over to the lessor his portion. Cf. C. A. 1107, 1108. C. I. 1619; C. G. 1771: if the cause of the damage existed and was known when the contract was entered into, the tenant farmer can request no remission. C. B. 584: no remission to be made is established. C. L. 1630: a lessee cannot demand diminution of the pension from a fortuitous event. C. H. 1575, 1576: no right of remission is granted to the tenant farmer for ordinary cases; but it is granted for extraordinary unforeseen cases, provided the fruits are lost beyond half their part before they have been gathered.

1214. What is emphyteusis? - Emphyteusis is a Greek word, which means the same as insertion, because namely this special thing is had in it, that the land is to be improved, and this is done by inserting something into the land. As regards the thing itself, emphyteusis is: a concession of useful ownership in an immovable thing, namely in a rural estate, with the obligation of cultivating and improving the same, and of paying the canon, that is, the established pension in recognition of direct ownership, made either in perpetuity, or for the life of the emphyteuta, or of several, or for a time not less than ten years. With regard to Common Law, the emphyteuta is bound to pay the customary contributions, because, since he receives all the emoluments of the thing, it is equitable that he also bear its burdens. Inst. l. 3, t. 25, § 3; C. A. 1123; C. I. 1556; Struggl 13, 17 ff.; L. 865.

1215. Whether emphyteusis is admitted by more recent laws? - According to C. G., emphyteusis does not seem to be recognized. But it is recognized according to C. H. 1605, 1628 ff.; according to C. A. 1123, 1127 ff.; and according to C. I. 1556 ff. According to C. I. 1556, emphyteusis is a contract by which a certain land is granted in perpetuity or for a time, with the obligation of improvement, and of the payment of an annual determined prestation, whether in money or in fruits. According to C. L. 1654, emphyteusis is perpetual. That which is for a time is counted as lease.

1216. By what laws is emphyteusis governed? - Emphyteusis, by reason of the goods which are given into emphyteusis, is one kind ecclesiastical, another lay. Ecclesiastical emphyteusis is governed by Canon Law and Roman Law. Hence it is not licit to redeem an ecclesiastical emphyteusis without the Apostolic beneplacitum. - Lay emphyteusis is one kind ancient, another new. The former is governed by ancient Law and by the agreed pacts. The latter, that is, entered into after the year 1865, is governed by the agreed pacts and by more recent Law. Italian Law, Nov. 20, 1865, art. 29; C. I. 1557. - L. 865; E. M.

1217. What according to C. I. are the special laws of emphyteusis? - Emphyteusis by law itself is subject to the following prescriptions: The emphyteuta has the power of disposing of the emphyteutic land and its accessions, both by act inter vivos and by last will, and in whatever way the land is transmitted, no prestation is owed to him who granted it. Subemphyteusis is not admitted. - The grantor of the land can request, every twenty-ninth year, recognition of his right from the possessor of the land, without, however, any prestation being owed to him. The emphyteuta can always redeem the land from the burden of emphyteusis by paying the prescribed sum of money. Arts. 1562-1564. - Provided the aforesaid laws are preserved, other particular agreements can be constituted; if these are lacking, one must stand by the laws established in the same Code. According to these laws, arts. 1558-1561, the emphyteuta makes all the fruits of the land and of its accessions

his own, and has the same rights which an owner would have in treasures and mines which are discovered in the land. Whatever the sterility or loss of fruits may be, or if part of the land perishes, the emphyteuta cannot request remission or diminution of the canon. But if a notable part perishes, the emphyteuta can renounce his right, yielding the land to the grantor. Taxes imposed on the estate and any burdens inhering in it pertain to the emphyteuta.

Italian Law, Nov. 30, 1865, art. 30; C. A. 1129, 1134, 1140, 1144; C. H. 1628 ff.; C. L. 1655 ff.; L. 865.

1218. How does emphyteusis end; what does the owner owe when emphyteusis has ended? Resp. To the 1st: Emphyteusis is lost by prescription of 30 years, namely if the emphyteuta has ceased from payment of the canon for so much time. C. I. 1563. - It is rescinded if the emphyteuta has rendered the land notably worse, or, having been legitimately summoned, has not paid the canon for a whole two years, C. I. 1565. - It is extinguished by the destruction of the thing; or when the time of concession has been fulfilled; or if the emphyteuta has redeemed the land at the legitimate price. C. I. 1560, 1564, 1566. - C. A. 1135.

Resp. To the 2nd: Once emphyteusis has been extinguished, the estates return to the owner with the fruits not yet received. If emphyteusis ends because of lapse of time, the owner is bound to refund to the emphyteuta as much as the land has become more valuable. But if it ends by fault of the emphyteuta, he is bound to pay either the value of the improvement made, or the expenses made. C. I. 1566. Servitudes and mortgages imposed in the meantime on the rent-paying thing vanish by law itself. C. I. 1567.

1219. What is a fief? A fief, from faith, is the concession of useful ownership in an immovable thing, with the obligation of furnishing fidelity and personal service to the direct lord. He who receives the fief is called feudatory or vassal, and he who hands it over is called infeudator or lord. But a vassal differs from an emphyteuta in this, that the latter must pay a real pension in recognition of direct ownership, while the former must only furnish fidelity and personal service, e.g., to wage war. The solemn act by which a vassal was put in possession of the feudal thing, and at the same time was bound to faith toward the lord, is called investiture. Struggl 14; L. 867.

1220. What is libellus? Libellus is nothing else than emphyteusis, or a fief, subordinated to another emphyteusis or fief; insofar namely as an emphyteuta or vassal sub-emphyteuticates or subinfeudates another. He who receives emphyteusis or land from the direct lord is called emphyteuta or feudatory. But he who receives the same thing from these for a pension is called by the particular name libellarius. That which is paid to the direct lord is called laudemium. - According to C. H. 1644, laudemium must be paid to the direct lord by anyone who comes under an onerous title into possession of useful ownership, when in the contract of emphyteusis such a right has been brought into pact; when no determined quantity has been established, two for each hundred are to be paid. C. L. 1701: subemphyteusis is prohibited. - L. 868.

XV. On the Contract of Partnership

1221. What is the contract of partnership? Partnership is a contract by which two or more contribute something in common, for the sake of receiving profit in common, C. I. 1697; C. G. 1833; C. A. 1175; C. H. 1665; C. L. 1240. Partnership: here the discussion concerns partnership so called civil. For there are also commercial partnerships, anonymous companies, etc., which are governed by their

proper statutes, approved by the authority of the Prince. Two or more: who namely are able to dispose of things, and who are not prohibited from acquiring reciprocal utility for themselves because of violation of the rights of other persons; for this reason, e.g., this partnership cannot be entered into between a mother and her natural son. C. I. 1704; C. G. 1840. - Something, that is, money, or other goods, or even one's own industry. Except goods which the partners will acquire either by donation, or by legacy, or by succession, unless according to C. G. the matter concerns spouses, which can be contributed in such a way that only their enjoyment, not their ownership, becomes common. C. I. 1433, 1698, 1701;

C. G. 1526, 1833, 1837. In common: something can be contributed in common in two ways: 1. So that not only the use and fruits, but the ownership of the thing contributed is common, so that each becomes owner of the whole capital by partial ownership. 2. So that, while ownership of the thing remains with the contributor, the use and fruits are common. L. 1 § 1; L. 2, L. 7, etc., Dig. Pro socio. Moreover, by law itself there pass into the ownership of the partnership those things which are consumed by use, or become worse; those which are contributed so that they may be sold; those which are given after an estimation of them has been made and consigned in an inventory. C. I. 1715; C. G. 1851; C. H. 1687. Cf. C. A. 1181, 1182. - Contribute; for if they do not contribute, but, e.g., two by legacy or by purchase fall upon one and the same thing, bequeathed to them or bought by them, there is not partnership, but common ownership. Profit in common; if there is no common profit, even though some utility is not lacking, as e.g., a common doorway, there is not partnership, but common ownership. Profit; if not profit as such, but a part of the profit as though a stipend and remuneration is given to him who furnishes the service, not partnership, but a hiring of service is understood. - C. B. 705; Lugo d. 30, n. 1, 4; Molina d. 411, n. 7; Less. l. 2, c. 25, n. 1; L. 904. A partnership is not a moral person or moral body, but is only a collection of persons. Hence those things which are communicated by the partners, and those things which are acquired by the partners, indeed become the property of all the partners, but not of the partnership. And if it is necessary to go to trial, not the partnership, but the individual partners must sue or be sued. C. I. Proc. 137. If someone lends money to a partnership, he claims it back from the individual partners man by man, or in equal parts, even if not all are partners in equal parts, C. I. 1727; C. G. 1863. Namely he lends not to the partnership, but to the partners, that is, to the individuals. Since partnership is a matter transacted among others, a partner can associate with himself some third person as regards his own portion in the partnership, but the creditor of the partners cannot use the right of the partners, nor involve himself in the affairs of the partners, C. I. 1725; C. G. 1861. Likewise, as regards third parties, those things which have been done by the mandatary of the partnership within the limits of the mandate are the same as if they had been done with the individual partners; but those things which have been done beyond the limits of the mandate are imputed to the mandatary himself. C. I. 1727, 1728; C. G. 1862, 1863, 1864.

Partnerships: some are Moral Bodies, others are not Moral Bodies. Both the latter and the former can acquire and possess, but with this difference: that a partnership which has been erected into a Moral Body has juridical patrimonial unity, distinct from the patrimony of any individual associate; but that which is not a Moral Body does not have the patrimony of a Moral entity, but has only co-ownership, by which the patrimony exists undivided in the individual associates. Therefore a moral body is like a private person, and has nothing in common with those of whom it consists. Wherefore what is owed to the body is not owed to the individuals; nor do the individuals owe what the body owes. And

when a moral person which had been instituted for the cause of public utility has been extinguished, its goods go to the church, if it was ecclesiastical; to the treasury, if lay. But those of one which was for private utility, as commercial and industrial partnerships, pertain to the partners or colleagues and their heirs. Besides civil partnership there is also commercial partnership, so called from Commercial acts, which are enumerated at the beginning of the Commercial Code, title 2. Wherefore the definition of civil partnership is valid also for commercial partnership, whether mercantile or industrial. But according to the same Code a threefold commercial partnership is distinguished: Partnership under a collective name; partnership in commendam; anonymous company. In a collective partnership, all the partners are obliged without limit and in solidum as regards the obligations of the partnership. In a partnership in commendam, one or more commendatary partners are obliged without limit and in solidum; but the other investing partners, one or more, answer limitedly up to a determined sum, which can also be represented by shares. In an anonymous company, social obligations are secured only limitedly to a determined capital, and each partner is obliged only by his own quota or by his own share. Art. 76.

1222. Whether the contract of partnership is licit? - Resp. Affirmatively. For it contains nothing which is opposed to justice. Nevertheless it requires the following conditions. 1. That the partnership be made in honest business. C. I. 1698; C. G. 1833; C. H. 1666. Certainly no one can licitly be obliged in a base thing. - 2. That loss of the capital pertain only to its owner, if only the usufruct of the thing is contributed into the partnership; but that it pertain to the partnership itself, if the capital itself is contributed into the partnership. For the thing perishes to the owner. C. I. 1715; C. G. 1851; C. H. 1687. Cf. C. A. 1183. 3. That due equality be preserved between profits and losses and expenses to be divided among the partners. Losses here are understood as those which come to the partners from the aspect of the partnership alone. Expenses are the costs of journeys, payments of tolls, etc. C. I. 1716, 1717; C. G. 1852, 1853; C. H.

1689; C. A. 1192-1197. 4. A partnership of immovable things, or of the use of them, indeterminate as to duration or beyond nine years, needs writing, and, as regards third parties, transcription. C. I. 1314, 1932, 1942. Cf. C.

A. 1178; C. H. 1667, 1668; L. 904-907; St. Thomas, 2. 2, q. 78, a. 2.

1223. Resolutions: Wherefore it is necessary that for each one there be established a part of the profit in proportion to the thing which he contributed, and a part of the loss in proportion to the profit. But if something else has been spontaneously agreed, the pact is valid, provided the profit be established at least equal to the just wage of the thing or service which someone contributes, as though leased; and provided it is not established that one should feel no part of the profit, or no part of the loss, C. I. 1719; C. G. 1855; C. H. 1689, 1691; C. A. 1193, 1196; C. B. 722; C. L. 1242. The proportion of him who contributed service alone will be the part of him who contributed least. C. I. 1717; C. G. 1853; C. H. 1689. Yet, with attention to natural law, if the industry of the merchant were notably worth more than the capital of the co-partner, certainly an agreement could be made concerning a greater profit to be received proportionately, which indeed is approved by positive Law itself. Inst. l. 3, t. 26, §§ 1, 2.

Cf. C. A. 1183, 1187, 1193; C. B. 706, 707. "It seems to me that it must altogether be said," says St. Alphonsus, 907, "that, while the capital remains safe for the owner, the profit is to be divided proportionally, account being taken of the value of the industry on one side, and on the other side of

the convenience furnished from the money, according to the common estimation of the profit which is commonly accustomed to be had from money applied to business. Hence it must be well noted that sometimes the industry of the merchant will be worth more than the use of the money, and then the profit must be distributed proportionally, so that sometimes a pact could be licit, that at the end even the capital be divided, while the profit meanwhile has been distributed equally, as is done by custom in many places in the partnership of animals. In addition it must be noted that sometimes the value of industry decreases because of the multitude of workers seeking partnership; for this reason perhaps several contracts can be excused which at first sight seem unjust, because the industry of the workers contributed into the partnership according to the custom of the place is commonly not estimated there as worth more."

1224. Resolutions: The pact is altogether unjust by force of which, once the merchandise has been bought, before all else and while the partnership lasts, the capital is restored to the owner; and then what remains is divided equally, because for the one placing that capital the danger of his capital is diminished, but the merchant, if afterward the merchandise perishes, is subject without compensation to the danger of capital and profit. L. 907.

1225. Whether the pact is licit that, if some sheep from a flock perish, they must be supplied from the offspring which are born, and meanwhile the other offspring, wool, and cheese are divided equally? The first opinion affirms, "because such substitution of sheep results as much in favor of the shepherd as of the one buying the sheep." The second opinion denies, and this seems altogether true to St. Alphonsus, 909, "because although the profit is diminished first for both, and afterward is compensated for both, nevertheless the offspring which are substituted ought to have been divided equally between the shepherd and the owner.

But when they are substituted, this certainly yields more to the utility of the owner than of the shepherd, since the owner then already compensates for himself the loss of profit, just as the shepherd does; but meanwhile the owner always preserves the capital safe for himself, which ought to be diminished for him, and therefore equality is not preserved in the contract." Partnership of animals is simple if the lessor furnishes the animals and the lessee furnishes labor for their care, custody, and feeding. It is in equal parts if each furnishes animals, and one of them also furnishes labor. In a simple partnership, the lessee has half of the increase, which consists in the offspring that come, and in the greater value of the animals. Milk and dung and the labor of the animals yield to the lessee.

Wool and what accrues to the animals are divided between the lessee and the lessor. C. I. 1669, 1676, 1684. In a partnership by equal portions, the animals become common for profit and for loss. Milk, dung, and the work which the animals furnish yield to the lessee; the lessor has right to half the wool and increase. C. I. 1684. Besides these two species of partnership as regards animals, there are two other species, namely partnership with a tenant farmer, and partnership with a sharecropping tenant farmer. In the former partnership with a tenant farmer, animals of the same value must be left at the end of the lease. Meanwhile the profits belong to the lessee. But the dung must be applied to the cultivation of the land.

C. I. 1687 ff. In the latter partnership, which is entered into with a sharecropping tenant farmer, it can be agreed that the tenant farmer yield his part of the wool, at its time, to the lessor for less, and that the latter share in half of the milk and take the greater part of the profit. C. I. 1693. In a simple

partnership of animals or one by equal parts, according to law, according to C. I. 1675, the animals which perish by chance perish to the owner alone, or to the lessor. According to C. G. 1810, unless all perish, but only a part, the loss is common to the lessor and the lessee. But according to both Codes, it cannot be agreed that the lessee participate more in loss than in profit. C. I. 1677; C. G. 1811.

1226. Whether the contract of partnership called "with capital safe" is licit, namely when animals are handed over to a shepherd with the pact of rendering them safe in the same number at the end of the partnership, and of dividing the profit? "Speaking of itself this contract is illicit, because the capital must stand at the danger of the one contributing it; for the thing perishes to its owner.

Nevertheless it can probably become licit if another contract of insurance is added, by compensating the shepherd, through a greater part of the fruits, for the burden of such danger of the capital taken upon himself.... Certainly the contract is unjust by which the owner gives oxen estimated according to their present value, with the pact that if they decrease, at the end of the partnership the same value must be restored, because deterioration of the thing pertains to the owner, unless this damage is otherwise compensated. But if nevertheless there were a pact that at the end of the partnership not only the profit, but also the capital of the animals, is to be divided with the partner, then the pact will not indeed be unjust, that if meanwhile the capital perishes, the shepherd is bound to restore to the owner half of the capital." L. 907, 909, q. 4.

According to C. I. 1683, 1686, 1692, 1695; C. G. 1817, 1820, 1830, the animals must be estimated at the very beginning of the partnership; when the partnership has ended, they are estimated again, and the lessor takes beforehand as many heads as equal the price of those contributed. But the profit is to be divided in various ways according to the various species of lease and agreements. In a simple partnership or one by equal parts, it cannot be agreed that the lessee bear the danger of the capital beyond half according to C. I. 1677, or the whole according to C. G. 1811, nor that he participate more in loss than in profit. C. I. ib.; C. G. ib.

1227. Whether a partner who ought to have contributed a sum of money into the partnership and did not contribute it, also owes interest? Resp. Affirmatively, C.

I. 1710; C. G. 1846; C. H. 1682. And the same is established there if a partner has taken some sum of money from the partnership chest for his particular utility.

1228. To whom does administration of the partnership pertain? - Administration of the partnership pertains to him to whom it was committed. C. A. 1190, 1198; C. B. 710. But from him to whom administration was given in the very contract of partnership, it cannot afterward be taken away except for a legitimate cause. But if it was given afterward, it can be revoked as a simple mandate. C. I. 1720; C. G. 1856; C. H. 1692; C. B. 712. If it has been committed to no one, it is judged to have been tacitly permitted to all. C. I. 1723; C. G. 1859; C. H. 1695; C. B. 709. But each one must employ such diligence in common things as he employs in his own things. C. B. 708. Cf. C. A. 1185, 1186. Therefore, if he has done some things negligently and injured the partnership, but has done other things diligently and increased the partnership, the negligence is not compensated, unless this latter was altogether extraordinary. C. I. 1714; C. G. 1850; C. H. 1686; C. A. 1191. If one of the partners has exacted something from a debtor of the partnership, who is at the same time his own debtor, he must impute the payment to each debt proportionally; but if he has ascribed the whole to the

partnership, it is valid. C. I. 1712, 1713; C. G. 1848, 1849; C. H. 1684. Cf. C. A. 1202, 1203; Inst. l. 3, t. 26, § 9; C. B. 718-721.

1229. In what ways is partnership ended? Partnership, if nothing has been specially agreed, is ended: 1. When the time for which it had been entered into has been completed. 2. When the common thing has been totally extinguished, or the business has been ended. 3. By the natural or civil death, interdiction, or publication of goods of one of the partners. 4. By the express will of one or more partners, when the duration of the partnership is unlimited; but if the partnership is for a determined time, its dissolution cannot be demanded unless some grave reason is present, e.g., the infidelity of the co-partner, or the continual infirmity of a partner by which he can no longer conduct the business of the partnership. C. I. 1729, 1731-1735; C. G. 1865, 1867, 1869-1871; C. A. 1189, 1205, 1207, 1210-1212; C. H. 1680, 1700 ff.; C. B. 723, 724, 726, 727, 728; Inst. l. 3, t. 24, §§ 4-8; L. 907.

1230. Note: When the partnership has ended, he who administered it must render an account of the administration. If by his fault the partnership has suffered damage, that damage will be imputed to his part, and if he himself is not solvent, it will be common to all the partners. - If, on the contrary, the administrator of the partnership has incurred damage, namely from the cause of the partnership, this damage also will be common to all the partners. - When a partnership of profits has been dissolved, the capital must first be restored to the owner, even if in fact no profit remains. Sixtus V, Bull Detestabilis § 2; L. 907; St. Thomas, 2. 2, q. 78, a. 2, ad 5. Similarly, if the capital perishes at the beginning, it perishes to the owner, since in a partnership of profits the capital, or sum of money, is not contributed, but only the convenience of the money. L. 907. When the partnership has ended, first the debts of the partnership are paid; then the received profits which remain are to be distributed proportionately among the partners. C. B. 731 ff.

1231. Whether an agreement can be made that, when a partner has died, the partnership be continued with his heir? Resp. Affirmatively. This certainly was prohibited by Roman Law, L. 35, 59, C. h.t. But it is admitted by Italian, French, Austrian, and Spanish Law. Nor indeed does it seem illicit by Natural Law. C. I. 1729; C. G. 1868; C. A. 1206-1209. C. H. 1704: the partnership remains if it was agreed that it should remain with the survivor or with the heir. But although the partnership does not remain with the heir, nevertheless he is bound to complete those things which were begun by the deceased. L. 40, C. h.t.; C. I. 4732; C. G. 1868; C. A. 1206, 1209; C. B. 727.

1232. Whether any loss of a thing dissolves the partnership? - Resp. Affirmatively, if one of the partners promised to contribute the ownership of the thing, or only its use and fruit, in common, and the thing perishes before it is contributed. Negatively, if the ownership of the thing had already been contributed in common. C. I. 1731; C. G. 1867. Yet he is bound to furnish warranty for the eviction of those things which the partner contributed for the sake of use alone. C. I. 1709; C. G. 1845.

1233. Whether, when a partnership has been contracted without limit as to duration, someone can withdraw from it at will? Resp. Affirmatively, provided nevertheless that his renunciation be in good faith and not made at an inopportune time. In good faith: not with evil fraud, for instance so that he alone may seize the whole profit, e.g., from inheritance, legacy, purchase. Inopportunely, that is, at that time when it was of interest to the partners that the partnership not be dissolved. C. I. 1733, 1734; C. G. 1869, 1870; C. A. 1212; C. H. 1705; C. B. 723, 738 ff.; Inst. l. 3, t. 24, § 4.

1234. How many kinds of contract of partnership are there? - The contract of partnership can be diverse, both by reason of the end, insofar as the proximate end is either only common use of things, or only fruits or profit, or both; and by reason of the matter, insofar as either all goods are contributed, or only use and profits, or the profits of certain goods or of a certain business; and by reason of time, insofar as the partnership is entered into either for life, or for a determined time, or until the outcome of some business. C. I. 1699 ff.; C. G. 1835 ff.; C. A. 1176; L. 907.

1235. What concerning universal and particular partnership? - A twofold partnership is distinguished: universal and particular. C. H. 1671. Universal can be either of all present goods, or of all profits. C. I. 1700 ff.; C. G. 1836 ff.; C. A. 1177; C. H. 1672, 1673.

If a partnership of all present things has been entered into, all the goods which are then those of the contracting parties immediately become common; and also those which they afterward acquire from these. But those things which the parties afterward acquire by succession or donation enter the partnership only as to usufruct, godimento. A stipulation as to the communication of these goods, according to C. I., is null; according to C. G., is prohibited. C. I. 1701; C. G. 1837; C. H. 1674. Cf. C. A. 1177, 1180. If partnership is made of all profits, it embraces only those profits which the parties will acquire by their own industry, by whatever title; goods whether movable or immovable of the partners become common only as to usufruct, C. I. 1702; C. G. 1838; C. H. 1675. Once it has ended, if the things were contributed only as to use, each one takes his own thing, or its price, if he transferred ownership into the partnership. A universal partnership entered into without another declaration is a partnership not of things but of gains, C. I. 1703; C. G. 1839; C. H. 1674.

But a particular partnership is that which is contracted concerning only some things or services, C. I. 1705, 1706, 1715; C. G. 1841, 1842, 1851; C. H. 1678. It can be made in many ways: 1. If all the partners contribute capital and service. 2. If all contribute only capital, but a third person hired by a stipend applies industry. 3. If one contributes capital and another service. - L. 907.

1236. Note: Partners are not held in solidum on account of the debts of a non-commercial partnership; nor can one oblige another without express faculty. C. I. 1726; C. H. 1698.

1237. Whether and what kind of partnership exists between spouses? A partnership, or rather common ownership, between husband and wife can be entered into before the wedding, and it can take its beginning only from the beginning of the marriage. C. I. 1433; C. G. 1399; C. A. 1180, 1233. Indeed, according to C. G. 1400, it is judged to be entered into by law itself, unless something else has been agreed. According to C. I. 1433, 1435, they are prohibited from entering into a universal partnership of goods; but it is permitted only as to useful things, with claims and debts both of the husband and of the wife excepted from common ownership, attivo e passivo presente dei coniugi, and likewise with goods to come from a lucrative cause of inheritance or donation excepted. Nevertheless, to the common ownership pertains the use and fruit, godimento, of all movables and immovables, present and future. The administration of this partnership is in the hands of the husband, to whom moreover it is permitted to alienate common things under an onerous cause, C. I. 1438; C. G. 1421. Leases made by him are held as made by a usufructuary. C. I. 1439. - But this partnership is dissolved by the death of a spouse, his or her declared absence, definitive personal separation, or judicial separation of goods. Once dissolved, it can be restored, but with the same pacts, and with the rights acquired meanwhile by a third party preserved. C. I. 1441, 1443. Once the

partnership has been dissolved, the woman or her heirs can repudiate it or accept it with benefit of inventory. C. I. 1444.

The effect of this partnership according to Roman Law is to make ownership common to each spouse. But the husband has the usufruct, L. 539, 542. Its effect according to C. I. 1436 is to render common and divisible the acquisitions made by the spouses together or separately during the partnership or common ownership. According to C. G. 1470, 1474, when the community has been dissolved, proper goods and owed indemnities are first taken out, then what remains is divided in equal portions between husband and wife, or their representatives.

According to C. A. 1233, 1234, 1236, common ownership of goods, if it has been entered into by special contract, is understood only for the case of death, and gives to the spouse a right to half the goods which have been reciprocally placed in common, which perhaps remain after the death of the other spouse. But no right is acquired to the fruits during the marriage. - According to C. B. 1432 ff., a partnership can be entered into between spouses both before marriage and after marriage has been contracted. It can be either universal or particular, and when one or the other spouse has died it is continued with his or her descendants.

The husband has administration; but he cannot freely dispose of the goods of the partnership, nor can he bring any detriment to the wife; nevertheless from the goods of the partnership he bears the burdens of marriage. The goods of the partnership belong to each spouse, and when the partnership has been dissolved they are to be divided between them in equal portions. Cf. 677, 868.

1238. Whether partnership is present between brothers. Among brothers "a partnership is not judged to have been made, unless this is had expressly or tacitly from conjectures. Hence not because brothers have an undivided patrimony and live from a common table is a partnership contracted among them, unless indeed all exercise themselves in some business; or unless, one conducting business, the others contribute their goods.... And this is more clearly presumed if all contribute in common all goods pertaining to each one. Yet this is understood when each one also contributes his own goods, besides the common goods; otherwise, if only one contributes his own proper goods, for instance profits of some office or art, and the others only common goods, then he can compensate these for himself.... And so likewise, if one contributes greater labor, he can receive more, according to the estimation of his labor. But if some absent brother conducts business in the common name from common goods, he is understood to have a partnership until he is admonished by the other brothers that they wish to make a division; and then the partnership does not cease even for the businesses begun." L. 907. Therefore partnership is understood among brothers if all contribute in common what they gain, or if they conduct business in common. - But once partnership has been entered into, the profits become common in proportion to the things and industry which each contributed into the partnership; and losses also become common in proportion to the profit. - If one of the brothers has children, who themselves also work for the partnership, or receive sustenance from it, in the first case a proportionate part of the profit corresponds also to them; in the other it will be imputed to the father's part.

If brothers retain for themselves those things which come to them from their own proper gain, with only the paternal inheritance left in common, so that they receive and feel also emolument and damage in common, the partnership will be restricted only to hereditary goods.

1239. What is the triple contract? - The triple contract is that by which someone, contributing a thing or money, makes a pact with another partner that, whatever happens, the thing or the whole sum be restored to him with a certain profit, yet less than that profit which he could probably hope for. Or it is a contract of partnership to which two other contracts are joined, namely insurance of the capital and insurance of the profit, or the aleatory sale of the hope of receiving a greater profit for a lesser certain and insured profit. I contract, e.g., with Peter, giving him a sum of money for conducting business. But since the hope of gaining 15 per 100 shines upon me, and on the other side I fear lest I lose the capital, I enter into a second contract with Peter, giving him 5 per 100 if he is willing to take upon himself the insurance of the capital. With this second contract entered into, only 10 per 100 remains for me to gain. But I would prefer a profit still smaller but certain, rather than greater and uncertain. Therefore I propose to my partner that he give me only 5 per 100, but restore it certainly, whatever may come upon us, both the capital and the constituted profit. Hence a threefold contract is given, namely of partnership, of insurance of the capital, and of insurance of the profit. L. 908.

1240. Whether the triple contract is licit? The first probable opinion denies. The reason is 1. Because thus partnership is destroyed, whose nature is that dangers be common; therefore it is a true mutuum; therefore the title or foundation for receiving profit is lacking, at least above the legal rate for mutuum. 2. Because, they say, the opposite doctrine was reproved by Sixtus V, through the Bull Detestabilis, a. 1586, § 1, and through the Bull of St. Pius V Onus, § 4.

The second probable opinion commonly affirms, provided the money is truly given for business. The reason is: 1. Because these individual contracts separately and with different persons are of themselves licit and just; therefore also if they are made together and with the same person. 2. Because there is nothing against equality, for compensation is given, and the danger is equivalently sustained by the one giving the money. 3. Because Benedict XIV declares, de Syn. l. 7, c. 1, that the triple contract was not condemned by Sixtus V, nor did he intend to condemn it. And in the Encyclical Vix pervenit he says that he does not wish to condemn contracts about which dispute exists among theologians. - As regards civil Law, some say that the triple contract is reproved, C. I. 1719; C. G. 1855; others, and more truly, say that nothing concerning it is had in C. I. or C. G. For those articles regard the simple contract of partnership. - L. 842, 847, 849, 908; Lugo n. 37; Benedict XIV, de Syn. l. 10, c. 7.

1241. What is common ownership of goods? Common ownership of goods is indeed distinguished from the contract of partnership, yet it implicitly contains in itself some contract of partnership, whatever may have been the origin of the beginning of this common ownership. Moreover, common ownership of goods is the co-ownership of two or more persons as regards one and the same thing, as, e.g., if several persons possess one and the same house. C. A. 361, 639, 825; C. H. 392; C. B. 741; C. He. 646-654; C. L. 2175 ff. Cf. here 1121 seq.

1242. By what laws is common ownership of goods governed? If special agreements are lacking, or special dispositions of Law, one must then stand by the general prescriptions of the Law itself. C. I. 673; C. H. 392; C. A. 826. These are the general norms of Law: The concurrence of those participating in the same ownership of a thing, in rights and burdens, must be proportioned to the quota of each. C. I. 548, 549, 561, 674, 676; C. H. 393; C. A. 830, 839 ff.; C. G. 655, 656. Anyone can use the thing placed in common ownership, and alienate, cede, subject to mortgage his own portion,

or even substitute another in his own right of enjoying, unless the right in question is merely personal, as is the right of habitation. C. I. 675, 679; C. H. 394, 399; C. A. 829. If the greater part does not consent, innovations cannot be made, even if useful. Nevertheless anyone can oblige the others to necessary expenses for the conservation of the thing. C. I. 676-678; C. H. 395, 397; C. A. 828, 833. - Anyone can also always withdraw from common ownership, unless the time has been determined by pact, which will not be beyond ten years. C. I. 681; C. H. 400. Cf. C. G. 815. Dissolution of common ownership cannot be demanded by co-owners of things which, if divided, could no longer serve the use for which they are destined. C. I. 684; C. H. 401. Cf. C. A. 830 ff. According to C. B. 741 ff., the parts of a thing undivided among several, in doubt, pertain to each equally, and the fruits corresponding also to his part pertain to them, and at the same time the common use of the thing, insofar as the other undivided owners take no detriment from it. Administration of the undivided thing pertains to all in common. - The thing cannot be essentially changed. But any undivided owner can dispose of his own portion. And all are bound to sustain the burdens of administration and conservation. Any undivided owner can demand the cessation of indivision. And this is had either by the thing itself divided among the undivided owners, or, if it cannot be divided, by the thing sold. Cf. ib. art. 1008 ff.

But there are various cases of common ownership for which special dispositions of Law are present: 1. When several things of diverse owners have been mixed together, and cannot be separated without damage, the ownership is then common, yet according to the proportion of the value of the thing pertaining to each one, C. I. 471; C. H. 381; C. G. 572 ff. - 2. When a wall between houses or gardens is common, or a tree is common, a ditch on the boundary of fields is common, or flowing water is common, common pastures. C. I. 546 ff., 542 ff., 682; C. A. 421, 854 ff.; C. H. 572 ff., 593; C. G. 646, 653 ff.; C. L. 2319 ff., 2328 ff.

3. When there are several owners of the same building, some owners of the upper parts, others of the lower. C. I. 562 ff.; C. H. 396.

4. When an inheritance is common. C. I. 984 ff., 1034 ff.; C. G. 815 ff.

Common buildings. If several are owners of the same building, some owners of the upper parts, others of the lower parts, repair of the walls by which the building is supported, of the roof, and of any other common thing, as e.g., the vestibule, well, solarium, is common, according to the value of each part. But each one, beginning from the lowest cellars, must make his own rooms, ceilings or vaults by which he is covered; lay above the pavements on which he walks; build the stairs by which he goes; and if the same floor, piano, is common to several, each is held according to the value of his part. Finally he to whom the highest apartments pertain cannot, without the consent of the others, raise them higher, although he can enclose them with a ledge or parapet, if that harms others. Trees placed in a common hedge or on the boundary are common. Each can be compelled to cut them down, except those which serve as boundaries of fields.

Flowing water, except that which is of public right, provided it flows naturally and without a manufactured work, belongs to those who possess estates near the banks. Wherefore they can divert it, while it flows, for irrigating their own fields or for carrying on crafts, provided it is restored to its natural course when it goes out from their own lands.

XVI. On Wagering, Gaming, Insurance

1243. What is wagering? Wagering is a contract in which two or more, contending about the truth or event of some thing, mutually pledge something to themselves, so that it belongs to him who has attained the truth. C. A. 1270; L. 869; Lugo d. 31, n. 73.

1244. Whether wagering is licit? - Wagering furnished with due conditions is of itself licit. For it contains nothing dishonorable, nor is it prohibited by any positive law. The required conditions are: 1. That it not be concerning illicit things; no obligation is given against morals. 2. That it be about a thing doubtful as regards each wagerer; otherwise chance is lacking, and equality is not given, unless one certain about the thing warns the other, and nevertheless the latter wishes to commit himself; for then a donation is presumed as in gaming. C. A. 1270, 1272. 3. That there be equality between the thing which is pledged and the uncertainty of the event, namely that he for whom the greater probability stands promise more, but he for whom the lesser probability stands promise less. 4. That each accept the thing in the same sense; otherwise they would by no means agree upon one thing. L. 869, 870, 878, 879; Lugo d. 31, n. 82, 83.

1245. Whether wagering obliges? - Wagering obliges in conscience by natural law, as any other licit contract. C. I. 1892; C. G. 1965; C. H. 1799; C. B. 762; C. L. 1543: the same is established for wagering as for gaming. Cf. 1247. C. A. 1271: a wager made in good faith and otherwise licit obliges, insofar as not only a price was promised, but also handed over or deposited. But it cannot be sought judicially. Through the Bull of Pius IV In eligendis, wagers concerning the doubtful election of the Pontiff, or concerning his life and death, are prohibited. Gregory XIV, through the Bull Cogit nos, extended this to the election of Cardinals, with excommunication latae sententiae added as regards the election of the Pontiff, and reserved even outside the time of the vacant See. And because wagers of this kind are declared invalid, no obligation arises from them. L. 869.

1246. What is gaming, and how many kinds are there? Gaming is a contract by which players agree among themselves concerning some certain thing or concerning a certain price that will fall to the victor. - There are three kinds: 1. Industrial, which is chiefly governed by the industry of the players. 2. Aleatory, which principally depends on chance. 3. Mixed, which partly depends on industry and partly on chance. L. 871; St. Thomas, 2. 2, q. 168, a. 2.

1247. Whether gaming is licit and valid? - A contract of this kind, considered according to the law of nature, and if the due conditions are present, is valid and licit. The reason is that any owner of his own thing, just as he can dispose of it by giving it absolutely, so can hand the same over to another under some condition, whether that condition is fortuitous or depends on industry. L. 871. Moreover, that gaming, insofar as it is a simple relaxation of the mind, is licit is beyond all controversy. For as the body needs rest, lest it be weakened too much by labor, so the soul also needs rest, lest it be too much wearied by continuous meditation. St. Thomas, 2. 2, q. 167, a. 2. Considered according to the law of nature. For games of mere chance are prohibited by Canon Law. Dist. 35, can. 1. Yet as regards laymen, they say that Canon Law has already been derogated by custom. But as regards clerics, it is disgraceful for clerics to play dice. C. 15, de Vit. et honest. cler. Cf. V. 2, n. 179. By Roman Law certain games, namely of dice and fortune, were prohibited. L. 1, 3, C. de Aleatoribus et alearum usu. By the same Law those who had been beaten in forbidden games could not be sued so that they should pay, and if they had paid, they had an action of recovery. Wherefore the payment made by the loser was not invalid, but was to be invalidated by the judge. But because these laws were penal, or

were held as penal, by use and custom, hence, with attention to Roman Law, it is most probable that laymen playing would not sin even venially. L. 883-885; Lugo d. 31, n. 8. According to C. L. 1541 seq., gaming as a means for making profit is not permitted. What someone has gained in gaming he cannot seek judicially. If nevertheless he has paid it, he cannot recover it, except in the case of fraud or deceit on the part of the victor, and of a game of mere chance, commonly di azzardo. And what is lent in the act of this game of mere chance likewise cannot be recovered. According to C. A. 1272, what has been established for wagering is applied to games. Cf. 1244. But all games of chance are held as illicit, and it is declared that they bring forth no obligation. Nevertheless an action of recovery of what has been paid is denied.

According to C. I. 1802-1804 and C. G. 1965, 1967, there is no prohibition of any game. Nevertheless it is established that the law gives no action for exacting payment of that which is owed because of gaming or wagering. Games which contribute to exercise of the body are excepted, such as handling of arms, racing either on foot or on horseback, ball games, etc.; for these an action is granted. Yet it is within the power of the judge even in these to deny the action if the sum deposited for the game or wager has been exorbitant. But if the loser freely paid, he cannot recover what was paid, provided fraud or deceit of the victor was absent, and the loser is not a minor, or interdicted, or declared incapable. According to C. H. 1798-1801, games of mere chance are prohibited, and no action for them is granted to the victor; nevertheless no action is granted to the loser to reclaim what was paid, unless deceit intervened, or he is a minor or made incapable. And the same is established for wagering. Wagers which have analogy to these games are prohibited. Games which contribute to exercise of the body are permitted, as in C. I. and C. G.; and for these games and analogous wagering an action is granted; nevertheless the judge can reject the petition, or reduce the sum owed, if it is excessive. According to C. B. 762, gaming and wagering produce no obligation. But what has been paid cannot be recovered.

If the due conditions are present, which as regards validity are: 1. That the things exposed to the game are proper to the player, and in his ownership, and in his free faculty of disposing; otherwise the contract will be either null, or rescindable, or at least the payment made by the loser will be invalidable. 2. That all force and fraud be absent; hence it is necessary that the players concur freely, and indeed that there be moral equality among them in hope of gaining and in danger of losing. - But for liceity it is required: 1. That nothing dishonorable be mixed in by words or deeds. 2. That there not be present from it proximate danger of sinning, for instance of breaking out into blasphemies, or harm to neighbor, for instance of neglecting care of domestic affairs, of making oneself unable to pay debts or to feed a family, etc. 3. "That it be suited to the person, time, and place, and be duly ordered according to the other circumstances." St. Thomas, 2. 2, q. 168, aa. 2, 3, 4; L. 882;

Lugo n. 28.

1248. Resolutions: If someone gains by exposing stolen money to gaming, apart from which he has nothing else that he might hand over, then he is bound to restore what he has gained, because the contract was null, since he exposed money which the co-player could not acquire. But if he has other money, it makes no difference at all that he stole the money from the one playing with him or from another. Since he was equal in solvency, he will indeed be able to retain the profit, for it is the fruit of his own industry; but the obligation always remains of rendering to another what was taken from him by theft. - L. 875.

1249. Whether someone is bound to restore what he has gained from a son of a family in gaming? - Resp. Negatively, if the sum lost by the son of the family is from his own goods, of which he has perfect ownership. Affirmatively, if the sum lost is from the father's goods, or from his own goods of which he himself has only direct ownership. Except unless the sum is of small moment, in which the consent of the father is presumed, who would not wish to deny honest recreation to the son, or unless it is some moderate part deducted from the food which the father supplies to him. "Nevertheless it is probable that in that case, if the son of the family does not wish to pay what was lost in the game, he can licitly oppose the exception and is not bound to pay, reserving something from his food." L. 876, 871-873.

1250. Whether a victor who is much more skilled in a game, so that he certainly foreknows that he will be victor, is bound to restore? - Resp. Affirmatively, much more probably, because the equality required among players is lacking, and therefore justice is injured. Hence one notably more skilled must withdraw from the game, or remit something of advantage to the adversary. Thus the more common opinion, against some. Yet in practice restitution should not be urged if the matter concerned a thing of lesser moment; or even when the adversary, sufficiently warned, nevertheless stubbornly wished to play. Then no deception would have intervened. - According to C. A. 1270, 1272, in wagering and in gaming, if the defeated party was previously conscious of the event, donation is presumed. But it is otherwise in public games. For in these the prize is promised to him who excels the others. L. 881.

1251. Whether, according to the law of Roman Law, a victor in a prohibited game is bound to restitution, or the loser is bound to pay in the same game?

Resp. To the 1st: Negatively before the sentence of the judge, because by positive law the contract is not declared invalid, but only illicit, and an action to recover is given to the loser. Resp. To the 2nd: The first very probable opinion affirms. The reason is that by natural law the contract was valid, and therefore the loser is bound to stand by it until he judicially opposes an exception or seeks restitution. The second and more probable opinion denies. The reason is that the law, by giving to the loser a right to defend himself by exception or by recovery of what has been paid, also gives an absolute right not to pay. For to what purpose is someone bound to pay, if he can immediately recover what was paid? According to more Recent Laws also the victor is not bound to restitution, and the loser is bound of himself to pay, since the game is not prohibited by the aforesaid laws nor declared invalid, unless force or deceit intervened. But if the game is prohibited by the same laws, it can perhaps be sustained not improbably that the laws implicitly removed the obligation of paying, since the judge could not urge it by his own sentence. - L. 887-894. Cf. here 1247.

1252. Whether gaming is valid if a large sum of money is exposed at one time? Resp. The first opinion denies. The reason is that because of prodigality the game is base. The second opinion affirms, of itself, more probably, if the players are able freely and fully to dispose of their goods without detriment to family and creditors, because the players then freely dispose of their own goods, and knowingly and willingly undergo danger equally; and therefore there is no injustice. Nor does the reason of prodigality press; for it is also base to play from the greed of profit alone, although this greed, as that prodigality, of itself is only light. Yet who would say that a game is invalid because the players are moved by desire for profit? Moreover profit can well be illicit without being invalid. Yet, practically speaking, they do not seem to be disturbed in the tribunal of penance who would not wish

to pay a large sum which they had lost. And this either by reason of good faith, not to be disturbed, or because by positive Law the judge can reject the petition when the matter concerns games approved by the law itself, but the sum agreed for the game is excessive. Cf. 1247; C. I. 1803; C. G. 1966; C. H. 1801; C. B. 762; L. 735; Gousset 889.

1253. Whether one who uses fraud while playing is bound to restitution? "He is not bound to restore who uses those clever tactics which the rules of the game and received custom allow, since each knows that such tactics are customary, and thus tacitly and freely consents to them; e.g., 1. If, having stronger cards and being sure of victory, he increases the wager, or simulates fear, so that the adversary increases it. 2. If, knowing that he has lower cards, he dissembles and increases the wager, so that what had been placed may thus be left to him. 3. If he looks at the cards of another from that one's negligence alone and without fraud; otherwise, if he places himself so that he can see, or appoints another by whom he may be warned. 4. If while playing he learns to know cards from the back, which he had not previously marked nor known. But he who uses frauds not customarily employed, or unknown to the co-player, e.g., steals cards, or marks them with signs on the back, or uses marked cards, or those which he knew beforehand while the partner is ignorant, or by some art arranges them, etc., is bound to restore not only the profit, but also as much as the hope of gaining, indeed even of playing with him, was worth to the other." L. 882, 877.

1254. Whether, if someone injuriously compels another to play, he can afterward retain what he gains? "The first opinion denies, because damage following from an injury must altogether be restored.... But the second opinion affirms that he can retain it, because then not the coercion or the game, but rather chance or the skill of the one coercing was the cause of the damage.... This opinion, speaking of itself, is more probable to me, unless the co-player who coerced surpassed the one coerced in skill at playing; for in that case I think he is bound to restitution of at least part of what was gained, according to the measure of skill by which he excelled the other. The reason is that that contract, notwithstanding the injury of fear inflicted, was sufficiently voluntary on each side, and valid, according to the more common opinion reported.... I said, speaking of itself, for if the one who suffered fear seeks restitution of the money lost, Lessius rightly teaches that the one inflicting fear is bound to restore what was gained." L. 880; St. Thomas, 2. 2, q. 32, a. 7, ad 2, etc.

1255. But what if someone compels only by importunate requests? - "Sanchez, etc., still hold that he cannot retain it. But Lessius, etc., far more probably contradict, because requests do not remove the voluntary, just as threats do not; as Busenbaum asserts from the common opinion with Bannes and Molina." L. 880.

1256. What is a lottery? It is a contract by which, several persons paying money toward a certain thing or toward a certain sum of money placed in the middle, a right of drawing lots is acquired; whence, once the drawing has been made, some have the whole proposed prize, some a part, some nothing.

1257. Whether a lottery is licit? Resp. Affirmatively of itself. For a lottery can be regarded as the sale and purchase of hope and of the right to a certain prize to be acquired by drawing lots. But as it is licit to bargain concerning the danger of some thing, so also it is licit to buy hope and the right to some thing. It is said of itself; for accidentally from extrinsic circumstances it can become illicit, e.g., if from it a family were to be thrown into misery. C. A. 1267, 1269. According to C. B. 763, a lottery

does not induce obligation unless it has been approved by the State; otherwise, the dispositions established for gaming and wagering are applied to it. Cf. 1247.

1258. What conditions must be observed in a lottery, lest it become illicit? The first condition is that there be no fraud in drawing the tickets, nor in paying the prize which has fallen. The second condition is that proportion be preserved between the smallness of the price and the greatness of the uncertainty of the hope, and at the same time with the greatness of the prize, and, in a public lottery which is constantly repeated, with the greatness of the danger to which the owner of the lottery is exposed, so that he can always satisfy future victors. There are some who add a third condition, namely that the profit in the lottery not exceed that which would be had in honest business if the money were spent in it. But this condition is established by no reason, since then the profit received in any aleatory contract, and generally the profit received in gaming, would be illicit. For this is proper to these contracts, that uncertain chance intervene, to which the contracting parties voluntarily subject themselves; and, when chance favors, it often happens that someone receives in a short time a profit which even in a long time his own industry would not produce.

C. A. 1273, 1274.

1259. What are stock-exchange games? Stock-exchange games are commonly called certain business and mercantile operations which are ordinarily made in the money market through intermediaries, who are called exchange agents. They are called games because titles of public revenues are sold and bought, which, according to various circumstances of society and governments, have varying value; whence the aforesaid operations are aleatory, and a certain wager intervenes concerning the variety of values of this kind, namely concerning their increased or diminished price. But they are called stock-exchange games from the public place, or money market, which is called the stock exchange.

1260. Whether stock-exchange games are licit? - Various stock-exchange games, more or less complex, are reduced to the following simple mercantile and business contracts. 1. Someone buys a title, e.g., of 1000 lire, at the current price, and with counted money of 900 lire. The annual revenue of the title is 50 lire, namely at the rate of 5 per 100. Through days, through months, through a year, through several years, the buyer receives the aforesaid revenue. Certainly nothing illicit is present in this matter, for it is a certain simple purchase, or a simple consignative census, or a simple constitution of revenue. But if the buyer, when a good occasion is offered and seized because the price of public revenues has increased, sells the title of that annual revenue of 50 lire, at the current price and for counted money, for 1100 lire, he indeed receives a great profit, but again there is nothing illicit in this matter; for it is a certain simple sale, and the profit is owed from the changed price of titles in the market. And if someone, intending this profit, buys several titles of annual revenues at the current price and for counted money when the price is lowest, so that he may resell them for counted money when the price is highest, business properly is had, which of itself has nothing illicit.

2. If someone again buys a title of annual revenue of 50 lire at the current price of 900 lire, not for counted money, but on credit to a term, e.g., for fifteen days, for a month, then either the title is immediately given, or only when the term arrives, or the fixed day, which day is called the day of liquidation: the first, the fifteenth of the month. If the first occurs, nothing is had except a certain purchase made on credit, by which the buyer can profit if on the appointed day

the value of the title increases, or on the contrary the seller can profit if on the appointed day the value of the title decreases. Nothing indeed illicit is in this matter. But if meanwhile the seller demands the legal interest of the money until the price is paid, he can do this by right, since it is not equitable that the buyer retain the thing and the price for himself and enjoy the utility of both. Then sale and purchase and mutuum intervene at the same time, or a simple mutuum.

If the second is verified, then the danger of detriment is equal for buyer and seller, and likewise the hope of profit is equal for both; for meanwhile the value of the title can increase and can decrease. Therefore when the day arrives on which the seller must hand over the title and the buyer the price, if the value of the title has increased, the profit will belong to the buyer; if the value of the title has decreased, on the contrary the profit will belong to the seller. Therefore, since equality of both is preserved, nothing illicit is had here of itself.

3. The seller and buyer likewise make a contract to a term or to a day, but the seller does not hand over the title to the buyer in the present, nor does he oblige himself to hand over the title to the buyer when the day arrives. Similarly the buyer neither hands over the price to the seller in the present, nor obliges himself to hand over the price of the title to the seller when the day, or the constituted term of the contract, arrives. Therefore the seller and buyer oblige themselves, when the day arrives, only to hand over the difference of the value or price of the title in the present, or today, and of the value or price of the same title on the constituted day. It is therefore a certain wager concerning the increase or decrease of the price, in which again equal danger and equal hope exist for seller and buyer. For if, when the day arrives, the value or price of the title has increased, the buyer gains this difference of value, to be handed over to him only by the seller without the title. But if the value of the title has decreased, then the seller gains that difference of value, which the buyer alone must hand over to him, without the remaining price of the title, namely the excess of the former price constituted on the day of the contract over that lower price which the title obtains on the established day. Wherefore neither is anything illicit of itself had here, just as nothing illicit would be had in the simple contract of wagering concerning an increase of the value of the title on the part of the buyer, who hopes that it is to be increased, and therefore buys; and concerning the diminution of the value of the title on the part of the seller, who fears it, and therefore sells. But this contract would be illicit if someone certainly knew, by private knowledge, that the value of the titles was soon to be increased. For then by the contract someone would give nothing to the other; he would not give the right to profit if the price were diminished, which would be altogether fictitious. And although the other is ignorant of this, that false and empty right does not for that reason cease to be such, since the price is certainly to be increased and the other certainly knows this.
4. The buyer, buying a title, with only part of its price immediately paid, to a term or to a day, reserves to himself the right, when the day arrives, either of demanding execution of the contract, or of withdrawing from the contract, leaving to the seller that price already given. Since the right which the seller grants to the buyer is appreciable by a price, this contract is just if the price is proportionate. The proportion of this price depends on various circumstances and on the varying concurrence of sellers and buyers. The right of rescinding the contract is sometimes conceded to the seller himself, with a premium left to the buyer. This

conditioned purchase and sale is called operation with premium; the two preceding ones are called operations to a term.

5. A mercantile relation, or reportus, is a certain species of retro-sale. It consists first in selling for a lower current price, immediately paid, any titles which are sold in the money market, and immediately redeeming the same at a price to be paid at a term, or on a day, but higher. C. I. Comm. 73. Here also no illicitness of itself appears; for there is a double sale of the same thing, or the sale of a thing with its immediate retro-sale, and if due equality of price is preserved, certainly there is no injustice. In the second sale, or in that immediate retro-sale, the thing indeed is sold at a term for more than it was bought. But this arises from the fact that within a short time the price of these titles is changed according to common estimation. But from the fact that the thing will probably be worth a certain amount on the constituted day, the seller can take the norm of the price. Wherefore this second sale, or retro-sale, is an aleatory contract by which both the seller and the buyer can profit, namely if the price of the title, on the constituted day, has grown or decreased still more than the price foreseen by the seller and to be paid by the buyer. Gur. Cas. 946-950. According to C. B. 764, the contract of paying by the loser to the gainer the difference between the agreed price of merchandise or of a monetary title and the price at the time of delivery is considered as a game. Cf. 1247.

1261. What is insurance? "A contract of insurance is that by which someone takes upon himself the danger of another's thing, obliging himself either gratuitously or for a certain price to compensate it if it perishes. But if this is done gratuitously, it is a gratuitous promise; if for a price, it is as it were a purchase, by which the insurer sells his obligation of furnishing to another his thing unharmed. For its justice it is required that the event of the thing be uncertain to each, at least as regards the knowledge which they have concerning it, because otherwise equality is not preserved." L. 911. For the same reason it is likewise required that the insurer be equal to paying what he promised if the thing perishes, and that on the part of the insured the price be proportioned to the danger.

Nor indeed according to C. I., C. H., C. G. can someone insure the same thing for its whole value with several insurers. Nor can he insure it for a quantity exceeding the value of the same thing. According to C. H. 1795, this agreement is ineffective for such a part. Lugo d. 31, n. 97; C. I. Comm. 417, 426, 429, 430, 431, 433; C. A. 1288, 1289, 1291; C. H. 1791, 1792, 1795, 1797; C. G. Comm. 346, 348, 357, 359; C. L. 1538, 1540. Insurance is treated in the Italian Commercial Code, for it is considered as the object of commerce; whence nothing about it is in the Civil Code.

According to C. I. Comm. 417, insurance is a contract by which the insurer obliges himself, by means of a price or premium, to repair detriments and damages which can come to the insured from certain fortuitous events, or from superior force, namely that which cannot be resisted, or to pay a sum of money according to the duration or events of the life of one or several persons. Hence all immovable and movable goods and life itself can be insured. - The contract of insurance must be made in writings, C. G. Comm. 332; C. H. 1793, 1794; C. I. 420. Insurance of life is entirely different from a life census. For it is a contract by which someone obliges himself to pay each year, during his life, a certain determined pension, and another obliges himself to pay a certain determined sum, after his death, to his heirs.

1262. Resolutions: If the insurer is certain that the thing is already safe, he unjustly seeks the price and is bound to restore. If the insured certainly knows that the thing has already perished, he cannot make a pact concerning its insurance. Likewise, if he himself was the cause that the thing perished in order to obtain the premium of insurance, he is bound to restitution. L. 911; C. I. Comm. l.c.; C. G. Comm. 348; C. A. 1290, 1291; C. H. 1797.

1263. What are the obligations of the insurer? - 1. The insurer must be solvent, C. I. Comm. 433; C. G. Comm. 346. But the insurer can cause another to insure his pledge. C. I. Comm. 422; C. G. Comm. 342.

2. The insurer must furnish compensation for detriments and damages which happen to insured things from fortuitous events or from superior force. But he by no means must furnish compensation for detriments and damages which arise from a defect inhering in the thing which was not declared, nor those which are owed to the action or fault of the insured, or of those acting in his name, or of agnates or cognates who are named in the instrument; nor furnish compensation for damages produced from war or from popular tumult, unless a contrary agreement existed. C. I. Comm. 434. Cf. C. G. Comm. 350 ff.; C. A. 1290.
3. Insurance against fire embraces all damages inflicted by fire, from whatever cause it was produced, except what has come from grave fault personally imputable to the insured himself, and except the case of war or popular tumult. C. I. Comm. 441.
4. The insurer is freed from the obligation of paying when by an act of the insured the dangers are changed or aggravated, by the change of some essential circumstance, so that the insurer would not have given consent if it had existed from the beginning. C. I. Comm. 432.
5. If a third party inflicted damage, the insurer who repaired the damage has an action against him. According to C. I. Comm. 438, the insurer who repaired the damage is substituted into the rights and actions of the insured. But the latter is held concerning every detriment brought by him to rights of this kind. But, setting aside this law according to which the contract of insurance is understood, although, speaking of itself, the insured has been made indemnified by the insurer, for that reason the damager is not freed from the grave obligation of repairing the damage of the one damaged. Nor does he satisfy this obligation by distributing the sum to be restored among the poor, or by spending it on pious causes; for thus the right injured by him is not repaired. Neither the poor nor pious causes were damaged by him. But what the insured receives by force of the contract of insurance, and of the price paid for it, does not exclude the right by force of the real injury inflicted on him from the damaging. The titles and rights are quite diverse. Speaking of itself; for by force of the preceding law and of the contract of insurance, understood according to its norm, it suffices that the damager compensate only the insurer for the damages; and consequently what the damaged person has received from the damager he is bound to hand over to the insurer.

XVII. On Suretyship, Pledge, Settlement

1264. What is suretyship? "Suretyship is a contract by which someone undertakes another's obligation to be fulfilled, if the principal debtor has not paid." L. 912; C. I. 1898 ff.; C. G. 2011 ff.; C. A. 1344 ff.; C. H. 1822 ff.; C. L. 818 ff.; C. B. 765; Inst. l. 3, t. 21. According to C. B. 766, for the

validity of the contract the security must be consigned in writing. According to the same C. 778, he who gives a mandate of furnishing credit in his own name to a third party is held toward the mandatary as surety of the obligation of the third party arising from that credit furnished. - Gousset 899.

1265. Whether it is licit to receive a price for suretyship? "For suretyship it is licit to receive a price, even if no danger is feared, because of itself it is estimable by a price. This is common and altogether seems to be held." L. 912; C. H. 1823. - Lugo, Resp. Mor., l. 6, d. 9.

1266. What is the obligation of the surety like? The surety cannot be obliged to more and in more than the principal debtor. "For his obligation is an accession to the principal obligation; nor can there be more in the accessory than in the principal thing. But conversely he can be obliged for less." Inst. t. 21, § 5; C. I. 1900; C. G. 2013; C. H. 1826; C. B. 707. - Suretyship for an invalid obligation of the principal debtor is invalid. R. 42 in 6; C. A. 1351. But it is valid for an obligation which is rescindable, but valid, e.g., in the case of minority of age, C. I. 1899; C. G. 2012; C. H. 1824; L. 912. "And indeed it does not matter whether the obligation to which the surety is added is civil or natural." Inst. t. 21, § 1.

The obligation of suretyship, insofar as it is real, is transmitted to the heirs themselves, but by no means insofar as it is personal. - Once the principal obligation has been extinguished, suretyship, which is accessory to it, is naturally extinguished. Suretyship is extinguished by the office of the judge if the surety is judicially sued for payment; if the established time of the suretyship has passed; if the principal debt can be demanded because the time agreed for payment has already passed; if the debtor has ceded his goods, or is about to cede them; if the principal obligation does not have a fixed term, after ten years have elapsed. C. I. 1919; C. G. 2032; Inst. t. 21, § 2; C. B. 775, 777; C. G. 2017.

1267. Who can be sureties? No one can be a surety unless he has free administration of goods and cannot be principally obliged. Such are a ward, a minor, a religious, a wife, an interdicted person, without the consent of the tutor, curator, superior, husband, judge. Moreover, according to C. G. it is required that the surety dwell in the territory of the royal court, and according to C. I. of the court of appeal, where suretyship is to be furnished. C. I. 134, 1904; C. G. 2018; C. H. 1828; C. A. 1349; L. 912. To indulge in suretyships is forbidden to clerics, lest they be entangled in secular business. C. I. de Fideiuss. But if they have made suretyships, they are bound to satisfy.

1268. What does the surety owe to creditors; what if there are several sureties? A surety is held toward creditors concerning all the obligations of the debtor, but only in his default, or impotence, and indeed juridically proved, C. I. 1907; C. G. 2021; C. H. 1830; C. A. 1355; C. B. 770, 771; L. 912. According to C. I. 1911-1913; C. G. 2025-2027, if there are several sureties of one debtor for the same debt, each is obliged for the whole debt. - Nevertheless each of them, unless he has renounced the benefit of division, can demand that the creditor first divide his action, seeking from each his own part. If, when some surety requested division, certain ones were then not solvent, that one is held to a part, account also being taken of this defective payment; but thereafter, even if other payments fail after the division, he can no longer be disturbed. - If, however, the creditor himself freely divided his action, he can no longer withdraw from it, however much before this very division certain sureties were not solvent. - According to C. H. 1837, if there are several sureties of one debtor for the same debt, each is obliged only for his part. - According to C. A. 1359, in the same case, each is obliged for

the whole debt. But if someone pays the whole debt, he has recourse against the others. - Inst. l. 3, t. 21, § 4; C. B. 678, 769, 733, 776.

1269. What are the rights of the surety? A surety who pays for the debtor is subrogated to all the rights of the creditor, and therefore has recourse against the same debtor, so that he may claim back from him whatever he was compelled to pay in his place. Inst. l. 3, t. 21, § 6; C. I. 1915, 1916; C. G. 2028, 2029; C. H. 1838, 1839; C. A. 1358; L. 912. According to C. I. 1919, 1920; C. G. 2032, 2033; C. H. 1844, when there are several sureties of the same debtor for the same debt, he who has paid the debt has an action against the other sureties, each for his own part. Yet this action belongs only in certain cases. - Instit. t. 21, § 4; L. Fideiussoribus, Dig. de Fideiussoribus, etc.; L. 11, C. de Fideiussoribus; C. 2, 3, 5, de Fideiuss.; C. B. 774. The surety is freed if by the act of the creditor he cannot be subrogated into the mortgages and privileges of the same creditor.

C. I. 1928. "But this surety is freed if, when the creditor could have proceeded against both the principal debtor and the pledges, he neglected this and was the cause why the principal debtor fell into worse condition. Let the creditor impute it to himself if, when he could have obtained the whole credit from elsewhere than from the surety, who was only subsidiarily obliged, he delayed bringing troubles against the principal debtor until he slipped from his resources and the pledges ceased to be suitable. For in this case, although he does not have the credit safe, nevertheless, since this proceeds from his own cause, it is the same as if he had it safe, since someone is not said to suffer damage when he gave cause for the damage." Voet in Pandect. lib. 46, tit. I, n. 38.

1270. Whether suretyship can be given in a criminal cause? Sureties can also be given in criminal causes, either when treated civilly, or even criminally, provided the penalty is no other than a pecuniary fine, which either the principal debtor or the surety can pay. De Angelis, Praelect. Iur. Canon., l. 3, t. 22, n. 1.

1271. What is a pledge? - A pledge is a contract by which the debtor gives a movable thing to the creditor or to a third party as insurance of the credit. A movable thing; for if he obliges an immovable thing, according to more recent Law it is a mortgage. C. I. 1878, 1882; C. G. 2071, 2072, 2076; C. H. 1864; C. A. 447, 448, 1358; C. L. 855 ff.; C. B. 1204, 1273. According to Roman Law, although pledge and mortgage are taken for the same thing in a broader sense, as in L. 5 § 1 ff. de Pignor. et Hypoth.; nevertheless in the stricter sense they differ, for pledge signifies a thing so consigned to the creditor that it exists physically in the possession of the creditor; but mortgage signifies a thing not handed over, but only transcribed to the creditor, as is expressly had in L. 9 § 1 ff. de Pignorat. act., where it is said: "Properly we call that a pledge which passes to the creditor; a mortgage when not even possession passes to the creditor." Cf. C. A. 451, 1368. - L. 913; E. M.

1272. What are the rights of the creditor? - 1. The creditor has the right of retaining the pledge until the extinction of the whole debt. C. I. 1878; C. H. 1860, 1866. Hence he can vindicate it, if it has been taken from him, from any possessor. C. H. 1866.

2. He can ask from the judge that the pledge be sold under auction if the debt is not paid, or that it remain with him in payment of the debt, up to the concurrence of the debt, according to the estimation of experts. Any pact which gives to the creditor authority of appropriating the pledge to himself, or of disposing of it, a commissory pact, without the prescribed formalities, is null. C. I. 1884, 1894; C. G. 2078, 2088; C. H. 1858, 1859, 1872; C. A. 461, 1371; C. 7 de

Pignor. Yet this law rests on the presumption of fact that the pledge is worth more. Wherefore it ceases in the forum of conscience if the pledge truly is not worth more. L. 775; C. 7 de Pignor.

3. If the thing handed over in pledge is in the possession of the creditor or of a third party chosen by the contracting parties, the creditor has the privilege that from it the debt be paid to him before other creditors. If, however, the thing is worth above 500 lire according to C. I., above 150 francs according to C. G., or if incorporeal rights of credit have been handed over in pledge, whatever they may be, a public or private writing is necessary, with the cession of the credit announced to the debtor, or accepted by him by authentic act, C. I. 1879, 1880-1882; C. G. 1690, 2074-2076. - According to C. H. 1865, in order that a pledge have effect against third parties, a public instrument is necessary. - C. B. 233.

4. The creditor is bound to restore the pledge or mortgage to the debtor who pays the whole capital or debt, but not to one who pays only a part. Hence, if the pledge or mortgage comes by testament, action, or contract to several creditors, and one of these retains it with himself, he cannot restore it to the debtor, although he has received from him the part owed to himself, but he is bound to consign it to the remaining creditors who have not yet been satisfied. Likewise, if the debt comes by testament to several, the heir who pays his part cannot reclaim restitution of the pledge unless the others also have fully satisfied the debt. Indeed, not even after the whole debt has been paid is the creditor bound to restore the pledge, if something else without pledge began to be owed after that pledge had been accepted, which can be demanded before the prior debt has been paid. C. I. 1888, 1889; C. G. 2082, 2083, 2087, 2090; C. H. 1860, 1866; C. A. 469; C. B. 1223.

1273. What are the obligations of the creditor? 1. The creditor must not use the thing entrusted to him, unless with the consent of the debtor, at least reasonably presumed. "But the owner is presumed to consent if no damage follows to him." L. 914, 776; C. A. 459. - But if the creditor abuses the pledge, the debtor can seek its sequestration, C. I. 1887; C. H. 1870, or its restitution, C. G. 2082; C. B. 1217 seq.

2. He must diligently guard the pledge as a good father of a household, otherwise he is held concerning damage. L. 14 de Pign. actio. Since the pledge is given for the security of the creditor, and at the same time for the utility of the debtor, the creditor is held concerning it for light fault. Wherefore the creditor must furnish compensation for loss or detriment of the pledge which happens by his negligence. C. I. 1885; C. G. 1137, 2080; C. H. 1867; C. A. 449, 1369; C. B. 1215; Inst. l. 3, t. 15, § 4.

3. He must compute the fruits received from the pledge toward diminution of the debt, in order to preserve equality. C. I. 1852, 1886; C. G. 1936, 2081; C. H. 1868; C. A. 1372; L. 914.

4. He cannot appropriate the pledge to himself, nor can he sell it by his own authority in payment of the debt. He is bound to render the excess of the price to the debtor. C. I. 1884; C. G. 2078, 2088, 2115; C. H. 1859, 1872; C. A. 461, 464; L. 775, 913; C. B. 1219 ff.; E. M.

1274. What are the rights of the debtor? By force of a pledge contract, or mortgage contract, the debtor remains full owner or proprietor and usufructuary of the thing pledged or mortgaged. C. H.

1868, 1869.

1275. What are the obligations of the debtor? 1. The debtor is bound to hand over to the creditor a suitable pledge. C. H. 1857. Cf. C. A. 456. 2. He must refund to the creditor the expenses necessarily made for its conservation. C. I. 1885; C. H. 1867; C. B. 1216. 3. He cannot reclaim the pledge before he has paid the whole debt, unless the creditor abuses it. For then he can ask that it be placed under sequestration. C. H. 1870, 1871.

1276. What is mortgage; what is its nature? - It is a contract by which an immovable thing is obliged to the creditor, so that from it he may be able to pay himself if the debtor has not paid. C. H. 1858; C. L. 888 ff.; C. A. 448; C. I. 1967; C. G. 2118. An immovable thing; for the creditor will be able to pursue a movable thing in the hands of a third party only with difficulty. - Mortgage is indivisible, and subsists wholly over all the goods obliged, and any one of them, and any part of them. It moreover inheres in the goods, and follows the same before any possessor. C. I. 1964; C. G. 2114; C. H. 1860. According to C. G. 2115, 2134, mortgage has place only in cases and according to forms prescribed by law. According to C. I. 1965, 1981, 2007, a mortgage does not produce effect unless it is published, and cannot subsist except over goods specially indicated and for a certain sum of money. According to C. H. 1875, the document by which the mortgage is constituted must be inscribed in the Register of property. Among several creditors, the mortgage prior in time of legitimate inscription is stronger in right. C. I. 2007; C. G. 2134. Mortgage confers a real right not only for the capital, but also for the interest of the preceding two years, of the current year and following years, as well as for expenses made. C. I. 2010. According to C. I. 2001, a mortgage lasts for 30 years; according to C. G. 2154, for 10, unless in the thirtieth year or tenth the inscription is renewed. C. B.

1113 ff.

1277. How many kinds of mortgage are there? A threefold mortgage is distinguished, C. I. 1968; C. G. 2116; C. A. 448. The first is legal, which according to C. G. 2121 is induced by the law itself in favor of wives, minors, interdicted persons, and communities, over the goods of the husband, tutors, and administrators. According to C. I. 1969, it belongs to wives, minors, interdicted persons. It moreover belongs to coheirs, partners, and other co-dividers, over the goods of the inheritance, partnership, common ownership. Likewise it belongs to the State over the goods of those condemned for expenses of justice in criminal or police matters, and to sellers or others alienating, over immovables alienated for the fulfillment of obligations deriving from the act of alienation.

The second is judicial, which results from the sentence of the judge, in favor of him who obtained the sentence against him who lost the case; for by force of that sentence the goods of the condemned person are burdened by mortgage for repairing the damage of the victorious co-party. C. I. 1970; C. G. 2123. The third is conventional, which depends on the mutual will of the contracting parties, or on testament. From positive law this requires persons capable of contracting, or who have free administration of their goods. Hence minors, wives, interdicted persons cannot hand anything over into mortgage. It must be done with the formalities prescribed by law, under penalty of nullity, and can be done only in present goods. According to C. G. 2127, it must be done before a notary. According to C. I. 1978, it requires a public act or a private writing. - C. I. 1974, 1975, 1977 ff.; C. G. 2124, 2127, 2129, 2130.

1278. What goods can be subjected to mortgage? - 1. Immovable goods which are in commerce with all accessories which are held as immovable. 2. The usufruct of the same goods with their accessories, except the legal usufruct of ascendants. 3. The rights of the grantor and of the emphyteuta over emphyteutic goods. 4. Revenues upon obligations of the State. C. I. 1967. Cf. C. G. 2118; C. A. 448; C. H. 1874, 1877; E. M.

1279. What are the rights and obligations of the mortgage-creditor? - The mortgage-creditor has this proper right, that from the mortgaged goods satisfaction be made to him before the other common creditors. C. I. 1964; C. G. 2114. Wherefore if the debtor has alienated the things subjected to mortgage among several, each can be compelled either to yield the thing accepted or to pay the whole debt. C. I. 2013, 2014; C. G. 2167, 2168, 2169; C. H. 1876, 1879. But the mortgage-creditor cannot appropriate the mortgaged thing to himself, or dispose of it. He is bound to free the immovable from the mortgage once the whole debt has been paid to him. C. H. 1859, 1860.

1280. What is antichresis? - It is a contract by which an immovable thing is so obliged to the creditor that it is handed over to him, and the faculty is given to him of receiving the fruits of that immovable thing; but he must impute the fruits received to his credit to be paid to him, namely to payment of the capital and interest. Wherefore the debtor remains only proprietor of the thing, but not also usufructuary. C. I. 1891; C. G. 2071, 2072, 2085, 2114; C. H. 1881, 1885; C. B. 1213, 1214; C. 1, 2 de Usur.; C. 6 de Pignor.; L. 776, 916.

1281. What are the obligations of the creditor? The creditor is bound to guard the thing handed over to him diligently as his own; to pay the annual taxes inhering in the same, unless a contrary agreement has been entered into, and other necessary expenses, but with the right of compensation from the fruits of the same thing. C. I. 1892; C. G. 2086; C. H. 1882. - Antichresis gives no right in the thing to the creditor because of the unpaid debt. Every contrary pact is null. Nevertheless the creditor can juridically seek the expropriation of the debtor. C. I. 1894; C. G. 2088; C. H. 1884.

1282. What are the obligations of the debtor? - The debtor cannot return into the enjoyment of the immovable thing given in antichresis before he has paid the debt wholly. Nevertheless it is within the power of the creditor to withdraw from antichresis at any time and restore the thing to its ownership, unless he has renounced this right. C. I. 1893; C. G. 2087; C. H. 1883.

1283. What is settlement; who can settle; what is the force of settlement? Settlement is a contract by which the contracting parties, by promising, giving, or retaining something, impose an end by mutual consent on some lawsuit which has arisen between them, or prevent a lawsuit which is foreseen as going to arise. No one can settle unless he has the faculty of disposing of the things which fall under the settlement; hence tutors cannot settle concerning the goods of minors, except in cases permitted by law. The same is to be said of wives and other similar persons.

Settlement has the force of deciding the matter finally; hence it can no longer be impugned, either by reason of lesion or of ignorance of law. - A settlement will be null if it has been made concerning a thing subject to no controversy, whether because the controversy had already been ended by the final sentence of the tribunals, which was unknown; or because it was made upon documents which thereafter were recognized as false. - A settlement is rescindable if a new document manifests that the other party has no right, or if there was error in the person, or in the object in controversy, or if there was error of some fact from which the title was null, but by no means when this was null from

some law which was unknown; or finally if deceit or force intervened. C. I. 1764, 1765, 1772-1777; C. G. 2044-2046, 2052-2058; C. H. 1809 ff.; C. A. 1380 ff. Cf. a. 1387; C. B. 779; C. L. 1710 ff.; L. Non minorem C. de Transact.; C. I. seqq. de Transact.

1284. Note: Although the matter may not be doubtful, nevertheless the owner of the thing can settle in order to end a lawsuit; however, the settlement then is not valid in the forum of conscience except insofar as a donation would be valid. - But how much is to be conceded to each in a settlement must be judged from the greater or lesser probability of each one's right. A settlement which is made with no thing given, retained, or promised is called an amicable composition, C. 7 de Trans. If, by consent of the parties, the controversy is referred to be decided by the judgment of a good man, there is a compromise. Settlement must be made by public act or private writing under penalty of nullity. C. I. 1314. This contract must be reduced to writing. C. G. 2044. Cf. C. H. 1225.

1285. What has been the order of things thus far? - Thus far we have spoken of contracts in particular, and first of gratuitous contracts: of promise, donation, testament, commodatum, deposit, mandate. Then we spoke of onerous contracts: of sale and purchase, census, hiring and leasing, the contract of partnership. In the third place we spoke of aleatory contracts: of wagering, gaming, insurance. Finally we spoke of subsidiary contracts: of suretyship, pledge and mortgage, settlement.

XVIII. On Injustice

1286. What sort of sin is opposed to justice? Up to this point we have treated justice; now we treat injustice, which is the vice opposed to the virtue of justice. Violation of legal justice is contained in transgression of laws, and it is a grave or light sin according as it gravely or lightly injures the common good. Transgression of distributive and vindicative justice is had by acceptance of persons, through which, in the distribution of common goods and burdens, rewards and punishments, regard is not had to the reason of the cause which makes the person worthy, or to the motive of justice, but to the reason of the person, namely of those qualities of his which do not pertain to the matter, e.g., blood relationship, friendship, flattery, etc. This is a grave or light sin according to the matter concerned; and thus the election of an unworthy person even to secular offices, e.g., of governor or judge, is a grave sin. St. Thomas, 2. 2, q. 63, a. 1. Finally, transgression of commutative justice is properly contained in injury. St. Thomas, Quod. 10, a. 12.

1287. What is offense and injury? - Resp. To the 1st: Simple or pure offense is one thing, and injury is another. Simple offense is the wounding or irritation of another's will, by which someone brings trouble to another against his rational will, and as it were gives him some right to anger, indignation, or aversion against the offender, yet without injuring any right of property. If you deny to your friend asking for a book as a loan, of which he greatly needs and which you can easily do without, you undoubtedly offend your friend, and give him sufficient motive of aversion; yet you do not inflict injury on him, because you injure no right of his. Hence by justice you are not obliged to satisfaction for injury, but only to satisfaction for offense, by the virtue of charity and human reconciliation of peace, renewing friendship.

Resp. To the 2nd: Injury is voluntary lesion of another's right, when he is reasonably unwilling, by which namely someone knowingly and willingly does something not only against the will, but also against the true and strict right of another. Moreover such an injury can sometimes be done without

damage to another, and then it is called mere injury, such as occurs if you commit occult adultery with no child conceived; for in such a case you injure the right of another, yet you do not cause damage. Hence you are held to satisfaction, but not to restitution; namely to satisfaction of the injury, by suffering something which brings trouble or burden, at least, e.g., by humbly asking pardon. This satisfaction is compensation for personal injury. Cf. 1319. But sometimes injury is done with damage to another and is called damaging injury. Such occurs if you commit adultery and a child is conceived. Hence you are held to restitution or to reparation of the damage. Wherefore this restitution is compensation for real injury. L. 584; C. A. 1293-1295; Inst. l. 4, t. 4.

1288. What is the object of injury? - Injury can have place: 1. in the goods of reputation and honor, concerning which there is discussion in the Eighth Precept of the Decalogue; 2. in the goods of body and life, concerning which it is treated in the Fifth Precept of the Decalogue; 3. in the goods of fortune, concerning which the question chiefly is here; 4. in the goods of the soul, whether natural or supernatural. - C. A. 1293.

1289. How many kinds of injury are there in the goods of fortune? There is chiefly a threefold kind, namely theft, robbery, and simple damaging. Theft properly is the hidden taking away of another's thing, when the owner is reasonably unwilling. St. Thomas, 2. 2, q. 60, a. 3. Taking away: so that he may have it for himself; not so that he may burn it, throw it away, or destroy it. Those participate in the malice of theft, and therefore are reduced to theft, who accept even another's thing taken away by another, or simply detain another's thing, or usurp another's thing; for that acceptance is a certain continuation of theft, and "to detain that which is owed to another has the same character of harm as unjust taking." St. Thomas, 2. 2, q. 66, a. 3. And the same harm is had if someone occupies or usurps another's thing as though his own. When he is reasonably unwilling; otherwise the right of another is by no means violated. - But robbery is the taking away of another's thing by force or violence brought upon the person. L. 1, Cod. de Vi bonorum raptorum. Hence robbery adds to theft a distinct species of the sin of injustice, because to the owner who is reasonably unwilling and wishes to preserve his own thing force and personal injury are brought. Finally, simple damaging is when, while the owner is reasonably unwilling, some damage is inflicted without anything being accepted or retained by the one inflicting the damage. - Inst. l. 4, t. 1, 2, 3; L. 1, C. de Usucap. pro empto; L. 2, C. de usucap. pro donato; L. 518; St. Thomas, 2. 2, q. 66, aa. 3, 4, 9. "If some private thing is taken away from a private person, it is called theft; if it is secretly taken from the public by him to whom a public office has been entrusted, it is called peculation; they call it kidnapping if a free man or another's slave is led away into servitude; but if a sacred thing is taken away, it is named sacrilege." Roman Catechism, 5. The unjust taking away of animals is cattle-theft. "Labeo says that theft is said from furvus, that is, black, because it is done secretly and in darkness, and generally at night; or from fraud, as Sabinus says; or from carrying and taking away; or from the Greek speech, which calls thieves phores; indeed the Greeks also said phores from pherein, that is, from carrying. § 1. Hence the mere thought of committing theft does not make a thief. § 2. Thus he who denies a deposit is not immediately also held for theft, but so if he has concealed it for the cause of intercepting it. § 3. Theft is fraudulent handling of a thing for the sake of making profit, either of the thing itself, or even of its use or possession; this is prohibited by natural law to admit." L. 1, de Furtis ff.

"Cattle-thieves are properly held to be those who withdraw cattle from pastures or from herds, and in some way plunder them, and practice the pursuit of driving away as though an art, leading horses

from droves or oxen from herds. Certainly, if someone has led away a wandering ox, or horses left in solitude, he is not a cattle-thief, but rather a thief." L. 1, 3, de Abigeis Dig.

1290. Whether legitimate consent removes the character of injury? - To one who knows and consents fully and at the same time juridically, no injury is done. It is proved 1. from Rule 27 of Law in 6, where it is expressly said: To one who knows and consents, injury is not done, nor deceit. And Rule 145 ff. de Regulis Iuris: No one seems to defraud those who know and consent. 2. Because he who juridically consents has, according to human and divine laws, legitimate power of consenting; therefore by the very fact that he fully and perfectly consents to some action, such an action is not injurious to him. St. Thomas, 2. 2, q. 54, a. 3.

1291. Whether simple consent also removes the character of injury? - To one who knows and freely consents without the right of validly consenting, injury is done by an action which otherwise is injurious to him. It is proved, because by the very fact that the consent is invalid by law, in moral estimation it is null; and therefore injury is done to one consenting in such a way just as if consent were absent. Without the right of validly consenting; for if some consent were only prohibited by law, but not void and invalid, it would still be efficacious in moral estimation, and consequently would remove the active right and the injury. Thus, although the defloration of a virgin outside marriage, and consent to it, is prohibited, nevertheless if the virgin consents to it, no injury is done to her, and there is sin only against chastity. St. Thomas, 2. 2, q. 59, a. 3, ad 3.

1292. Resolutions: Injury is done to a cleric, although he consents to being dragged before a secular tribunal or to being struck, because he cannot validly and efficaciously yield the right conferred in favor of the whole clerical state. Likewise injury is done to a husband, although he consents to the adultery of his wife; for such consent, on account of reverence for the sacrament and the indissolubility of marriage, is invalid by divine law. Cf. pr. 50 condemned by Innocent XI. "At most this will be effected from the consent of the spouse, that the spouse consenting to the adultery of the other cannot institute a complaint concerning the injury inflicted on himself by the adulterer, since he seems to have stripped himself voluntarily of action against him." Ithur., Cas. 6, n. 16.

1293. Whether consent from error and fear removes injury? - Injury is done to one consenting from error, fear, or necessity. It is proved because by the very fact that consent is made from error, fear, or necessity, it is involuntary, at least in some respect, and the one consenting does not wish altogether freely to yield his right. Therefore, while such consent stands, injury is done to him.

1294. Whether injury can be inflicted by an anterior act alone? - Although injury can be inflicted on another through a merely internal act, nevertheless an internal act of itself cannot cause an external act to become unjust. The first part is proved, because sometimes by an internal act alone the strict right of another can be injured. This is clear from the example of rash judgment, by which, according to the common opinion, justice toward neighbor is violated, since each person has a strict right to the good estimation of himself among individuals. The second part is proved, because an internal act cannot change the nature of an external act. Hence he who refuses out of hatred to help another does not sin against justice, unless he is held by office; nor does a judge, condemning a murderer from hatred to the death he deserves; nor a merchant, selling his goods at the lowest price so as to deprive other merchants of profits. Of itself; for an external action inchoatively indifferent is determined only by the interior intention, so that it is the beginning of a completed unjust external action rather than a just one. And thus one who accepts a thing from the hands of a thief does not sin against justice if

he does it to restore it to the owner, but he does if he does it to retain it. Lugo d. 22, n. 156; La-Croix l. 3, p. 2, n. 635, 636; C. A. 1305.

1295. What sort of sin is injury? - Injury is a grave sin from its kind. But that matter is judged grave which from its nature, or from the estimation of men, is apt to cause another sorrow difficult to calm, or to dissolve mutual charity. The first part is proved, because injury of itself brings grave harm to the good of others; and therefore tends to dissolve charity. But mortal sin is "that which is contrary to charity." St. Thomas, 2. 2, q. 59, a. 4.

The second part is proved, because since the end of justice is to promote common peace, public tranquility, and mutual love through the conservation of rights, that matter is deservedly judged grave which from its nature, or from the estimation of men, can dissolve mutual love, with loss of common peace, or cause sorrow difficult to calm. From its nature: because, generally speaking, in establishing a general rule, attention must be paid to that which commonly occurs among men using tempered judgment and affection, not what the tumult and intemperance of the passions suggests in these circumstances; for justice follows the guidance of reason and the dictate of prudence.

But speaking specifically of justice, since it belongs to justice to preserve equality of thing to thing, one must attend in it to the objective lesion itself of another's thing, and by no means also to the subjective dispositions of the individual, to which charity further extends itself in attending. - L. 700. But injury is of a diverse species according to the diverse right injured, and the morally diverse object, as regards the supernatural or natural goods of the soul, as regards intrinsic goods of life and members, and as regards extrinsic material goods of fortune, or as regards extrinsic moral goods of reputation and honor.

XIX. On Theft

1296. What is the malice of theft? - Theft is a sin mortal from its kind. It is proved, because theft from its generic concept, and apart from another malice, is gravely opposed to justice, indeed to common peace and tranquility; therefore it is a sin mortal from its kind. For "through theft a man brings harm to his neighbor in his goods; and if men everywhere stole from one another, human society would perish." St. Thomas, 2. 2, q. 66, a. 6. Meanwhile, nevertheless, it is certain among all that theft admits smallness of matter, and because of this it is often a sin only venial in the individual; as, e.g., if a poor person steals something small. St. Thomas, Quodl. 6, a. 6; 2. 2, q. 66, aa. 3, 5, 6; L. 700; E. M. "Those also are to be placed in the number of thieves who, when they have been hired for some private or public office, furnishing no or little work, neglect the duty and enjoy only the wage and price." Roman Catechism, 9. To theft is reduced any fraud or defrauding, which is the lesion and diminution of another's goods or rights, accomplished by deceitful circumvention. Robbery differs in species from theft, because theft includes in its nature the ignorance of him to whom injury is done, but robbery includes violence. In theft the thing is accepted by cunning, deceit, fraud. In robbery the thing is accepted by one's own power, coercion or violence having been made to the person. St. Thomas, 2. 2, q. 66, aa. 4, 5, 8, 9. Cf. here 1289.

1297. What is grave matter in theft? - The matter of theft is one kind absolutely grave, another relatively grave. Matter of theft absolutely grave is that which according to itself, and apart from the state, or wealth or poverty, of him from whom it is taken, gravely conflicts with justice, by inflicting

grave damage on society. But matter of theft relatively grave is that which is grave not precisely according to itself, but by relation to the person from whom it is taken, and inflicts on him a relatively grave detriment. - L. 526.

The print's appendix has more on this paragraph: [On Grave Matter in Theft](/manuals/bucceroni/on-grave-matter-in-theft). (ed.)

1298. What is matter of theft absolutely grave? Two or three gold pieces do not seem to suffice for absolutely grave matter, namely about ten or fifteen lire; but thirty or forty lire. For old theologians established two or three gold pieces as absolutely grave matter. But in our time the value of money has greatly decreased, and the abundance of money certainly has doubled and more than doubled. Therefore, if in the former time absolutely grave matter was established at ten or fifteen lire, in the present it seems to be established at thirty or forty lire. - Indeed the rule for discerning absolutely grave matter is one kind extrinsic, another intrinsic. The extrinsic rule is contained in the common judgment of theologians and prudent men, since this matter, as it depends on many circumstances, depends especially on common sense and estimation.

Moreover in the present doctors and God-fearing and sensible men commonly hold this as absolutely grave matter. - But the intrinsic rule must be taken from this: that that matter of theft is absolutely and universally grave, on account of whose taking away any owner, even a very rich one, would reasonably be gravely unwilling, because it is such a quantity as can serve several uses and necessities of life, and, if it were stolen often and by many and through light thefts, which are frequent, there would be danger of enormous damage to society; for the security of society would no longer stand. But the quantity designated as absolutely grave, with attention also to the changed circumstances of present times, certainly appears to be such. - L. 527, 528; Gennari, Consultazioni Mor. Can. Liturg., P. I, Cons. 64.

1299. What is matter of theft relatively grave? Matter of theft relatively grave, speaking of itself, is the price which is required for the competent sustenance of one day of that person from whom it is taken.

It is proved, because against the taking away of the price which is necessary for procuring the sustenance of one day competent to himself, anyone can reasonably be gravely unwilling; therefore such a price is suitably established as relatively grave matter of theft. Speaking of itself; for if a Prince, or another, lived very sumptuously, for relatively grave matter of theft a lesser price would suffice than would be required for his daily food. For would he reasonably be unwilling if that Prince on that day, e.g., had to abstain altogether from his magnificence? For competent sustenance, etc.; for if a very rich man from economy lived sparingly, for relatively grave matter of theft the price which he is accustomed from economy to spend for daily food would not suffice. For sustenance, in which not only food is computed, but also clothing and dwelling, as well as honest recreations, and even distributions to be made according to one's proper condition. For sustenance, that is, either for the whole sustenance, or even for a notable part of it; since even then someone would still be reasonably gravely unwilling. L. 527.

1300. Resolutions: For grave matter considered relatively, with attention to the principal places of Europe and the circumstances of our times, there seem to be required: 1. About the value of one lira relatively to the poor, and sometimes less or more according to the greater or lesser degree of necessity. 2. About two or three lire relatively to workers who procure food for themselves by daily

labor. 3. About five or six or seven lire relatively to men exercising a liberal profession and living honorably from it. 4. About ten or eleven or twelve lire relatively to ordinary rich persons; but fifteen or twenty relatively to the more opulent rich, but not the very richest, for whom absolutely grave matter is to be attended to. L. 527, 528.

1301. What if in theft the necessity of the one secretly taking is grave? The matter of theft, though more grave, can become relatively light because of the grave necessity of the one taking, in which without the secret taking of another's thing he would have to lead a most miserable life, as La-Croix, l. 3, p. n. 955, and Struggl, de 7 Praec. Dec. 13, teach with Laymann and Sporer. The reason is that the owner cannot reasonably be gravely unwilling if a miserable man in such a case takes as much as is necessary to relieve such grave necessity in some way.

1302. What if the person secretly taking is domestic?

The matter can likewise become relatively light because of the condition of the person, e.g., if the one taking is a son, a wife, or a servant very useful to the owner; for against the thefts of such persons the owner is not so gravely unwilling. - L. 539.

1303. How much determinately is required in grave thefts of sons of the family? - Several theologians require for grave theft by sons a sum twice greater than for strangers, and others extend this quantity of matter even much more. But since a universal and absolute rule concerning the gravity and lightness of similar thefts cannot be given, it must be taken 1. from the state, wealth, liberality, and greater or lesser affection of the parent toward the son; 2. from the plurality, age, and other circumstances of the children; 3. from the end and use of the thing taken. The reason is that from these heads it is ordinarily accustomed to happen that the father is more or less unwilling against the theft of the son. Prov. 28:24; L. 528, 543, 544.

1304. How much determinately is required in grave thefts of wives? For grave theft by wives, several theologians also require a greater quantity, and indeed twice as much as for theft by sons. The reason is that between husband and wife there is a greater conjunction and moral identity, especially in order to common goods, than between father and son; therefore against the theft of a wife the husband is ordinarily judged to be less unwilling. Nor are several and grave theologians lacking who extend this quantity of matter even more broadly, and assert that the wife does not sin mortally, even if annually she secretly takes a twentieth part of the revenues for honest uses; which sum St. Alphonsus, 540, H. A. tr. 10, n. 33, judges excessive, at least speaking universally. Therefore, since here also a universal and absolute rule cannot be established concerning the gravity or lightness of similar thefts, this must be taken 1. from the state, wealth, liberality, and greater or lesser affection of the husband toward the wife; 2. from the greater or lesser dowry, from the wife in order to household economy, and from other circumstances. The reason is that from these heads it is ordinarily accustomed to happen that the husband is more or less, or at least can be, unwilling against the theft of the wife. L. 539, 542.

1305. How much determinately is required in grave thefts of servants? "Concerning thefts of servants, doctors commonly say that small thefts which are made by servants from foods which are not customarily guarded carefully never reach grave fault, provided they do not sell them or carry them outside, and provided they do not take them in extraordinary quantity, or, it must be added, if they were not things of extraordinary price." L. H. A. tr. 10, n. 34; l. 3, n. 545. And this holds

especially if the owner does not furnish them due sustenance. But if servants steal money or things carefully guarded, no greater quantity is required for grave sin, because owners are then not less unwilling toward them than toward others. Indeed thefts of this kind are punished more severely by civil law because of the defect of fidelity which intervenes in them. But if these things are by no means guarded, indeed if the servants themselves have the administration of things, several and grave theologians require still a greater quantity than for strangers; this must be judged 1. from the state, wealth, liberality, and affection of the owner toward the servant; 2. from the labor, utility, and necessity of the servant himself, and from the greater or lesser liberty which is given to him in administering the things committed to him. Tambur., Exp. Dec., l. 8, tr. 2, c. 3, par. 4, n. 1; L. 539, 545, 546.

1306. What if several small thefts are made? More grave matter can also become relatively light when it is done through several small thefts and performed successively. The reason is that in these thefts less damage is effected; hence owners also are not accustomed to be so gravely unwilling against these thefts.

Hence, if small thefts are made from the same person at different times, the matter will be grave when it exceeds by half the sum commonly required for grave theft. - If small thefts are made from different persons, matter will be judged grave of itself when it is twice greater than the sum commonly required for grave theft. - Wherefore a still greater quantity is required if these thefts are made against several persons and several times, and then the excess seems to be required threefold greater. But these things hold when those small thefts coalesce among themselves. L. 530; D'Annibale, p. 2, n. 254, ed. 4.

1307. Whether small thefts made several times can coalesce together? - Small thefts can coalesce into grave matter. It is proved 1. from the similar case in meals on a fast day, in servile works on a feast day. 2. From proposition 38 condemned by Innocent XI. 3. Because from multiplied light thefts there can be grave damage, or danger of grave damage. And this holds even if the little thefts are made from several persons. For although grave damage is not done to individuals as individuals, nevertheless grave damage is done to the community and society itself, or to one moral body in its members. Moreover, the matter concerns a thing which, unless it were gravely prohibited by justice, would give rise to a most grave evil against the common good; for it would be easy for sellers, e.g., to defraud measures, etc. Ithur., Cas. 1; L. 533, 534; E. M.

1308. When do small thefts coalesce together? Small thefts coalesce into grave matter in four cases: 1. Through the intention of reaching grave matter, unless that prior will is retracted. The moral effect of this intention is to give moral unity to the various little thefts, and thus they reach grave matter. 2. If there is not a great interval of time between theft and theft. Otherwise, morally speaking, theft is not united with theft; nor therefore do they constitute one object in the moral genus. But more probably, and commonly speaking, thefts no longer coalesce beyond the space of two months, even if they would approach quasi-grave matter. Yet others assign a longer interval, others a shorter one. The variety of these opinions shows that judgment in this matter must be taken not from the space of time alone, but also from other circumstances of things. Moreover, small thefts, even with whatever interval posited, coalesce according to the opinion of all whenever they were committed with the intention of reaching a notable sum; because by this intention they are truly united among themselves. But this intention being excluded, if the thefts are altogether modest, even with a lesser

space of time, say fifteen days or even less, they do not coalesce. For who would say that the drink of coffee which a maid takes today coalesces with that which she will take after fifteen or ten days; or that the draught of wine taken today coalesces with the draught of wine taken tomorrow? 3.

Through conspiracy, where several conspire among themselves, and the little thefts of individuals, collected together, constitute grave matter. Since then each is the cause of the whole damage, in which he cooperates together with the others. - 4. Through the accession of a stolen thing to a stolen thing, if both are preserved; and then not only moral but also material union is had. Ithur., Cas. 27, n. 16; L. 530, 533, 535, 536, 537.

1309. Note: 1. He who often steals a little from the same person, even if he has not had the will of becoming rich or of taking away a notable quantity, nevertheless if in the last small theft he notices that he has now reached a great quantity, by the last small theft, regularly speaking, he sins mortally. The reason is that such a thief by the last theft wills to continue and complete the grave damage of another; therefore by force of this volition he sins mortally, although the external theft according to itself precisely is light. L. 533. The same must be said if after grave matter has been completed, he steals something light; for the grave sin is continued. L. 538. - 2.

"It is not mortal, speaking of itself, to take secretly any sum whatever with the intention of restoring immediately, e.g., within a quarter-hour. The same is the case if within that brief time someone wishes to restore only that last part completing grave matter, or if he delays restitution for a brief time." L. 531, 533, 653. - 3. "If little thefts which together reach a great quantity have been made from different certain owners..., it seems more probably to be said that a thief of this kind does not sin gravely if he does not restore to the certain owners, when he can conveniently do so, and that he satisfies his grave obligation if he distributes the things owed to the poor... and he will also be excused from venial sin if some reasonable cause is present." L. 534.

1310. Whether in extreme necessity it is licit to take secretly another's things. In extreme necessity, namely when no other way appears for preserving oneself, it is licit to take secretly another's things which are simply necessary for preserving life. The reason is 1. because against a taking of this kind the owner of the thing cannot be reasonably unwilling. 2. Because the division of goods, in whatever way it occurred, cannot derogate from natural or divine right. But according to the natural order instituted by divine providence, lower things are ordered to this, that from them relief be given to the necessity of men. Wherefore a right belongs to each one to provide for himself when he labors under extreme necessity. Therefore in such a case all things become common; and thus one accepting another's thing for relieving himself accepts a thing truly common, which he makes his own, just as happened before the division of goods. Therefore he does not commit theft. Nor indeed is he bound to ask or accept the thing as a loan; otherwise now nothing would ever become common. But because he has a right to that thing from justice, he can, if he is prevented, even take it by force. St. Thomas, 2. 2, q. 32, a. 7, ad 3; q. 66, a. 7; L. 520, 623, 624.

1311. Resolutions: A poor person in extreme need can accept a thing even of great value, if it is absolutely necessary to him for preserving life; and unless it is an altogether extraordinary means for preserving life, although another is not bound to give. For the obligation of giving is from charity, which does not urge with great inconvenience; but the faculty of accepting is from the very right of nature, which all have of using goods destined by nature itself for the sustenance and conservation of man. But nature itself does not wish goods, especially very precious ones, to be common to all;

whence no one is obliged to employ even those extraordinary goods to preserve life for himself. Yet someone can well preserve life even by extraordinary means, from the very faculty which he has of preserving life by created means. Lugo d. 16, n. 159; L. 520.

1312. Note: Since the reason for taking another's things secretly is necessity, hence if one in extreme need has elsewhere, in fact or in probable hope, from which he can pay, he cannot take another's thing except with the burden of restitution, because necessity does not require that the ownership of the thing be acquired when it can sufficiently be relieved by a thing accepted as mutuum or commodatum. A rich man hiding his own things, or using another industry so as not to help the poor man, when the necessity of the poor man ceases, is not bound to restitution, because necessity, even extreme necessity, confers on the poor man a right to the use of another's thing only as long as the necessity itself urges. In addition, even while that extreme necessity of the poor man stands, the thing of the rich man does not cease to be his own as long as the poor man has not occupied it.

If a rich man prevents a poor man by force from accepting his goods, he sins against justice and is held concerning the damages arising from it; for since in that case the poor man has a right of using those things, he also has a right not to be impeded from them. L. 520, 701; H. A. 19, 20; St. Thomas, Quodl. 5, a. 17.

1313. Whether also in merely grave necessity it is licit to take secretly another's things, by private right? - Resp. Negatively. 1. From proposition 36 condemned by Innocent XI.

2. Because in these circumstances owners are reasonably unwilling, since things do not become common. For in this grave necessity, either the matter does not concern common goods of life, to the sustaining and conserving of which nature destined exterior common goods; or, if the matter concerns those goods, there is not absolute impossibility of providing for oneself from elsewhere, although not without inconvenience and labor. 3. Hallucination in this matter would be easy, and an entrance to plunderings would be more easily opened. Moreover, it does not seem illicit to take some small thing to avert grave damage of life, both from the intention of nature, which destined these lesser exterior goods for those lesser common goods of life, and from the presumed will of the owner. Lugo d. 16, n. 156. In merely grave necessity. For if someone suffers necessity, not indeed actually extreme, but very urgent, which more probably or certainly will soon verge into extreme necessity, he could take secretly from another's property for avoiding extreme necessity and danger of life. By private right, because since the common good prevails over the particular good, on account of public necessity and good the Prince can by high right at least dispose that the rich, e.g., open their granaries and sell at a just fixed price, etc. L. 520; Lugo d. 16, n. 154, 156, 160; E. M.

1314. Whether, if a thief threatens to take your thing unless you accept and hand over to him another's thing, you can take this secretly so as not to lose your own? "This is not licit to do, because I do not have the right of inflicting damage on another in order to preserve my own goods; and therefore if I do this, I do an illicit and unjust action." L. 569.

1315. "Whether those cutting wood in a forbidden forest sin and are bound to restitution? Doctors commonly teach that if the grove belongs to the whole community, its inhabitants who cut wood against the prohibition do not sin at least gravely, indeed not even venially according to Sanchez, etc., and are bound to restore nothing unless they make great destruction, but are bound only to the

penalty after sentence; for such a prohibition is judged purely penal." L. 529, 614; l. 1, n. 145. The same holds concerning fields of the whole community as regards pasturing animals. L. ib. "Consequently those are free from all, or certainly from grave, fault who cut single bundles on single days for the use of the family, and the poor who cut besides two bundles each week for selling." D'Annibale, p. 2, n. 253, ed. 4. One must stand by the usages of places in this matter, Gousset 983. "In private forests, the poor are free from all, or at least from grave, fault who gather from them, indeed even cut down shrubs and brushwood necessary for fire; for not undeservedly you would say these are owed to them from charity, especially if the owners know and are silent, provided they do not devastate by cutting down, nor cut small trees or branches of trees, unless perhaps dead ones, nor carry away their poles or those of vineyards, nor tear down hedges." D'Annibale, l.c.

1316. "Whether it is licit to eat grapes in another's vineyard? - Covarruvias, Valerius, Ripa, etc., apud Lugo d. 16, n. 33, affirm, provided one does not carry away the grapes, and they adduce Deut. 23:24, 25. And the same thing that is said concerning grapes and ears of grain, says Abulensis apud Cornelius a Lapide, understand concerning apples and other fruits." L. 529. St. Alphonsus in the same place says this opinion is sufficiently probable, and adds: "Moreover, probably," says Lugo, "by the law of nature it is licit to eat one or another cluster of grapes, that is, one or another grape; and in like manner he concedes eating from another's orchard one or another apple. For to prohibit this seems very harsh and contrary to humanity." Nor indeed would someone sin gravely if he ate up to satiety, provided he carried nothing away. - L. H. A. tr. 10, n. 24; D'Annibale, l.c.

1317. What is to be judged concerning remnants of tailors? - If the remnant is a notable part, they are bound to restore it to the owner, if he pays the due price of labor. The reason is that the owner would be reasonably unwilling. If the remnant is of lesser moment, and is expressly reclaimed by the owner, they are also bound to restore, if he pays the due price of labor, for the same reason. If the remnant is of lesser moment and is not expressly reclaimed by the owner, then it can be retained, because owners commonly know that tailors retain similar moderate remnants, and therefore also often pay a lower price for the labor. L. 568.

1318. How does he sin who takes away from another a small thing very dear to him, or a thing of greater moment which he does not care about? - Resp. To the 1st: He sins mortally against charity, yet not in the genus of theft against justice. The reason is that such a person unjustly gravely saddens another, yet in the goods of fortune he does not inflict grave damage. Hence, if such a thing perishes, the thief is not bound to restore to the owner as much as that owner valued the thing, but only the value and common estimation of the thing in itself. Resp. To the 2nd: He sins only venially if the owner cares little about it, as if it were of small moment; but if the owner does not care about it at all, and holds it as neglected and abandoned, he does not sin even venially. The reason is that injury is inflicted on the owner in the goods of fortune insofar as he himself is unwilling; therefore, since in the former case he is lightly unwilling, and in the latter in no way unwilling, in the former a light injury is inflicted on him, and in the latter none.

XX. On Reparation of Injustice

1319. How is injustice repaired? Injustice or injury inflicted on another is repaired through restitution. Restitution is the rendering of another's thing, or the compensation of damage unjustly inflicted. This definition, as is clear, comprehends not only restitution of mutuum, commodatum,

deposit, and pledge, where no violation of another's right preceded, but also restitution from actions in which violation of another's right preceded. - Therefore restitution differs from satisfaction in this: that satisfaction is compensation of offense or personal injury through some service, or request for pardon, or some other fine or penalty; but restitution is rendering of a real right, or compensation of real injury. C. A. 1323; St. Thomas, 2. 2, q. 62, aa. 1, 5; L. 547. Cf. here n. 1287.

1320. Whether the obligation of restitution arises from any violation whatever of justice? The obligation of restoring of itself does not arise from violation of distributive or legal justice, but from violation damaging commutative justice alone. The first part is proved, because through violation of distributive or legal justice, precisely as such, the right of property in a thing or to a thing is not injured, or no damage is inflicted on another; therefore from violation of distributive or legal justice, precisely as such, no obligation of real restitution arises. For neither violation of justice regards a good which is in some way at least one's own or proper, of which another is despoiled or deprived, as can be seen in the unequal distribution, e.g., of common goods, which do not pertain to individuals but to the community, and are to be assigned to individuals; likewise in defrauding fines which are owed by individuals and are to be paid to the community from the precept of law. Moreover, by transgression of distributive or legal justice there is indeed sin against such kinds of justice, but there is no precept of repairing that transgression, since it is now impossible that one has not sinned. There can indeed only be a new other obligation to be fulfilled, at another time, on another occasion. And thus if on Sunday you did not hear Mass, there will indeed be again an obligation to hear Mass for the following Sunday, but the obligation of the preceding Sunday has now entirely ceased. - The second part is proved, because restitution strictly such is compensation of damage unjustly inflicted; but real damage is inflicted only when the right of property, and commutative justice, is injured; which regards equality of things, and consequently the good which is one's own or proper to another, namely that each one have what is his. Hence the obligation always perseveres until you give to another his right. Therefore. Hence St. Thomas, 2. 2, q. 62, a. 1, says: "To restore seems to be nothing other than to set someone again in the possession or ownership of his own thing." But since "to preserve justice is of necessity of salvation, it follows that to restore that which has been unjustly taken from someone is of necessity of salvation." St. Thomas, ib., a. 2; L. 547; C. L. 2356, 2361 ff.

1321. Resolutions: A superior is not bound to restitution if he distributes the offices of society to those less worthy, because he does not violate the strict right of the more worthy person, nor of the community, which cannot demand anything else except that the unworthy be kept away from offices. But it is otherwise if in a competition the superior preferred the less worthy to the more worthy, because in a competition, speaking of itself, a pact intervenes, from which strict right belongs to the more worthy person. A superior who distributes merely honorific dignities, whether to the less worthy or even to the unworthy, is not bound to restitution, because he deprived no one of his right, although he sinned because of acceptance of persons. One guilty of damage is not held if he denies his crime lest goods be extorted from him; nor is he held who carries out prohibited merchandise against the command of the laws, although from this their price increases. L. 547; l. 4, n. 107; St. Thomas, 2. 2, q. 63.

1322. Whether the obligation of restitution ever arises from violation of distributive and legal justice? From violation of distributive and legal justice accidentally, and because of connected commutative justice, an obligation of restoring can arise. It is proved, for from violation of either of

those kinds of justice real damage to a third party can arise, which by reason of office could and ought to have been avoided; and therefore an obligation arises at the same time of repairing that damage. But this obligation arises because of connected commutative justice; since in that case someone is guilty not only of the common good omitted, to which distributive and legal justice incline, but also of a violated contract, or quasi-contract, by which, in assuming the office, he implicitly obliged himself to prevent damages to subjects or others. St. Thomas, 2. 2, q. 62, a. 7; q. 66, a. 8.

1323. Resolutions: An unjust distributor of public offices is held to nothing toward the worthy person passed over, because he violated no strict right of his. Nevertheless he is certainly held toward society and toward private persons concerning all damages, arising therefrom both to society and to private persons. St. Thomas, l.c. A magistrate who prevents someone from competing for a prize, or forbids the prize to be adjudged to him who surpassed the others in the contest, is held concerning damage. - A magistrate likewise is held concerning damage who afflicts someone with an unjust penalty, if damage follows from it. A magistrate is also held concerning damage who burdens someone with taxes beyond his resources. Gousset 671, 1001; St. Thomas, 2. 2, q. 66, a. 8. Speaking of themselves, those who do not pay just tributes and tolls are bound to restitution, since they are owed from legal justice, which is intimately connected in this matter with commutative justice, by the very fact that someone is part of society, and a right has been acquired by society by force of the law itself of exacting tributes and tolls, so that its necessary expenses to be made may be compensated, if they are actually demanded and their payment is denied. Hence the Roman Catechism, 10, affirms that those not paying tributes and tolls are guilty of theft and rapacity. Gousset 671, 999. Cf. 232.

1324. Whether one unable to restore from goods of the same order is bound to restore from goods of a different order? Resp. Negatively, more probably. The reason is that restitution is replacement into the former state; and justice gives to each his own, not something else. Yet others probably affirm, because one who cannot render the same thing ought to render that which he can. But this follows from equity of right, not from strict justice. For he owes not this, but another thing. Hence through vindicative justice it can be imposed by a judge or superior that someone for injury concerning one genus of goods furnish something in goods of another order; more probably, however, by reason of penalty only, not by reason of justice. Moreover, the injured person has the right of denouncing before the Judge the one from whom he received injury, and therefore of accepting money from that one so that he may omit denunciation. Thus, e.g., a woman violently oppressed by someone can summon the violator before the judge, C. I. Poen. 38, or exact money from the scoundrel so that she may renounce her right. C. A. 1326, 1329, 1330, 1413; C. B. 842; L. 627, 1000; St. Thomas, 2. 2, q. 62, a. 2, ad 1.

1325. Whether restitution made by one civilly incapable is valid? - By positive law, the payment of a thing owed is not valid if it was made by him who was not proprietor of the thing, or was incapable of alienating. Thus according to C. I. 1240; C. G. 1238; C. H. 1160; and according to C. A. 1421, if the debt was not yet liquid. But a payment of this kind, made by one incapable of alienating, although subject to rescission, is not declared invalid by full right. Nor does it seem that there is place for rescission even in the external forum, if the thing owed is certain and the day has arrived. But by

natural law there can be no doubt about the validity of a payment owed, made, e.g., by a minor, by a wife, by an interdicted person.

1326. From what does the obligation of restitution proximately arise? The obligation of restitution broadly accepted remotely arises from an obligation contracted by commutative justice and from violation of commutative justice; but it can proximately arise from the following heads: 1. From the unjust taking of another's thing: such taking injures another's right, and therefore the injured right must be repaired. 2. From another's thing possessed, formally or equivalently existing, and not yet legitimately prescribed: although another's thing was not unjustly accepted, nevertheless another's thing possessed and not yet prescribed is always its owner's, and must be rendered to him. 3.

From the fact that someone has been made richer unjustly from another's thing: if he has been made unjustly richer, another's right has been injured; but an injured right requires reparation. 4. From unjust damaging: he who brings damage to another injures his right. 5. From contract or quasi-contract: contracts have the force of private law; and therefore they oblige one to render to the contracting co-party his right. 6. From law or from juridical sentence: law or the sentence of a judge has the force of obliging in conscience. 7. From unjust cooperation: he who unjustly cooperates in an unjust action, by his cooperation truly injures another's right. L. 534, 547, 548, 711, 927; St. Thomas, 2. 2, q. 62, aa. 1, 2, 4, 6, 7; q. 66, a. 6.

XXI. On Restitution from Unjust Taking

1327. Whether there is an obligation of restitution from unjust taking; what in a case of doubt? It is undoubted that from the unjust taking of another's thing an obligation of restitution arises. For if another's thing has been unjustly accepted, it is possessed either by no title or by an invalid title; and therefore that thing cries out for its owner.

Inst. l. 4, t. 1, 2; St. Thomas, 2. 2, q. 62, a. 6; L. 548. But one thing can be asked here: Whether someone unjustly accepts another's thing when he begins possession with doubt concerning his right. Now in truth, he could begin possession here in two ways: 1. By despoiling another, without any title of itself able to transfer ownership; and in this case, since the peaceful possession of another gives a morally certain right, the despoiler is bound to restitution. 2.

By accepting a thing under another title, e.g., of purchase, donation, etc., from another concerning whom it is doubted whether he is its owner; and then one is bound to inquire into the truth of the matter, and, if doubt perseveres, "he must restore," says Father Gury, 652, "according to the proportion of the doubt, to the probable owner, or to the poor, if the owner is unknown. The reason is that possession begun with doubtful faith does not favor him, and therefore he cannot retain the whole; nor from another source does he seem bound to restore the whole, since he doubts whether the thing is another's and not his." But even if that doubt is not merely negative, but positive, he seems to be held to nothing; for he can then form conscience from reflex principles: no one is evil unless proved, etc.; nor from another source can a certain obligation be imposed which certainly is not established. Moreover, he can use the right of him to whom he succeeds by title of purchase, donation, etc. Wherefore, if that one possessed the thing in good faith and therefore could retain it, the one who succeeds him will also be able to retain the same thing for himself. Lugo d. 17, n. 83. Finally, he can retain the thing by title of occupation or possession until the owner appears; and if he

does not appear, it can rightly be presumed that no owner is present, if, e.g., someone found a gem on the shore of the sea and doubts whether the thing belongs to no one, or was lost by some traveler. Cf. here 1334. But to what one retaining and continuing possession with doubt concerning his right is bound, cf. 1352-1354. - St. Thomas, 2. 2, q. 62, a. 6; L. 547, 625; Gousset 939, 1028; d'Annibale, ed. 4, p. 2, n. 121.

1328. From what fault does the grave obligation of restitution arise in delicts? It arises only from broad juridical fault joined with grave theological fault; likewise from light and very light juridical fault when someone, by grave theological fault, omits that diligence which he was bound under grave obligation to employ. "The reason is that restitution is commonly accepted as a penalty; and therefore we say that, in order that due equality be preserved, for the grave obligation of restoring a thing of grave value, grave theological fault is required. Theological, because since conscience is burdened concerning the obligation, it is necessary that there have been a delict in conscience. Grave, because in order that conscience be held to a grave obligation, it is necessary that the fault have been grave." L. 550, 551; C. A. 1295; Inst. l. 4, t. 3, §§ 6, 7. Cf. n. 1072.

1329. "Whether a venial sin against justice induces the obligation of restoring? If it is venial by reason of smallness of matter, it certainly obliges to restitution under light obligation. But if it is venial by reason of inadvertence or indeliberation... The first opinion affirms.... Yet the second, more probable and more common opinion... teaches that in that case there is no obligation of restoring... neither under grave nor under light obligation. Not under grave, because a grave obligation does not have proportion with that light fault. Not under light, because a light obligation does not have proportion with a grave thing." L. 552.

1330. Whether from a light sin against justice because of smallness of matter there can sometimes accidentally arise a grave obligation of restoring?

Resp. "Affirmatively, and the case is when in the last little theft, completing grave matter, the thief does not advert to the past little thefts; for then he is held under grave obligation to restitution at least of the last little theft.... The graver obligation then does not arise from that last unjust taking... but arises from the unjust retention of grave matter already culpably accepted." L. 553. And in the case of damage inflicted, when this is now grave, grave sin is now present, and the owner certainly is gravely unwilling if it is not repaired. E. M.

XXII. On Restitution from Another's Thing

1331. Whether there is an obligation of restitution from another's thing? It is undoubted that by reason of another's thing there is an obligation of restitution. For this is to restore: to set the owner again in possession of his own thing. Nor indeed is it considered by whom, or by what cause, or whether in good, bad, or doubtful faith, the thing is held. For these do not change the truth that the thing is another's. A possessor is in good, bad, or doubtful faith according as he invincibly does not know the thing to be another's and prudently judges it to be his own; or openly knows it to be another's; or doubts whether it is his own or another's. We shall speak of each gradually and specifically. St. Thomas, 2. 2, q. 62, aa. 1, 6; C. A. 826; Inst. l. 4, t. 1, 2; E. M.

1332. What of a possessor in good faith? A possessor in good faith, as soon as he knows the thing possessed to be another's, is bound to restore it, still extant, to the owner. The reason is that

otherwise he retains another's good while the owner is reasonably unwilling, and therefore violates his strict right.

If meanwhile by his negligence he has made another's thing worse, he is bound to no compensation of damage. If he has lost or destroyed another's thing, even by his negligence, he is held to nothing. "He who neglected the thing as though his own is subject to no complaint." L. 31 § 3, Dig. de Haered. petit.; C. He. 938; C. L. 494; L. 607; C. B. 985, 993.

1333. Note: A possessor in good faith can deduct all necessary expenses, indeed also useful expenses, namely those which preserve the thing and make it better; otherwise the owner would receive more than his own, namely if the thing is still better. He can also claim back voluptuary expenses in those same cases in which a possessor in bad faith can do this. For what is granted to a possessor in bad faith cannot be denied to a possessor in good faith. Cf. 1348. But among expenses are not to be computed fortuitous events, nor damages caused accidentally. Thus, e.g., if in cultivating another's field your horses perished, the value of the horses cannot be deducted, but only the estimation of the labor done by the horses for the cultivation of the field.

C. I. 502, 704, 1013, 1019; C. G. 856, 861; C. B. 994 ff.; C. A. 331, 332; C. H. 454; C. L. 498, 500; C. He. 939; L. 1, 3, 5, 7, 14, de Impensis in res dotales factis Dig. If a possessor in good faith received the thing from him who had received the same from the person who owned that thing and believed himself to be debtor of the same thing, he is by no means bound to restitution, with recourse preserved for the owner against him to whom he himself had given it by error. C. I. 1146; C. G. 1377; C. B. 929, 932. If a possessor in good faith of a stolen or lost thing bought it at fairs, or in a market, or in a public sale, or from a merchant selling similar things, the owner cannot vindicate it for himself except within the time constituted by law and after the price has been paid. C. I. 708, 709; C. G. 2280. Cf. C. H. 464; C. A. 367; C. B. 935; C. He. 934.

1334. Whether a possessor in good faith can retain the thing if, before the time required for prescription, he certainly discovers that the thing is another's, yet it is impossible to recognize the true owner of the thing, whether the thing is movable or immovable? If the matter concerns a movable thing, it seems that that possessor can retain the thing for himself, nor is he bound by obligation to give it, or the equivalent price, to the poor or to a pious work. For that thing can then be equated with a lost thing. Moreover, the finder of a lost thing can retain it for himself if, sufficient diligence having been employed, the owner does not appear, nor is there any hope that he can be found. If the matter concerns an immovable thing, the same seems to be said, for whether the thing possessed is movable or immovable is something material in the reason of justice. Wherefore if in that case a movable thing can be retained, an immovable thing also can be retained. Besides, the same reason can be made here as is made for a lost thing. For in that hypothesis, because the owner can no longer be found, the thing becomes no one's and is acquired by the first occupant. Finally, the possessor of this thing can indeed still retain the thing while waiting until the owner appears. For thus he better provides for the good of the owner himself than if he gives it either to the poor or to a pious work. Hence, if the owner ever appears before the time required for prescription of the longest time, he is bound to restore it to him. But if the owner appears after the time required for this prescription, then nothing seems to have to be restored to him. For this is admitted for the case of a lost thing; therefore also for the present case, which is equated with it. L. 589.

1335. To what is a possessor in good faith bound who alienated the thing? A possessor in good faith who alienated or consumed the thing with profit, sparing his own, is bound, of himself, to restore this profit, insofar as he has been made richer from another's thing. The reason is that profit which is immediately from another's thing is equivalently that other thing itself. Therefore, just as a possessor in good faith is bound to restore another's thing formally existing, so he must restore the same thing equivalently existing. A possessor in good faith who alienated, lost, destroyed, or consumed the thing, although deliberately and with fault, but without any profit, is held to nothing. The reason is that the thing perishes to its owner, and it no longer exists either in itself or in an equivalent; and, as has already been said, "because he who neglected the thing as though his own is subject to no complaint." L. 31 § 3 ff. de Haered. petit. - Wherefore he is held to nothing if he gave away a thing accepted as a gift, or if he sold it, having bought it, for the same price. Gousset 929. - L. 607-609; C. A. 329; C. G. 1238; C. H. 457; C. L. 494; C. He. 938; C. I. 1240; cf. here 1338.

1336. Whether a possessor in good faith must also restore fruits?

A possessor in good faith is in no way bound to restore industrial and mixed fruits, insofar as these correspond to industry. But as regards natural and mixed fruits, insofar as these correspond to the thing, by natural law he is bound to restore them. The reason is that the thing bears fruit for its owner. Therefore, just as the thing naturally bears fruit for its owner, so one's own industry and labor bears fruit for the one laboring. - L. 609, 610; Gousset 931.

1337. What concerning the fruits of another's thing by positive law as regards a possessor in good faith? - According to Roman Law, natural fruits received and still existing must be restored, L. 22, de Rei vind. C. But there is controversy as regards fruits no longer extant or consumed. Yet nothing seems to have to be restored, although the possessor has become richer from them; for "he must profit, if he has consumed them." L. 4 § 2, Fin. regund. Nevertheless inheritance must be excepted, because this is singular in it, that fruits increase the inheritance. L. 9, Famil. ercisc. C.; L. 40, de Hered. petit. Dig. - Does the bad faith of the deceased harm the heir?

Certainly so, if the deceased possessed precariously, by commodatum, deposit, etc., because since the heir cannot change the cause of possession for himself, he truly does not possess; and thus "the fortune of an heir succeeding into the defect is also to be held equal." L. 2, de Fruct. et lit. expens. C. But if the deceased did not possess precariously, then the heir truly possesses, and is a possessor in good faith, and therefore makes the fruits his own. Inst. l. 2, t. 1, de Rer. divis. §§ 35, 36; Reiff. l. 2, t. 13, n. 134; Schmalzgr. l. 2, t. 13, n. 50 ff.

According to C. I. 701, 703; C. G. 549, 550; C. H. 451, 452; C. L. 495; C. He. 939; C. A. 330; C. B. 955, 987, 993, all fruits, whatever they may be, are assigned to the possessor in good faith, provided he possesses the thing itself as proprietor and from a title which by its nature can transfer ownership. But can this disposition of Law also have force in the forum of conscience? It must more probably be affirmed, because it can reasonably be presumed that such is the force of the law, since, understood thus, it promotes the public good much more and removes inextricable complaints and difficulties which would continually be raised concerning the quantity of fruits to be restored, etc. But that the force of the law is not only to deny action in the external forum, but truly to transfer ownership, as in the case of prescription, is plainly clear from its words; for it says: the possessor makes the fruits his own. Voet l. 5, t. 3; Carrière 1052, 1054; Vernier 564; Gousset 931, in a. 550; L. 619.

According to C. B. 988, 2020, an exception is to be made of the possessor in good faith who obtained the thing under a gratuitous title. For he is bound to restore the fruits received to the reclaiming proprietor. Likewise an exception is to be made of inheritance; for the possessor is bound to restore it to the heir with its fruits. Cf. here 1339, 1341. According to C. G. 1697, the seller of an inheritance is bound to include also the fruits received from it after the death of the testator. The same is had according to C. I. 1545. - Cf. here 1341.

1338. To what is a possessor in good faith bound if he has given another's thing to another? If a possessor in good faith has given the thing to another, being otherwise about to give nothing of his own, he is bound to no restitution, as is established from n. 1335. But if otherwise he would have given something else equal or less, and he himself accepted the thing as a gift, he would be bound to restore that equal or lesser thing to the appearing owner who cannot recover his own thing, as is established from the same n. 1335. And he himself accepted the thing as a gift; for if he bought it, he would also be held to nothing according to the aforesaid n. 1335.

1339. To what is a possessor in good faith bound if he has sold to another a thing bought from a thief? In the case of eviction, that is, if the owner vindicated his own thing from the buyer, the seller is bound to render the price to the buyer. The reason is that when eviction intervenes, the contract must be dissolved, and the buyer by that very fact acquires recourse against the seller, since by handing over the thing to the buyer he implicitly obliged himself to repair the damage if perhaps there would be future eviction. - The same, for the same reason, must be said in the case of spontaneous restitution made by the buyer. Of spontaneous restitution: with the exception of the case in which spontaneous restitution made by the buyer would be the cause why the seller afterward cannot recover the price from him who had sold him the thing; for then he is not bound to render the price, because the damage which he inflicted on the buyer by selling another's thing, that buyer in turn inflicted on him by accelerated restitution. C. I. 1497; C. G. 1640. - This same must be held if another's thing has passed into the hands of various possessors under onerous title. For if the last possessor is compelled to render the thing to the owner, both he and the individual buyers have the right of pursuing their own seller, so that they may recover the price paid. The first seller has recourse against the thief from whom he accepted the thing in good faith, judging it to be his own. For a possessor in good faith ought not suffer damage from another's bad faith. L. 601; Gousset 929.

Outside the case of eviction, or, according to some, also of spontaneous restitution on the part of the buyer, the matter is not without difficulty, and is sharply disputed. According to Roman Law, the seller is held to nothing, at least more probably, unless he was made richer from the sale. The reason is that the sale of another's thing with good faith is not held in law as altogether invalid. For although by it ownership of the thing is not transferred to the buyer, nevertheless ownership of the price is transferred to the seller. And this man, even if he later discovers that the thing sold is another's, nevertheless is not bound either to warn the owner so that he may be able to recover his own thing, or to indicate to the buyer that the thing is another's. Thus the more common opinion. Lugo d. 17, n. 106; Salm. c. 1, n. 88, etc., against Billuart a. 10 and others, who oblige the seller to render the price to the owner or buyer because, they say, the sale of another's thing is wholly invalid.

According to Italian and French Law, the difficulty grows, because the sale of another's thing is declared invalid. Therefore, they say, if the contract was plainly invalid, the buyer did not transfer ownership of the price to the seller, and therefore the seller has no right to preserve that price.

Therefore the price seems to have to be refunded to the owner, if he cannot reclaim his own thing from the buyer. Thus Carrière 1047 with others. Yet others rightly contradict, whose opinion seems sufficiently probable. For it is not plainly established, even according to Italian and French Law, that the sale of another's thing has no effects at all. From C. I. 1459; C. G. 1599; C. H. 1474, these things merely can be deduced: 1. That the owner of the thing preserves his right in it. 2. That the buyer is subject to eviction. 3. That the seller in the case of eviction or restitution on the part of the buyer is obliged to restore the price to the buyer. Nothing beyond these can be deduced from the practice of tribunals. Moreover, what cause is there between the seller and the owner of the thing? What sort of recourse can the latter attribute to himself against the former? Namely, the owner has against the seller neither a personal action, because no fraud intervened, nor a real action, because that man does not have the thing. In addition, it would be very harsh that he who neither still has another's thing, nor has been made richer from it, be obliged to undergo so great an inconvenience voluntarily. Therefore to obtain his right, or the reparation of the violated right, the owner has recourse against the actual possessor of the thing indeed, or against the thief, but in no way against the others. Gousset 929; Gury 638; L. 608.

According to C. B. 932, the buyer of another's thing, if he acted in good faith and has possession of it by the delivery of the thing made to him, acquires ownership in the thing bought. According to C. A. 333, only this is had: that a possessor, even in good faith, cannot demand from the owner of the thing the price paid by him for the acquisition of that thing. But these things pertain nothing to the seller. And in a. 1336 it is said that from the general rule no one is bound to repair damage caused without his fault or involuntary action. But art. 931 holds the seller only by the obligation of preserving the buyer unharmed in the case of eviction. If another's thing has perished in the hands of the buyer, the possessor in good faith who first bought it and then sold it is held to nothing. For he is not held by reason of the thing, since he no longer has it; nor by reason of damage, since he is not the cause of its destruction, nor from another source has he cooperated in any way formally in the taking away of the thing. Gury 641; C. A. 329.

1340. If someone in good faith bought another's thing for a moderate price and sold it for a greater price, whether he is bound to render the profit received to the owner? Resp. Negatively, if that profit is to be attributed to extraordinary industry, e.g., if he went to another place with notable labor so that he might find an opportune occasion of selling the thing more dearly, etc. The same must be said if the thing, during the time of detention, was made better by the care of the detainer. - Resp. Affirmatively, on the contrary, if the thing increased from its own nature or from the common estimation of men, but not from the industry of the detainer, because in that case it increases for the owner. Thus Gury 640. But cf. here 1337, 1339, 1341.

But if, apart from the three aforesaid cases, someone has bought a thing at the lowest price and resold it at the highest, some think he can retain what exceeds the lowest price, because that whole profit seems to be the fruit of the industry of the possessor. Some say he can retain what exceeds the middle price, because this alone can be held as the fruit of the industry of the possessor; some say the whole must be restored, because the just price of the thing belongs to the owner of the thing; finally some say that nothing must be restored: not the moderate price, because it corresponds to the price for which he himself bought the thing; not its excess, because he himself is the one who made

this profit by his own industry, and it is only the fruit of his commerce and labor. Gousset 929, 930. Cf. here 1337, 1339, 1341. - Lugo d. 17, n. 20; Sanchez in Dec., l. 2, c. 23, n. 27; Gury 640.

1341. To what is a possessor in good faith bound if he has sold to another another's thing accepted gratuitously? In the case of eviction, he is bound to repay the damage to the buyer, as in the preceding case. Cf. 1339. Outside the case of eviction, namely when the thing cannot be recovered by the owner, either because the last possessor consumed it, or because he no longer appears, the seller, according to the first opinion, must refund to the owner the whole price received from the buyer. The reason is that from that whole price he has truly been made richer, nor therefore does he suffer any loss on its occasion, while on the contrary the owner, unjustly despoiled of his own thing, is compelled to undergo the whole damage of the thing. Hence this owner must be kept unharmed from the profit which the seller received without any title. L. 608; Vogler 66.

The other opinion frees the seller from every obligation, because the owner can have no recourse against him, no otherwise than in the preceding case, since altogether the same reasons are valid, which it will help to weigh. Indeed, although the sale of another's thing is by that very fact null as regards transferring ownership of the thing, it is not nevertheless by that very fact null as regards acquiring ownership of the price. Therefore, excluding the case of eviction or spontaneous restitution, the seller is bound to nothing both toward the buyer and toward the owner. And indeed, if this reason is valid in the case in which a possessor in good faith bought the thing from a thief, cf. 1339, the same must also be valid in the case in which he received the thing gratuitously; for this gratuitous acceptance is altogether extrinsic to that contract of sale, nor therefore does it cause him not to acquire ownership of the price. Besides, the seller would have to restore the price either to the buyer or to the owner. But he does not have to restore it to the buyer, for the seller is bound toward the buyer by no other obligation except that of furnishing indemnity for eviction or even spontaneous restitution; but outside this case the buyer suffers no damage at all. But again neither does he have to restore the price to the owner, for the owner has against the seller neither a personal action, because no fraud intervened, nor a real action, because that man does not have the thing. Nor is it valid to say that, although he does not have the thing materially, nevertheless he has it formally in the price accepted for it; for in every contract of sale, since on one side ownership of the thing is transferred, while on the other ownership of the price is transferred, the price is no longer the merchandise sold, nor does it represent it; but it brings only the obligation for the seller of preserving the buyer unharmed in the case of eviction. And this appears more clearly in the sale of another's thing; for in it ownership of the merchandise is not transferred, yet ownership of the price is transferred; therefore the price, as being the seller's, is in no way the merchandise, which belongs neither to the seller nor to the buyer. "Nor can it be said," says Father Gury, Cas. 608, "that the price of the thing represents the thing itself." And D'Annibale, ed. 4, p. 2, n. 125: "This is not asked, if perhaps I bought a thing from another, whether I bought it with another's money, for instance stolen money; because the thing does not succeed into the place of the price; nor, if I have sold another's thing, does the price succeed into the place of the thing." Therefore the seller, not only if he bought the thing, but also if he received it gratuitously, after he has sold it, has it neither materially nor formally. The seller acquires ownership of the price of the thing sold, which consequently is in no way the equivalent of another's thing which he no longer has. The price of the thing is not substituted for the thing, nor does it in any way put on the nature of the thing. If the thing is immovable, the price of the thing always remains movable. Troplong, della Vendita, cap. 1, art. 1592, num. 162; cap. 5, art. 1653, n. 614.

In addition, the reason on account of which a seller who received the thing gratuitously would have to restore the price to the owner, if the last possessor of the thing does not appear or has consumed the thing, would be only this: because the seller has truly been made richer from that whole price, and therefore suffers no loss on its occasion; while on the contrary the owner of the thing, unjustly despoiled, is compelled to undergo the whole damage of the thing. But 1. it is one thing that someone is made richer from another's thing, another on the occasion of another's thing; one thing that someone is made richer unjustly from another's thing, another that someone becomes rich without any injury to another. Moreover, the seller indeed becomes rich on the occasion of another's thing, nor does he become rich unjustly; and this is not illicit. 2. That the owner alone should suffer damage in the case is accidental. For his legitimate right is no other than against the thief and against the actual possessor of his own thing. If he cannot pursue that right, it is altogether accidental.

Finally, in the case in which the seller, who received the thing gratuitously, sold it to another, and the thing perished in the hands of the buyer, those who oblige the seller to restitution do not agree among themselves: for some probably say that he must restore to the buyer, because the thing perished to the owner, and the buyer has the right to recover his own money since the sale was invalid; others probably say that he must restore to the owner, because, since the owner has been unjustly despoiled of his own thing, and the buyer has truly suffered no damage, equity requires that the owner be made unharmed. But if the right both of the owner and of the buyer is only probable, probably also the seller is held to nothing, and possession in fact prevails, according to the common rule. Gousset 930; Gury 639, 641. Therefore the owner of the thing has recourse only both against the actual possessor of it, if there is one, and against him who at the beginning unjustly accepted it. Gousset 980, 985.

Prescriptions of more recent Law: The heir of a depositary who in good faith sold the thing which he did not know was deposited is obliged either to restore the price received, or to cede his action against the buyer who has not yet paid him the price. C. H. 1778; C. I. 1851; C. G. 1935. - The apparent heir who in good faith alienated a thing of the inheritance must pay only the price, or cede the action for it not yet paid. C. I. 933. - Likewise, he who in good faith received a thing not owed to him and sold it must restore only the price of sale, C. G. 1380, or cede the action to obtain it, C. I. 1149; C. H. 1897. He will be able to retain the excess of the price for himself. C. I. 1149; C. G. 1380; Gousset 921 and in a. c. But he who has consumed the price without having been made richer thereby is held to nothing. Gousset, l.c. Cf. 1124. According to C. B. 816, if someone without right disposes of some object, whence some effect arises as regards its owner, he must restore to the latter that which he received by force of that disposition. - If the disposition was gratuitous, the same obligation falls upon him who by force of that disposition immediately acquires juridical advantage. - If a prestation is made to one not having right to it, whence effects arise as regards the one having the right, that one is bound to restore the prestation to him. 818. The obligation of restitution extends to produced fruits received and to everything which has been received by virtue of the acquired right, or under title of reparation because of destruction, deterioration, or taking away of the object to be restored. If restitution of the thing is not possible, its value is restored. The obligation of restitution of the thing or of its value ceases insofar as he who received the thing was not made richer thereby. - 822. He who gratuitously remits to a third party what he himself received, if he himself by virtue of this liberality is no longer bound to restitution of the thing by which he had been made richer, that third party is bound to restitution, since he did not juridically obtain that liberality. - 988.

A possessor as owner of another's thing, under gratuitous title, is bound toward the true owner of it to restitution of the fruits received, even before they are demanded.

1342. Whether a possessor in good faith, after a sale or donation has been made of another's thing and the error has been discovered, is bound to warn the donee or buyer so that he may render the thing to the owner, or the owner himself so that he may be able to recover his own thing? Resp. Affirmatively, if he can do this without his own grave inconvenience. For no one, precisely by force of charity, is bound with his own grave inconvenience to help his neighbor constituted in some grave necessity, whether temporal or even spiritual. Nor is anyone, precisely by force of justice, bound with his own grave inconvenience to repair or impede the grave damage of his neighbor, whether it is temporal or spiritual, unless from piety, from contract or quasi-contract, from formal grave and efficacious injustice, or from juridical sentence, or the authority of law. L. 601; Gury 637.

1343. Whether he who in good faith bought a stolen thing can return it to the thief in order to recover his own price? Resp. Negatively, if the owner appears, reclaiming his own thing from him; for then he must render it to him, even with the loss of his own price, because by natural law the owner can seize his own thing wherever he finds it. Nevertheless an action is given to the buyer against the thief. C. A. 333. Except according to C. I. and C. G. if the thing was bought in a public market, or from one who is accustomed to sell things of this kind; for then the buyer is not bound to render the thing to the owner unless the price is paid. But this disposition of law, according to several, has force also in the forum of conscience, because it is very useful to the public good, to the tranquility of possessions, and greatly favors commerce. Cf. 1333; Bouvier, de Possessore bonae fid.; Carrière 1041; Gousset 1027.

If the owner is indeed known, but unaware of the thing, the first opinion, "very probable," denies, "because the thing snatched from the hand of the thief has now obtained a better state; and therefore if he were to return it to the thief, he would throw it into a worse state, and thus would inflict injury on the owner." The second opinion, "perhaps more probable," affirms, "because you are not bound to preserve the thing for the owner with your own damage." But since each one has a right to guard against his own damage, there certainly "is not forbidden to him that action which of itself is necessary and direct for repairing his own damage, although indirectly and accidentally damage comes to another.... Yet it must be noted that this opinion can have place only when no other way of recovering his own price is available to the buyer except by restoring the thing to the robber." L. 569.

If the thief, or another seller, does not appear, or does not wish to render the money, the buyer, once the owner is known, cannot sell the thing to others, nor turn it to his own uses in order to keep himself indemnified, because he is not the owner of the thing; but he must render it to the owner, notwithstanding the loss of the price. He preserves recourse against the seller. But if he cannot find him, the damage must be undergone by him. Cf. 1351; C. A. 333.

1344. Whether he who buys a thing from a thief in order to restore it to the owner can reclaim the price from the owner? Resp. Affirmatively, if he bought it at a very modest price. For he usefully conducts the owner's business. But he who usefully conducts the owner's business is not to be defrauded of the price which he paid for the utility of the owner.

C. A. 333. - Resp. Negatively, speaking of itself, if he buys it at an altogether just price. For the owner on one side is not bound to buy his own thing, and the buyer on the other side in that case would not

usefully conduct the owner's business if he could compel him to pay that whole price. Wherefore in the case he can reclaim only the part which, from the management of affairs useful to the owner, he could reclaim. Speaking of itself; for if the owner were prepared to recover his own thing at whatever price, then the buyer could demand this whole price, because then in fact he usefully conducts the owner's business. C. A. 333. - But what if the buyer had indeed judged that the thing was valued by the owner at so much, but falsely? Some stand for the buyer, others for the owner. "Tamburini settles the dispute, establishing thus: that the just price, however enormous, must be paid to the buyer if indeed he suffered himself to be deceived relying not on light but, in the judgment of prudent men, grave foundations; otherwise if by lightness of mind and without the matter being well weighed." Ithur., Cas. 4, n. 5. - L. 600.

1345. What of a possessor in bad faith? - A possessor in bad faith must restore the thing itself, materially or formally existing, for the thing cries out for its owner. Moreover, he is bound to compensate all damages which came to the owner from the unjust possession of the thing, for he is the per se efficacious cause of those damages. - Likewise he is bound to restore all those things in which he has been unjustly made richer from the unjust detention of another's thing; for no one can justly become rich from another's injury. C. A. 335; C. B. 985, 987-990, 992; C. He. 940; C. L. 496. According to C. I. 1147, he who received payment in bad faith is bound to restitution both of the capital and of the interest or fruits from the day of payment.

1346. Resolutions: If the thing had varying value, the possessor in bad faith is bound to restore the thing to the owner, if he has it, whatever value it now has, for the thing increases and decreases for its owner; and besides to compensate damages, if any followed, for instance if it was made worse by his fault, if the owner would have sold it at the time of greater value, etc.

But if he no longer has the thing, he must restore it according to the value which it had then, when it perished or he alienated it, because, since the thing perishes to its owner, and it then perished according to the value which it then had, no other obligation now remains except of that value which was then equivalent to the thing and represented it. Likewise, since when the thing was alienated it pertained to the owner, and pertained to him according to the value which it then had, that value is consequently owed to the owner. Likewise he must compensate damages, if any followed, for instance if the owner would have preserved the thing up to the time of receiving the greatest profit from it. And certainly, if then the thief had restored the thing to the owner when it perished or he alienated it, he would have had to give nothing else to him except the thing itself, whatever value it then had, and compensate losses incurred or profits ceasing, "according only to the estimation of the hope." L. 768, 619, 620, 621; C. H. 1896; C. I. 1147, 1148; C. G. 1378, 1379; C. B. 849.

1347. Whether a possessor in bad faith must also restore fruits? Speaking absolutely, standing in the rigor of principles, he would have to restore all fruits, after expenses are deducted, as will be said in the following number, because the thing bears fruit for the owner. Yet, morally speaking, when the matter concerns theft of a small and very common thing, e.g., of a hen, it suffices if the value of that thing is restored, because by common estimation the owner of the thing has suffered no other damage. For if he wants to have another similar thing, he can very easily procure it for himself. Hence one must restore neither the eggs nor the other chicks obtained from it. L. 621; Gousset 935; C. B. 987, 988, 990; C. L. 497.

1348. What of industrial fruits and of expenses made? - A possessor in bad faith can retain all industrial fruits and deduct expenses, both necessary and useful. The reason is that labor bears fruit for the one laboring; but the owner himself would have made necessary expenses to preserve the thing for himself; and useful expenses increase the thing and render it better for him. It is in the owner's power to refund either as much as was expended, or as much as the land has been made more valuable. Indeed, in the forum of conscience and before the sentence of a judge condemning him to the penalty of the delict, he can deduct even merely voluptuary expenses where they can be separated while the substance of the thing remains intact; for no right of the owner is injured thereby; or if they cannot be separated without detriment to the thing, and the owner would also have made them, or wishes to sell the thing, but not in the opposite case, because again in one case the owner suffers no damage, but he does in the other. - L. 618; C. A. 336; C. I. 450, 705, 1150; C. G. 548, 555, 1381; C. B. 850, 852, 994 ff.; C. H. 453, 455, 456; C. L. 497, 498, 499, 502; C. He. 940.

1349. Whether a thief who stole a thing otherwise certainly going to perish is bound to restitution? - Resp. Affirmatively, after deducting expenses made, with the price of the labor employed to free the thing from danger. The reason is that that thing, now snatched from danger, does not cease to pertain to the owner, although it was previously exposed to the greatest danger. Resp. Negatively, if the thief immediately consumes the thing remaining in certain danger, e.g., food or drink already going to perish in a fire, because a thing not freed from danger is of no value for the owner, since it is estimated at no price. Besides, the owner cannot then be reasonably unwilling that a thing certainly going to perish for him be consumed by another. Several extend this to the case in which another's thing is withdrawn from proximate danger which is foreseen, and is immediately consumed; e.g., if you take another's wine certainly about to be seized by a hostile incursion, and drink it with family or friends. The reason is that since it is immediately consumed, by moral estimation it still has no value. Lugo d. 18, n. 77, 144 seq.; L. 620; Elbel 80.

1350. Whether a thief is bound to restitution if the stolen thing has perished with him? - Resp. Affirmatively, absolutely, if it perished by the fault of the thief or of any other, because the thief was the efficacious cause of the damage, whether he himself or another lost or consumed, gave away, or destroyed the thing from culpable negligence. Resp. Affirmatively generally, if likewise the thing perished with the thief even without any fault of his. The reason is that the thief, by taking away the thing, took upon himself the whole danger of it. Generally: for it would be otherwise if the thing would have perished with the owner at the same time and by the same case, or from its intrinsic defect, because then no damage at all is inflicted on the owner. More probably this holds even if the thing certainly would have perished at the same time and in the same common danger in which it perished with the thief, e.g., in the same fire or in the same public calamity. The reason is that then the theft was not the cause of the damage, but the thing would equally have perished in the same way and time. L. 620; H. A. 79; Lugo d. 18, n. 141; Vogler n. 501; C. A. 338; C. H. 1896; C. I. 1148, 1298; C. G. 1302, 1379; C. B. 989, 990.

If the thing would have perished at the same time with the owner; because if it would have perished beforehand, and it is to be ascribed to the theft that it did not perish, it was always crying out to the owner while it remained with the thief, nor would it have perished if it had already been restored; therefore the thief is bound to restitution.

But if it would have perished afterward with the owner, the same obligation of restitution presses for the thief, who at that instant in which the thing perished with him contracted the obligation of restoring. In the same danger; because where the danger is altogether diverse, it can well be imputed to the thief that it perishes, because without his theft the thing would not have been exposed to this danger, although it would have undergone another risk. Yet some contradict, because, they say, it is the same whether the thing perishes in this or in another danger, when each risk coexists at the same time. L. 620.

According to Roman Law; Italian 1208; French 1302; Austrian 338; Spanish 1185; German 848: in whatever way the thing perished in the hands of the possessor in bad faith, he is held to restitution. Yet he does not seem to be obliged to restitution before the sentence of a judge, unless it is established that he is obliged by natural law, because this was constituted as a penalty, out of hatred of theft and violence. Carrière 1072; Gousset 933, in a. 1302.

1351. Whether a buyer in bad faith can restore the thing to the thief? Resp. "Doctors more commonly deny this.... But Holzm., Elbel, etc., still affirm. And Lessius calls this opinion not improbable. And indeed not without merit Busenbaum thinks it absolutely probable; indeed Lugo says perhaps more probable. The reason is that although this man sinned by buying the thing in bad faith, nevertheless after the purchase he has the right, just as a buyer in good faith, to rescind the contract by rendering the thing to the thief, as was proved above." L. 570, 600; cf. here 1343. Indeed D'Annibale, ed. 4, p. 2, n. 242, says: "Even if it is not of interest to you, I think an action for damage cannot be brought against you, since you set him back into the former state." Yet C. B. 851 does not free the one restoring it if he knew the right of a third party.

1352. What of a possessor in doubtful faith? - A possessor in doubtful faith can be such either at the beginning or only during the course of possession. Concerning the first case it has been said above, n. 1327. Concerning the second, the discussion is here. - A possessor in doubtful faith must inquire after the true owner of the thing; otherwise he exposes himself to the danger of retaining another's thing through his own culpable negligence. Once inquiry has been made, and doubt perseveres, he can retain the whole thing if before the doubt arose he possessed in good faith. The reason is that peaceful possession of a thing in good faith exhibits moral certainty. L. 547, 608; Gousset 940, 1028; C. A. 323; C. I. 687; C. G. 550; C. H. 433.

1353. What if a possessor in doubtful faith neglects to inquire after the true owner of the thing? Inquiry having been neglected, if the owner can no longer be found, "it seems," says Father Gury, 653, "that something must be restored to the poor according to the proportion of the hope which the owner could have had of recovering his own thing. Generally that hope does not reach half the price, but is of much lesser value." - But that resolution does not seem capable of demonstrative proof from the principles of law; rather the opposite seems to be drawn from them. For if up to now someone has neglected to inquire, he can still institute inquiry in the present. In addition, since it is probable that there is in fact no owner, because the thing probably is not another's, it is not established that this possessor culpably deprived the owner of the hope of recovering his own thing. Likewise, although someone neglected to make that inquiry, he always has in his favor the prior possession of the thing, altogether peaceful before the doubt arose, and therefore even now he can invoke in his favor that known principle: The condition of the possessor is better.

This can be confirmed from another resolution which the same Father Gury has, 655. For, according to the praised theologian, a possessor in doubtful faith who began to possess in good faith, if, after inquiry has been made, he finds that the thing is more probably another's, more probably is not bound to restitution, "because from certain possession a morally certain right arises. In addition, until the other has proved his certain right, the axiom holds: The condition of the possessor is better. St. Lig., l. 1, n. 35, and others very commonly according to St. Lig., against some who teach that then restitution must be made proportionally." But 1. each of these reasons does not lose its force even if someone neglected to inquire. 2. As is established from the second reason, in fact someone is not held by a strict obligation of justice to inquire, but can always prudently say: The condition of the possessor is better, until the other proves his certain right. 3. That hope of finding the owner through inquiry, even if the doubt is not merely negative, for then, as imprudent, it can be disregarded, but positive, constituting true probability, can by right be equated with probability or even greater probability in favor of the owner. But even while this greater probability stands in favor of the owner, after inquiry the possessor is not bound to restore. Therefore neither before, until the other has proved his certain right. L. 547, 562, 657, 658, 706; l. 6, n. 906.

1354. Note: The conclusion placed last holds also for a possessor in doubtful faith from the beginning of possession, when he accepted the thing under title of purchase, donation, etc., doubting whether he from whom he accepted it is its owner, and he neglected to inquire, and the owner of the thing can no longer be found. For a nearly similar reasoning can be made here. This again can be confirmed from the doctrine of the same Father Gury; for he openly has these things, 656: 1. "If you doubt whether your predecessor possessed goods by legitimate title, you can, after the matter has been weighed and the doubt persevering, nevertheless accept and retain the inheritance, provided it is established that he possessed in good faith.

For if the axiom, in doubt the condition of the possessor is better, favors your predecessor, it also favors you as successor; for in this case the principle of a possessor in doubtful faith who began possession in good faith must be applied, since predecessor and successor make one moral person by law." 2. "In doubt whether someone began in good or bad faith, presumption must be made in favor of the possessor, because delicts are not presumed but must be proved." - Moreover, if someone has this intention, that, possessing the thing as though meanwhile precariously, he wishes to render it to the owner whenever he appears, he licitly takes and retains possession. - Lugo d. 16, n. 96; D'Annibale, ed. 4, p. 2, n. 121; Gousset 1028.

1355. What, in a case of doubt, if possession of the thing is not had? When none of those about whom it is doubted whether they are owners of the thing in fact possesses the thing itself, at least from natural equity, if the doubt is equal, the thing must be divided equally among them; but if the doubt is unequal, it seems to be divided according to the proportion of the doubt. But if the thing cannot be divided, it must be sold, so that the price may be divided; or by consent of the parties it must be conceded to one, who is obliged to render to each of the others his right; or even cast into lots, so that it may be attributed to him whom the lot favors. La Croix 566; Sanchez, decal., l. 2, c. 23, n. 173; Carrière 1101; L. 706; D'Annibale, l.c.; cf. 1469.

XXIII. On Restitution from Unjust Profit

1356. What sort of obligation of restitution is had from unjust profit? Resp. An obligation of restitution is had first from the fact that someone has been unjustly made richer from another's thing. This head of restitution, from the fact that someone has been unjustly made richer from another's thing, does not regard another's thing itself, but profit made from another's thing and fruits received from another's thing; and not any fruits whatever, but fruits immediately received from another's thing, by which someone has been unjustly made richer, as we have already explained. Cf. 1341. But concerning restitution of profit and fruits of this kind we have already said enough. Cf. XXII. Wherefore nothing remains to be added here. Moreover, the obligation of restitution by reason of unjust profit is had in every contract in which someone does not preserve due equality; and restitution then must also be made from another cause, namely from the cause of contract, concerning which it will have to be spoken below. But this must be noted: that as another's thing is a source of restitution, so from the fact that someone has been unjustly made richer there is another source of restitution; for restitution must then be made not of another's thing itself, but of the profit unjustly made, as can be seen, e.g., in a mandatary, borrower, depositary, mutuum by reason of usury, acceptance of what was not owed, etc.

XXIV. On Restitution from Unjust Damaging

1357. Whether from damaging there arises an obligation of restitution? A damager is called one who injures another's right, harming his neighbor in his goods, yet without becoming richer thereby. Wherefore damaging is a source of restitution diverse from the preceding ones. "Whoever damages someone seems to take away from him that in which he damages him; for damage is so called from the fact that someone has less than he ought to have.... And therefore a man is bound to restitution of that in which he damaged someone." St. Thomas, 2. 2, q. 62, aa. 4, 6; Inst. l. 4, t. 3; C. B. 249 ff. Whatever act of man is the cause of damage to another obliges to reparation of that damage.

Nor indeed does only one's own act oblige to restitution, but also the act of another person or of a thing, of which someone has custody and care. And thus the proprietor of a house which falls because of defect of due conservation or construction is held concerning the damage which comes from it. The proprietor or custodian of an animal which causes pauperies is also held concerning damage. If a damaging act of this kind was committed with the intention of harming, it is called deceit and delict; if without that intention, from imprudence and negligence, it is called quasi-delict and juridical fault. C. I. 1151 ff.; C. G. 1382 ff.; C. H. 1089, 1092, 1104, 1105, 1902 ff.; C. A. 1293 ff.; C. B. 823 ff.; St. Thomas, 2. 2, q. 62, a. 1, ad 2; aa. 4, 7; E. M.

1358. What are the conditions required for restitution from damaging? - In order that a damaging action induce an obligation of restitution, by the law of nature a threefold condition is required, namely that it be unjust in itself, and not only in intention; that it be an efficacious cause of the damage, that is, that it really influence the damage of another; and that it be theologically culpable; that is, that it be unjust truly, efficaciously, and formally. It is proved. It must be an action unjust in itself; otherwise there is no place for real reparation of justice. C. A. 1305. It must be efficaciously unjust; otherwise, since someone is not the author of the damage, he is not bound to repair the damage.

It must be theologically culpable; otherwise an obligation in conscience of repairing damage inflicted by injury by no means arises, since injury was lacking in the forum of conscience. - Hence very probably juridical fault alone, excluding theological fault, does not suffice for compensation of damages. But if juridical fault also induces theological fault, then indeed it obliges to compensation of damages. Fault, namely grave. Cf. 1329. - Cf. 1072, 1073, 1077; Ithur., Cas. 27, nn. 2, 3, 5, 12, 13; L. 550, 551, 556, 570, 572, 613; C. A. 1299, 1300, 1306 ff., 1331; C. B. 276, 273, 280, 823, 827, 833 ff.

If several slight damagings were made, and were made to the same person, they become a grave sin, whether because of the intention of grave damage, or because of moral union with a brief interval, or because of conspiracy with others, and the damage inflicted must be repaired under grave obligation. But if small damages were made to different persons and inflicted separately, and not all coalesce together by moral union by reason of distance of time, slight quantity, etc., grave sin is not present, since no one is gravely damaged, and the one damaging does not become rich from another's property, nor consequently is there grave danger of damage for society, and therefore there is no obligation under grave obligation of reparation of the damage.

1359. What must the damager restore? - The unjust damager is bound to restore: 1. The whole equivalent of the thing damaged. Thus, e.g., if someone culpably burns another's house, he must repay its full price to the owner. 2. The whole equivalent of damages foreseen besides the damaging of the thing, if any have come from it. Hence, e.g., if a workman is compelled for some time to omit his customary work because you destroyed an instrument necessary to him, you are bound to compensate him not only concerning the value of the instrument, but also concerning ceasing profit. Concerning ceasing profit: "such damage need not be recompensed equally, because it is less to have something in potency than to have it in act." St. Thomas, 2. 2, q. 62, a. 4. - C. L. 2392.

1360. Whether he is bound to restitution who indeed inculpably placed the cause of damage, but afterward did not prevent it, although he could have prevented it? - Resp. Affirmatively. The reason is that each person is bound from justice to prevent, if he can without great inconvenience, lest his action harm his neighbor; therefore he is also bound to prevent lest the evil following from his action persevere.

Hence 1. he who inculpably set fire under another's house, when he adverts to the danger of fire, is bound from justice to prevent it, if he can. 2. Likewise a pharmacist who by error sold poison for medicine must from justice warn the buyer. 3. Likewise, he who by error said something grave against the reputation of another is afterward bound, once the error is known, to correct it; and, if he does not do so, he sins gravely and is obliged to reparation of all damages which come from this. - L. 564.

1361. Whether damage must be repaired which follows from a cause culpably indeed placed, but already retracted when the damage is inflicted? - Resp. Affirmatively, at least if that damage was determined and foreknown in species. Thus, e.g., if someone voluntarily gave poison to another, and afterward cannot impede its effect, however much, repenting of the deed, he greatly wishes to do so, he will be bound to repair damages arising from the homicide. The reason is that he who placed the cause of the damage always continues to influence it efficaciously.

1362. Whether damage must be repaired which is indeed accidental, but inflicted while giving oneself to an illicit work? - Resp. Negatively, because that damage is not voluntary, since it was not foreseen even confusedly. Nor does it matter that the action was illicit; for this pertains nothing to the reason of justice. Thus a cleric who, giving himself to hunting against the prohibition of the Church, kills a man instead of a wild animal, is no more guilty of injustice than a layman who would have done this. Indeed, damage inflicted accidentally does not have to be repaired even if it happened on the occasion of an unjust action, because it does not have connection with that action. Hence one is not bound to restitution who kills Titius, whom he by no means saw nor knew was present, while he was directing a gun at Caius. - Lugo d. 8, nn. 72, 82; L. H. A. 39.

1363. Whether he is bound to restitution who by his bad example induced others to inflict damage, if he foresaw the efficacy of the bad example? The first and more probable opinion denies, because one who gives bad example is not the cause of the damage, but a mere occasion. For an evil action does not of itself tend to excite others to imitate it. Therefore the other damagers are determined altogether from themselves to inflict damage. - The second opinion affirms, because one furnishing bad example, with foresight of contagion, can be held as an efficacious cause of damage; since in some way he influences the determination of those who inflict the damage. And experience teaches that men are moved more by examples than by counsels, according to the axiom: Words move, examples draw. - L. 537; l. 2, n. 45; Antoine p. 2, c. 3, qu. 15; Billuart diss. 8.

1364. Whether you are bound to repair damage coming to someone on the occasion of your unjust action, e.g., if you stole and the theft is imputed to him? - Resp. Negatively, certainly, if you did not foresee that damage. For you are not the theologically culpable cause of such damage. Resp. Negatively also, more probably, although you foresaw this damage. The reason is that your action, even with foresight of the damage posited, is not its cause per se, but only accidentally. Indeed, probably it must also be denied even if you deliberately acted so that your action might be imputed to him, because this action is always only the accidental cause of the damage, and not the per se cause; for it did not by its nature efficaciously influence that damage. For a depraved intention does not cause that work to be unjust which of itself is not unjust with respect to the third party. - Resp. Affirmatively, if the circumstances ever were such that a true connection would be given between them and grave suspicion concerning another. Likewise, altogether affirmatively, if someone used those means which would offer the gravest suspicion for accusing another, e.g., if he put on his clothes to commit homicide and threw them away stained with blood, etc. - L. 635, 636; La Croix 157.

1365. What if an external work is posited indeed from an evil intention, but, although damage can occur, it is not truly probable that it will follow? There is controversy among the gravest theologians. But the state of the question will be clearer from the following examples, namely: 1. Someone places poison or a snare in a place through which his enemy passes very rarely, but with the intention that he be killed if by chance he passes. 2. A physician employs all the diligence to which he is bound, but does not wish to employ greater diligence out of hatred, so that the death of the sick man may follow. It is asked: whether these are the cause of an unjust death which perhaps will follow, if in fact it follows? There is a twofold opinion. The first, more common opinion denies. The reason is that on one side the external act is not unjust, since the mere possibility of another's damage must not be attended to in human affairs; on the other side, the external act is not made injurious by reason of

the intention, since intention does not influence the efficacy of the cause, or the danger of damage. For then it must be called a merely accidental cause, and the depraved intention does not change its nature. Hence neither is he unjust in fact who digs a well on his own land so that the neighbor's well may dry up. Who certainly would say that the director of a railroad is bound to restitution because he does not send scouts before individual carriages to see whether some person is in the middle of the way and perhaps is to be killed by the passage of the carriages, although he omits this from the depraved will of killing all if perhaps they are there? But the second opinion affirms. The reason is that in the aforesaid cases homicide is certainly against justice and is not excused except insofar as involuntary. But the intention renders it voluntary. For the reason why, excluding the intention, it is not voluntary is that the one placing the cause is not judged to will the effect efficaciously, since the effect is not probably connected with the cause; but the intention supplies that connection and causes the one acting to be its true cause. For the intention of the one acting contributes much to the character of a cause. Therefore. But mere foresight of the possibility of damage in the aforesaid cases would not suffice for the character of injury; rather, the intention of procuring it is also required. - Lessius l. 2, c. 9, n. 133; Lugo d. 8, n. 75; L. 584; C. A. 1305, 1311.

1366. Whether one who thinks from invincible error that the damage inflicted by himself is much less than it truly is, is bound to restore it all if afterward he recognizes the true price, e.g., if someone throws into the sea another's jewel worth 100, while he believes it to be worth only 10? - He is probably bound to restore only in proportion to the known damage, because damage which is invincibly unknown is not judged voluntary. For restitution from a thing unjustly accepted rests on material injury alone; but restitution from unjust damaging rests on formal injury. Moreover, injury is estimated from the mind of the one injuring; and therefore, if by chance an excess was not foreseen in the damage inflicted, it is not imputed. But the opposite does not follow if, on the contrary, an excess is falsely thought, because then damage is not in fact, but in opinion; and damage is not made by opinion, but by action. Nevertheless there will be an obligation of repairing the whole damage if, when suspicion of a greater price arose at least confusedly, the whole damage becomes voluntary. L. 613.

1367. Whether he is bound to restitution who impeded another from the attainment of some good? - Resp. Affirmatively, if the neighbor has a strict right to obtaining the thing, e.g., in the case of competition for some public office. For then someone either himself commits injustice against him, or becomes an accomplice in the injustice done to him by another. - If the neighbor does not have a strict right to obtaining the thing, one must distinguish. It must be affirmed if it is impeded by unjust means, e.g., by fraud, calumny, fear, etc. But it must be denied if it is impeded, e.g., by means just in themselves, e.g., persuasion, requests, etc.; or even if it is impeded by unjust means, but the thing cannot be given without sin, as e.g., if by lies a wife impedes her husband from squandering the goods of the family.

The reason is that in the first case a most true injury is done to another; in the second no right of another is then violated, neither in itself nor in the means; nor is injury had in the third case, since there is an obligation of not giving. For anyone has the right of impeding an illicit act, and therefore commits no injustice in relation to him who for that reason is deprived of some good, although, to impede that evil act, he uses an unjust means. Nor indeed can someone claim any right, whether

proximate or remote, to that good. L. 582, 585, 587, 588, 614, 632, 633; H. A. 61; St. Thomas, 2. 2, q. 62, a. 2, ad 4; Gousset 970-972.

1368. Whether you are bound to restitution if from an evil intention, e.g., from hatred, yet with means of themselves unjust excluded, you turn another away from the attainment of a good to which he does not have a strict right? Resp. Negatively, more probably. The reason is that no injury is inflicted on the neighbor. For evil intention does not suffice for injury, but an external action is required which is the true and efficacious cause of unjust damage. - L. 584, 585; Elbel 108.

1369. Whether he is bound to restitution who doubts whether he himself was the cause of damage? - It is common among doctors that in doubt whether the cause was placed, or whether damage was inflicted, he is held to no restitution. The reason is that the fact is not presumed but must be proved. If the doubt turns on the influence of the action into the damage which certainly occurred, there is controversy. The first opinion, very probable from St. Alphonsus, affirms, because, once the fact of the action is posited, the action is presumed to have been the cause of the evil, if it was truly apt to inflict the damage. The second opinion, from the same Holy Doctor, "also sufficiently probable, denies... and St. Thomas seems to hold this, 2. 2, q. 62, a. 7.... The reason is that general rule, that no one is obliged to restitution unless such an obligation is altogether established, namely that he himself was the true cause of the damage." L. 562. Likewise it seems to be denied if someone probably judges that he has already sufficiently repaired damage certainly inflicted by himself; for the condition of the possessor prevails, and no one is to be despoiled of his own thing unless there is a morally certain obligation. And this also holds in the case of a debtor who probably judges that he has already fully satisfied the debt. For although the obligation was certain beforehand, nevertheless now it is doubtful. - L. 547, 575, 579, 706. Cf. here 1469.

1370. Whether you are bound to repair damage which you inflicted on someone from error, while you intended to harm another, e.g., if you burn the house of Caius, which you think is the house of Titius your enemy? - There is a twofold probable opinion. The first, which several and grave theologians hold, affirms, because in that case all conditions required for urging restitution are present, namely an unjust action, an efficacious cause of damage, and theological fault.

The second, "with Leander, Molina, Tamburini, Lugo, La-Croix... denies that he is bound to restitution, provided he did not intend, not even confusedly, to burn the house of another than Titius.... The reason is that for the obligation of restitution which arises from damaging, principally made because of injury, formal injury is required; nor does material injury suffice, and only effective injury without intention, just as neither does merely affective injury suffice when the external work has not been completed, as this would be. For Cardinal de Lugo speaks thus: 'When I intend to inflict damage on Titius, with the intention of bringing injury to him alone, anyone else being excluded, if afterward through invincible error I injure Caius, the injury with respect to Caius is not formal and affective, but only material and effective, and merely accidental, since I did not have the intention of injuring him, neither in particular nor in general; and therefore I am not bound to restore to him damage which arises from injury. It does not avail to say that for the obligation of restitution it is enough to intend some unjust action and execute it; for the cited doctors respond that for the burden of restitution by reason of damaging, an action materially unjust alone does not suffice, but in addition an action formally, or voluntarily, injurious toward the other who is injured is required. But this voluntary injurious action is lacking in our case, since the action happens beyond the intention,

and it is not formally injurious to anyone; for if I intend only to injure Titius, and exclude anyone else, then I voluntarily offend no one: not Titius, because in fact he is not injured; not the other, because with respect to him my action is altogether involuntary, and therefore the error is about the substance.' Thus St. Alphonsus, 629. But soon showing the distinction between damaging and theft, the Holy Doctor adds: 'For in theft it is not attended to whom he wished to do injury, but whether he truly wished to accept the thing while the owner was unwilling, since the obligation of restitution because of damaging seems to differ in this from restitution because of theft: for in damaging injury to the person of the owner is principally intended, and his damage accessorily; but in theft unjust profit is principally intended, and injury of the owner accessorily; and therefore error of owner, in the case of theft, seems to be about a quality, but in the case of damaging about the substance.' Certainly injury is done to a person, and if it is not done to a person, what injury can there ever be?" Cf. L. 628.

1371. To what is the damager bound in goods of the soul? - Whoever, by fraud, lie, force, fear, or another unjust means, or being obliged from office, by his action strives to inflict on someone spiritual damage, whether of the natural order, e.g., by depriving him of memory, reason, etc., through poison, a potion, etc., or of the supernatural order, e.g., by inducing him into sin, into error against faith, etc.; or strives to deprive him of some good, whether of the natural or supernatural order, e.g., lest he learn a science or art, lest he enter religion, etc., is bound from justice to remove that unjust means. Moreover, he must repair damages which come from that unjust means, provided those damages can be repaired in the same order. The reason of both is that anyone has the right that damage not be unjustly inflicted on him, or that he not be impeded from attaining a good. L. 660-662; St. Thomas, Quodl. 5, a. 25; C. A. 1299, 1300.

But if someone not obliged from office, and without fraud, lie, force, fear, or another unjust means, by his action is the cause to another of some spiritual damage, whether supernatural or natural, or of privation of some good, he is bound from charity to impede, if he can, with greater or lesser inconvenience to himself according to the greater or lesser danger of another's damage, and according to the greater or lesser good of which the other is deprived, lest his action harm his neighbor. For if he does not do this, now his action, the cause of another's damage, which from the beginning was perhaps altogether inculpable, when he now adverts to the subsequent damage, becomes altogether culpable. And if from the beginning it was culpable, he ought not persevere in the fault. Yet he is held to no reparation of damages from justice, e.g., if someone by bad example alone or depraved persuasion, without force and fraud, induced another to sin; or if someone gratuitously, without any obligation of pact or office, and fraud and deceit excluded, badly taught another from mere negligence or ignorance. - L. 660.

1372. To what is the damager bound because of unjust homicide? - Homicides or mutilators more probably must restore nothing precisely for life, member, etc., because these are not estimable by price. But they are bound to compensate all other temporal damages of which homicide was the efficacious cause. L. 7, de His qui effuderint, Dig.; C. A. 1325 ff., 1329; C. B. 823; L. 626.

1373. Resolutions: A homicide or mutilator is bound to compensate damages which are inflicted on the injured person himself before his death, such as expenses made in curing the illness, and whatever during that time and for that cause he lost from interruption of work, omitted business, impeded profit, etc.; unless these are condoned by the injured person himself, they must be paid, in his absence, to the heirs, whoever they may be, to whom the real rights of the killed man pass. L.

630, 631; G. 725; C. A. 1325, 1326, 1337. He must compensate damages necessarily coming to the wife, children, or parents of the killed man. For the unjust homicide is bound to restore also to those to whom by his unjust action he per se inflicted damage. But to those whom the killed man ought to have and could have supported, with attention to age, health, etc., by his unjust action he per se inflicted damage. Therefore. But since the injured right of these persons is not the right of the killed man himself, the latter cannot remit it to the killer. From the very reason adduced, the quantity of compensation to be made by the killer toward such persons is clear. Namely, speaking of itself, he is bound to restore as much as the killed man was bound and able to furnish for their necessary sustenance, and that owed to their state, according nevertheless to the hope of that sustenance. To the wife, etc., not to others whom perhaps the killed man supported, because damage happened to them accidentally. Sustenance: therefore if they are in need, and insofar as and as long as they are in need. Lugo d. 11, nn. 81, 82, 88; L. 630, 631, 632; C. A. 1325-1327, 1329; C. L. 2384 ff.

He must likewise compensate all other damages to the wife, children, or parents of the killed man, for whom the killed man was going to gain and probably was going to leave goods, according to the estimation of this frustrated hope, if namely the killer foresaw this; for by unjust means they are deprived of the attainment of these goods. Cf. 1367. He must compensate whatever damages, and of whomever, which follow necessarily, per se, and unjustly from the death of the killed man; such are damages of creditors. For by killing, he unjustly and with the greatest force impedes the debtor from satisfying the creditors. Cf. 1367. Nor can the killed man condone these, because he has no power of disposing over the rights of others. But others simply deny this obligation, Lessius l. 2, c. 9, dub. 26; others oblige him only in the case in which the one injuring foresaw the damages of creditors, which certainly is altogether necessary; and others assert that the homicide is not bound to restore to the creditors of the killed man, even if the homicide foresaw their damage, provided he did not intend it. Yet that direct intention, whether it is present or absent, does not change the nature of that externally unjust action toward the creditors, and of the most efficacious cause of their damage. Indeed, if the killing, considered objectively, is not a per se cause of their damages, it certainly is not made such by this extrinsic intention. L. 584, 613, 633, 634, 636; C. B. 843 ff.

1374. Note: Although a homicide is punished with capital punishment, the obligation of restitution passes to the heirs. C. A. 1337. For these succeed both into the rights and into the real debts of the deceased. Yet several judge the heir excused from restitution if compensation of damages is not sought, because then the parties are presumed to condone. L. 631, 705.

1375. Whether he is bound to anything who kills another in a duel? - Resp. Negatively, more probably, whether he was the challenger or the challenged. For the one himself who was killed, by consenting to the duel, placed by his consent the whole necessary and sufficient cause of those damages. Except unless he induced the other by force or grave threats, and thus as though coerced him. L. 638.

1376. To what is the damager bound because of stuprum and fornication? Two things must be distinguished: simple injury and damage. Simple injury is compensated by satisfaction; and this is owed both to the woman who unwillingly suffered stuprum, and, regularly speaking, to her parents; if namely it has become known to the father, and the daughter still remains in the father's family, although she is no longer under paternal power. By satisfaction: namely by asking pardon, showing honor, with humble submission of oneself. L. 641. For merely natural damage, or for lesion of bodily

integrity and loss of virginity, nothing, at least more probably, must be restored, because that damage cannot be compensated by money. L. 640. Even for temporal damage which has followed from shameful intercourse, nothing, except the education of the offspring, must be restored when the woman consents to the solicitation; neither to the consenting woman herself, because injury is not done to one knowing and willing, nor to her parents, because no strict right of theirs is violated. Except nevertheless if the fornicator himself reveals the crime, and damage comes to the woman and her parents from the defamation; this certainly must be repaired. C. A. 1328; Gousset 1012; L. 641.

If the violator has violated the girl by force, fraud, deceit, threats, he is bound to repair every damage coming therefrom to her or her parents, because he is the efficacious and unjust cause of this damage. L. 641; C. A. 1328; C. B. 825, 847. Damage must be repaired, namely if the woman, from lost virginity, either can no longer marry, or cannot enter except into worse marriage. But damage from this is present if the stuprum is revealed, by no means if it remains hidden; and therefore restitution then ceases. But if it is revealed by the fault of the woman, although she herself suffered force, she must impute the damage to herself. But if it is revealed by the fault of the man, he is bound to compensate the damage, although the woman consented and had already been corrupted. But if it is revealed by the fault neither of the man nor of the woman, and the woman was unwillingly oppressed, the man took upon himself the danger of damage and is bound to restitution. L. 640, 641, 642, 646.

Restitution consists in this: that the man either dower the woman or take her as wife. Dower: namely if she has no dowry; or, if she has an insufficient one, that he increase it so that the woman can marry equally well. Take her: if namely the woman wishes, lest injury be added to injury if she is coerced. But it belongs to the woman to choose either to accept dowry or to enter marriage; for she cannot be compelled to accept dowry, since the damage inflicted cannot otherwise be repaired more to equality than by marriage entered into; and if the woman wishes marriage, the man, of himself, is bound to marry her in the forum of conscience, especially if he promised marriage, or if the girl whom he seduced conceived thereby, to impede scandal and to secure the lot of the child. Lugo, Resp. Mor., l. 1, d. 44. Yet, because coerced marriages often have an evil outcome, hence doctors commonly teach that it suffices if the man dower the woman, so that she can marry equally well; and, they say, the man is bound to marriage only if he cannot dower the woman, provided he can do this without far greater damage to himself, as, e.g., if the woman is of far inferior condition, if great scandal is feared from the marriage. But dowry is owed only to the woman whose interest it is to marry, and begins to be owed from the time when it is sought. Wherefore, if it has not been sought, and the woman marries equally well or dies, nothing is owed. - L. 641, 642, 644, 648, 649; l. 6, n. 104, 851; Lugo d. 12, nn. 8, 9, 11, 12, 14, 16, 17, 18; Resp. Mor. l. 6, d. 19; C. L. 2391. Each is bound to recognize and feed the son born, because he is the son of each. If the son cannot be recognized without infamy, and the woman suffered force, the man alone is bound to feed him, C. A. 1328; but if the woman makes gain from her body, she alone is bound to feed the son. But in default of the violator, the mother must undertake care of the son, although she admitted no fault, because she is the mother. But then she preserves recourse against the corruptor, who is bound to compensate her for all expenses which she made on the occasion of the offspring.

But if the woman consented to the sin, according to Roman Law the mother is bound to feed the infant for three years, and afterward the father must provide for him. According to C. I. and C. G.

nothing is expressly established. Yet jurists recognize that parents are equally and in solidum obliged at least to feed and educate legally recognized children. This is drawn from C. I. 138; C. G. 203. According to C. A. 139, 141, 143, 163, 166 ff.; C. H. 165; C. B. 1707-1709, 1715, the father is principally obliged, and in his default the mother. But even if the children have not been recognized, nevertheless by natural law the same obligation falls on them. - Carrière 1371; Gousset 1016. According to C. B. 1717, an inquiry of paternity is had, and in cited arts. 1707-1709, 1715, there are obligations, toward the son, of the mother; and, toward the son and mother, of the father. Likewise according to C. He. 302 ff., the mother and son have the right of inquiring concerning the father; and the same obligations of the father toward the son and toward the mother are declared, and in the case also in which he promised marriage to the mother before intercourse. According to C. A. 163, 164, unless he confesses, the father is presumed to be he who had intercourse with the mother at a time apt for conception of the offspring. And the proof is full if his name has been duly consigned in the books of the baptized, with the testimony of the pastor and godparent added. According to C. H. 134 ff., the father and mother are bound to recognize a natural son when some writing of theirs is undoubtedly present, by which they expressly recognize their paternity or maternity; and when, as regards the father, the son is in continuous possession of the status of natural son of the required father, proved by direct acts of the same father or of his family; and when, as regards the mother, the fact of childbirth and the identity of the son are fully proved. A recognized natural son has a right not only to food, but indeed also to a hereditary portion which is owed to him according to the same Code, art. 840. Yet a recognized natural son is of a distinct condition with respect to a legitimated natural son. For the latter succeeds in the first place, and the recognized son in the third place after descendants and after ascendants, art. 807.

1377. To what is the damager bound because of adultery? - Whatever has come to an illegitimate son, as though legitimate, from a false cause must be restored. Hence "there must be restored for the expenses which the husband makes in the food of another's offspring. Likewise what for that cause he gives to him, or leaves after death, which indeed must be rendered to the other sons or coheirs. Likewise if the consanguineous relatives of the husband, thinking the son to be legitimate, give or leave something to him with that in view. For all these things they do and spend from a false cause, and the unjust deceit of the adulterer." Lugo d. 13, n. 2, 34 ff.

On the contrary, what comes in any way to the adulterine son from the mother and maternal consanguineous relatives, by donation, legacy, testament, must not be restored. But both the adulterine son himself and his adulterous parents must restore. The adulterine son must restore from the thing unjustly accepted, and therefore he must restore those things which he still has, or their equivalent in which he has been unjustly made richer. - The parents must restore from unjust damaging, and therefore they must compensate the damage which follows per se and as it were necessarily from the adulterine son being held as legitimate, namely the expenses made by the husband, or by his ascendants, for feeding, sustaining, and educating the adulterine son; and those things which the adulterine son received from them, not from other consanguineous relatives, by gift, testament, succession.

What he received from other consanguineous relatives as brother or nephew is accidental. - Lugo d. 13, nn. 37, 40; L. 659. But the parents must restore, namely 1. the adulteress, unless she was unwillingly oppressed, by leaving more to the legitimate children, by living more sparingly, by

administering the family property more diligently; 2. the adulterer, unless the mother could easily have removed the son. But each is held in solidum, if the crime was voluntary on each side, because the whole must be imputed to each.

If the adulterer extorted the consent of the woman by force or grave fear, he alone is held to repair the whole damage. Lugo d. 13, nn. 9, 13; Less. l. 2, c. 10, dub. 6, 7; L. 659; C. B. 826, 847. But the son must restore if it is certain and evident to him that he is adulterine. Likewise his parents must restore if it is certain and evident that he was conceived from adultery. - Lugo d. 10, n. 17.

Restitution must be made to those who expended or gave, and, when they are deceased, to their heirs; restitution must likewise be made to the legitimate children injured because of the adulterine son, if the illegitimate son accepted the inheritance together with the legitimate ones. L. 659. A cause justly excusing from the aforesaid restitution is if it cannot be made without grave danger and damage to life, liberty, or reputation. Lugo d. 13, n. 58; L. 653. If the crime has become known to the husband, they must compensate the personal injury by asking pardon, by signs of sorrow and submission, and by other things of this kind. Ithur., Cas. 6. If no offspring followed, no restitution is to be made. For then by adultery no damage is inflicted, but only simple injury to the person.

1378. What in doubt whether the offspring is the husband's or the adulterer's, or from such adulterer rather than from some other? Resp. To the 1st: More probably, the adulterers are held to nothing, because the damage is not established. L. 657; Lugo d. 13, n. 17, and many others against others who say restitution must be made proportionally. Resp. To the 2nd: The first opinion holds that each adulterer is held to restitution proportionally. The reason is that the damage is certain, and it is established that it was done by one or the other; moreover, each is an efficacious and unjust cause of the uncertainty which prevents compensation from being demanded determinately from one. La-Croix l. 3, p. 1, n. 704; p. 2, n. 337; Lugo n. 19; Roncaglia c. 2, q. 3. The second opinion denies, because a certain burden cannot be imposed where the obligation is doubtful. Nevertheless, except if the second adulterer adverted, at least implicitly, that by his sin he would be the cause of uncertainty. Likewise, if the adulterers perpetrated adultery by common counsel, or if neither was ignorant that the woman had already been known by another. L. 658. - Elbel, de Actib. human., 161 ff.; cf. here 1369; C. B. 830.

1379. Whether the woman is bound to reveal her crime if she cannot repair the damage in another way? - Resp. Negatively, generally speaking. The reason is 1. because commonly this revelation cannot be made without great infamy for the woman, and often without danger of death, or perpetual hatred, or other grave evils. 2. Because, even with such a means employed, she could repair the damage only with difficulty, especially since the son is not bound to give faith to the mother. Cf. 1380. They commonly except if the mother is of ruined reputation, etc. L. 653. "To the woman who, while her husband is ignorant, conceived offspring from adultery, although she fears to confess this to her husband, penance is not to be denied.... But fitting satisfaction must be imposed on her by a discreet priest." C. Officiis 9, de Poenit. et remiss.; St. Thomas, Quodl. 5, a. 16.

1380. Whether the son is bound to believe the mother even swearing that he is illegitimate? - Resp. Negatively, because from law and common sense no one is bound to believe one witness, even of very proved faith. Yet it is otherwise if besides the testimony of the mother evident indications are added, e.g., the absence of the father for a long time. L. 654.

1381. Whether, if adulterers or fornicators were wealthy, and sent the offspring to a foundling hospital, they would be bound to repay the expenses? - There is controversy.

The first opinion affirms. The reason is that foundling hospitals are instituted in favor of infants, not of parents; nor are their founders to be presumed to have wished to exempt the rich from paying expenses. Lugo d. 13, n. 3; Bouvier, de Restit., p. 2, art. 2; Carrière n. 1373; Rousselot, opusc. de Sexto Praec. - The second opinion denies, because those foundling hospitals were erected for all infants indiscriminately who are cast off by parents, whether they pertain to rich or to poor progenitors. Nor is it an obstacle that subsidies are furnished by the Government or Municipality for those little children, because these are generally attributed for abandoned little children, without attention to parents. In addition, hospices of this kind were instituted for this end, that illegitimate infants be freed from the danger of death, both eternal and temporal, to which they would be especially exposed unless they were received in those pious places. For how many impious and barbarous parents has fear of infamy driven either to procure the abortion of their offspring, or to inflict death on it? Moreover, the children of the rich no less than the children of the poor would incur such danger. St. Lig. 656, who thinks this opinion more probable.

1382. To what are soldiers bound because of damage inflicted on the occasion of military service? - Soldiers are held to nothing by reason of damage in common action, unless the injustice of the war is established to them, because they are not formally unjust damagers. - But soldiers in an evidently unjust war are held concerning all damages which they inflicted by private action; and each is held proportionally concerning damages inflicted by the whole army, unless they were compelled to wage war from grave fear; for then they did not exercise influence into the whole damage either by real action or by common conspiracy. But commanders or Princes are held primarily and in solidum concerning the whole damage inflicted by the army, because they are truly commanding; or, if they did not command the damage, they were bound from office to prevent it. - Lugo, Resp. Mor., l. 6, d. 16.

1383. Whether individual soldiers are held in solidum concerning the whole damage inflicted by the army, in default of others? - Resp. Negatively, more probably, because the individuals are not the cause of the whole damage, but only of a part. For individuals are neither the sufficient nor the necessary cause of the whole damage. Moreover, in practice they would be excused from absolute impotence.

1384. To what are conscripted soldiers who are deserters bound? - They are bound of themselves to return to the camp from obedience or from legal justice. The common good itself of public security to be protected demands military service to be furnished by citizens. For society has the right of its own conservation, and consequently to the necessary means, so that it may be defended from internal and external enemies. Moreover, military force is a means altogether necessary for this. Wherefore military laws of themselves are altogether just, and citizens are bound to obey them. But it is clear that for this law of military service to be just, more soldiers must not be required than are necessary for the security of the republic; and if sufficient volunteer soldiers are present, others should not be compelled to military service, since this is not done without damage to them and their families. But clerics, religious, and sons altogether necessary for feeding a family are to be exempted from the law of military service.

There are some who hold that the law of military service is merely penal, and that soldiers who desert the army sin in nothing. But this is altogether false, since the necessity of the very existence and common good of civil society requires an army, and another more sacred obligation is also added from the oath to be furnished. L. l. 1, n. 147; l. 3, n. 616. Except: 1. If they would meet excessive danger to salvation, e.g., if means of confessing were not available, etc. 2. If returning, they would be punished with death, galleys, or other most grave penalties. 3. If the war is evidently unjust. But certainly deserters are held to no restitution whenever the law does not require others in their place, because they in no way injure commutative justice, since they inflict damage on no other person. But it would be otherwise if others because of them had to undergo the burden of military service.

1385. To what are those bound who hired themselves for others and then deserted military service? - Of themselves they are bound to restore the price accepted to him from whom they accepted it, because there is lacking to them the reason for accepting the money, which is paid only because of the burden of military service. Yet this holds only where he who hired a soldier in his own place is exposed to the danger of undergoing military service. For with this danger excluded, although the deserter does not undergo the burden of military service, he freed the hirer from this burden of military service, which the hirer in fact intended in that hiring.

1386. To what are those not yet enrolled in the military bound, who withdraw themselves from it without just causes? Hired soldiers who by contract and agreed wage have obliged themselves to military service are held by commutative justice to follow it. If they do not furnish it, they are held to restitution and reparation of damage. - Conscripted soldiers who corrupt magistrates or physicians so that they may be declared unfit by them are certainly held to restitution if others must therefore undergo military service in their place. For they are cooperators, as commanding, or counseling, or in some other way, in injustice; for magistrates and physicians are obliged from quasi-contract. Those who by lies, frauds, or prior mutilation deceive the magistrates, according to the more common opinion, are obliged to restitution. The reason is that other exempt young men have a strict right that such means not be employed with their detriment; and those required by lot cannot decline the burden of military service legitimately imposed on them without strict injury, since the law or lots established by law constitute a strict right, by requiring some and exempting others from military service. Bouvier, de Restitutione, q. 2, art. 2. But they say that they are not the cause, but only the occasion of the damage which those suffer, for the efficacious cause of the damage is the military law. But this is false; the law alone is not the cause of the damage. And certainly, if they had observed the law, others would not be conscripted; but the cause of the damage is at the same time the law and the fact of those conscripted against the law. Wherefore they are not held to restitution if by law all apt young men are assumed to military service, because then they themselves inflict damage on no one. But practically speaking, restitution often is not to be urged in the preceding cases, either because those who use the aforesaid frauds do not believe that they sin against justice and it would be difficult to persuade them, or because it is morally impossible to repair the damage inflicted. He who would betake himself to another country to evade military service, so that he might live there, would in no way sin, because while absent he would not be bound by the law of his homeland, since the law cannot be extended outside its own territory. But those already designated for military service who withdraw from it, or obtain exemption without true causes, if no one is to be required in their place by law, sin against legal justice; yet they are held to no restitution. Gousset 1002. Cf. here 234.

But whether it is opposed to distributive justice that only families which have sons fit for military service undergo this burden? Several affirm, and therefore they would then wish that another burden be imposed on rich families if they do not have sons fit for military service. But how can this be opposed to distributive justice, if certain families do not have sons fit for military service and therefore are exempted from this burden? Since this can happen in advance to any family, the condition of all is equal. Otherwise distributive justice would be injured not only as regards families not having sons fit for military service, but also as regards the young men themselves, of whom some are fit and others are altogether unfit for military service. And then, with military service removed, a nation certainly would not endure one day in its being, and would be absorbed by a more powerful nation which desires to extend its dominion. And, by the same reason, all taxes would also have to be abolished, because all would be unjust. For those who have nothing pay no tax.

XXV. On Restitution from Contract

1387. Whether there is an obligation of restitution from contract? Restitution is the restoration of damage given. But damage is said from taking away. Wherefore restitution properly supposes something taken away and as it were diminished from our things. Hence the things which someone owes to another precisely by force of contract or quasi-contract, e.g., by force of sale, purchase, mutuum, commodatum, etc., he does not restore, but renders, as though giving back. Nevertheless, as restitution truly belongs by nature and by law, so also it can belong by pact. And thus, if a borrower by evil deceit broke vessels lent to him, by natural right he is held to restitution.

If by civil fault he did not guard them and lost them, by civil right he is held to restitution. If he took a fortuitous event upon himself, he is also held to restitution, not from natural or civil right, but from pact. Likewise someone is held to restitution and compensation of damages from pact when it is not fulfilled, or if he is constituted in delay. And the same obligation of restitution arises from quasi-contract: "as Princes, who are bound to preserve justice in the land, if robbers increase through their defect, are held to restitution; because the revenues which they have are as it were stipends instituted for this, that they preserve justice in the land." St. Thomas, 2. 2, q. 62, a. 7. - C. I. 1218 ff.; C. A. 919, 1295; Inst. l. 3, t. 14.

1388. Whether theological fault is required to induce the obligation of restitution for damage inflicted on another's thing, which was detained from some contract, e.g., of commodatum, deposit, lease, etc.; or whether juridical fault suffices? - There is a twofold probable opinion in this matter, one affirming, the other denying, concerning which we have already spoken in n. 1072.

1389. Whether theological fault is also required for the obligation of restitution because of damage inflicted on another in fulfilling an office, or in observing a quasi-contract, e.g., if a physician from inculpable error furnished a harmful remedy to the sick person? - Resp. Affirmatively, more probably. The reason is 1. because the obligation of restoring because of merely juridical fault in an office, or in a quasi-contract, cannot be proved either from natural law, or from positive law, or from the agreement of the parties. 2. Because such an obligation would be harmful to the public good; for from it upright and God-fearing men would be kept away from undertaking the affairs of others, as well as from public offices. - Except nevertheless: 1. If someone undertaking some office expressly promises that he will employ such diligence; for thus he is obliged from special pact, especially if for this reason he accepts a greater stipend. 2. When he tacitly promised such diligence, e.g., by boasting

that he is better and more learned than others, and thus preventing the other from seeking one more learned or more diligent; for thus he deceived the other, and consequently is held to the damage following from his ignorance or negligence, even if this in itself was not theologically gravely culpable. Cf. 1072; Ithur., Cas. 27, n. 20; Gousset 923; C. A. 1299, 1300, 1306; Inst. l. 4, t. 3, §§ 6, 7.

1390. What is owed by reason of delay? If the obligation is in a certain sum of money to be handed over, which was not handed over at its own time, legal interest must be paid from the day on which the debtor is in delay, without the creditor being bound to prove the damages which he suffered, C. I. 1231; C. A. 1333. Indeed, from the day of judicial petition, or of special agreement entered into after the time of restitution has elapsed, interest of interest is owed. C. I. 1232. Cf. here 1105, 1106; C. A. 1335. If the matter of the contract is not money, but another thing, and the debtor is in delay in handing over the thing, the thing remains at his danger, although before the delay it was at the danger of the creditor. C. I. 1219. If compensation of damages has been determined by agreement, one must stand by it, C. I. 1230. Otherwise, with deceit not intervening, only damages are to be compensated which were foreseen, or could have been foreseen at the time of the contract, C. I. 1228. But with deceit intervening, all damages must be compensated which directly and immediately come from the unperformed fulfillment of the obligation, C. I. 1229. - C. A. 912, 913, 1324, 1333; L. 704.

1391. Whether there is an obligation of restitution from the sentence of a judge? There is no doubt that an obligation of restoring is present from the juridical sentence of a judge. This is established 1. from the common opinion of theologians; 2. because civil power also, when it legitimately commands, has the force of obliging in conscience. But the civil magistrate commands legitimately, whether according to law he imposes a fine to be paid, or also according to the same law settles lawsuits regarding property. Therefore. But that these laws are just is clear again 1. from the common authority of theologians; 2. from the fact that among all civil nations these laws have flourished and do flourish; 3. because these laws are especially necessary for the right rule of civil society and its common good, whence civil authority can in no way lack the moral faculty of making such laws. L. 631, 641, 711, 927; St. Thomas, 2. 2, q. 62, a. 3; q. 66, a. 5, ad 1.

1392. Whether there is an obligation of restitution from law? There is likewise no doubt, as is established from what has just been said, that an obligation of restoring is present immediately from the law itself, even with no juridical sentence of a judge

XXVI. On Restitution from Law or from Sentence of a Judge

1393. Whether in the remaining laws, while juridical fault stands, someone is bound to restitution before the sentence of the judge, and after it can compensate himself? - St. Alphonsus, 554, speaks of juridical fault, whether it alone, without theological fault, suffices for imposing restitution, and says: "Those laws which in certain cases altogether command restitution indeed oblige, even if sin is absent, but not before the sentence of the judge." But one condemned by a judge "to repair damage because of juridical fault can by no means compensate himself for such reparation, because the sentence of the judge for the internal forum also stands by the one suffering damage." Ithur., Cas. 27, n. 4.

Civil fault is justly restrained, because it is a matter of avoiding common danger of damage. - Therefore, although an owner is not bound to repair damages inflicted on a neighbor by his animals without his theological fault before the sentence of the judge, nevertheless he is bound after the sentence, nor can he thereafter secretly compensate himself. - Hence also "although precisely for life, member, killing, there is no obligation of restoring, nevertheless through the sentence of the judge the one injuring is compelled to satisfy for the injury." L. 631. - If in order to avoid damage, damage is caused to another, compensation is owed to him by him in whose favor that damage was inflicted. Thus according to C. L. 2396 seq.; C. A. 1320 ff.; C. I. 1154, 1155; C. H. 1905 ff.; C. L. 2394, 2395; Inst. l. 4, t. 3, 5.

1394. "Whether he who by frauds or lies, or false witnesses, prevents goods from being applied to the treasury which because of a crime, e.g., of a toll not paid or another, would be assigned to the treasury, is bound to restitution? - Resp. With Lessius... and others very commonly, that after sentence he is certainly bound; but otherwise before sentence, because before sentence the treasury has acquired no right to the penalty, which is not owed except after sentence; or because at least this right of the treasury to penalties is commonly accepted thus." L. 583. But cf. here 1367.

intervening. Consequently, civil law produces such an effect of restitution to be made in only a twofold case:

1. When by the fact itself it transfers ownership, as are the laws of prescription.
2. When again by the fact itself it impedes transfer of ownership, as are laws invalidating contracts by the fact itself, and laws decreeing the legal price of merchandise. Wherefore in no way is someone bound to a fine or to restitution before the condemnatory sentence of the judge, or at least a declaratory one, if the law is penal, or merely prohibitive but not invalidating, or even invalidating, but only by right, not by the fact itself.

XXVII. On Restitution from Unjust Cooperation

1395. Whether restitution is owed from unjust cooperation, and how many kinds are there? - Restitution must be made from unjust cooperation. For there is not always only one cause of damage given, and a cooperator in unjust damage to a neighbor is truly its cause. Hence all those who in any way are an influencing and efficacious cause of the damage that followed are held to restitution; and those who, obliged by office and obligation of justice to guard against damage, did not guard against it. But cooperation in damage to neighbor can be done in nine ways, of which the first six are positive, the later three negative. All are contained in the following verses: Command, counsel, consent, flatterer, recourse, participant, silent, not preventing, not revealing. St. Thomas, 2. 2, q. 62, a. 7; C. B. 830.

1396. What of the one ordering and of the one commanding? - One ordering is he who by his own authority compels another to execute something; but one commanding is he who, by free agreement, commits to another something to be executed, and thus, or with a wage promised, induces him to act, so that he may inflict damage on another in his name. - The one ordering or commanding is bound to repair every damage ordered and inflicted by force of the order or mandate; but otherwise if he only approves damage done in his name. The reason is that in the former case he efficaciously influences the damage. But as regards the latter case, mere approval of a deed pertains nothing to the

reason of mandate; and therefore he who merely approves something already done neither ought nor can be called one commanding. L. 558; St. Thomas, 2. 2, q. 62, a. 7; E. M.

1397. Whether one commanding is bound to restitution if he revoked the mandate before the damage was inflicted? Resp. Negatively, if the revocation becomes known to the mandatary before execution of the mandate; but otherwise if it in no way or too late becomes known, because in the former case the mandate vanishes and does not influence the damage; in the latter it does not vanish and does influence. L. 558.

1398. Whether one commanding is held concerning damages which come to the mandatary in the execution of the mandate? La-Croix with others affirms, because one commanding, by ordering damage, is judged to take upon himself the obligation of preserving the mandatary unharmed. But it seems that this must be restricted to the case in which the one commanding coerced another by fraud, deceit, force, or fear, unless the damage is altogether fortuitous, having no connection with the commanded act. Otherwise the mandatary seems voluntarily to have taken upon himself the whole burden and its consequences; and unless a pact about indemnity preceded, the one commanding will be held not from justice, but only from a certain equity. But not even from equity, if knowingly and willingly he accepted that dangerous mandate. - Gousset 950.

1399. Whether one commanding is bound to repair damage which the executor from invincible error inflicted on another? - Resp. Negatively, because the true cause of the damage is the error of the mandatary. Nevertheless, it must be excepted if perhaps it was too difficult to avoid the error. For although all agree that the one commanding is not held concerning damages which the mandatary inflicted beyond the mandate, yet they limit this if it was in the power of the mandatary to preserve the limits of the mandate. Therefore, also in the case if it was not morally possible to avoid the error, the error must be imputed to the one commanding. C. B. 278.

1400. Whether a superior, ratifying damage, is to be compared to one commanding? Resp. Negatively, if the ratification follows the execution of the damage, because then it cannot influence the damage. But otherwise if it precedes the damage, or regards the proposed infliction of damage and truly influences it. L. 558.

1401. What of one counseling? One counseling sins against justice whenever knowingly and willingly he furnishes an iniquitous counsel by which another is efficaciously induced to inflict damage unjustly, because the damage is imputable also to him. This is also established from proposition 39 condemned by Innocent XI. Hence one counseling who in good faith gave damaging counsel, once the truth is known, is bound to retract it, and indeed from justice. But one counseling is not bound to restitution if the executor was already determined of himself to damaging, so that even without that counsel he would have inflicted the damage; because then the counsel did not efficaciously influence the damage. But it is otherwise if the executor was also efficaciously moved by that counsel, because then it is truly an efficacious con-cause of the damage. L. 561, 562; St. Thomas, 2. 2, q. 12, a. 2, ad 4; a. 7; Gousset 952; C. A. 1300, 1315; E. M.

1402. Whether one counseling is bound to restitution who revokes his counsel before the execution of the damage? Resp. Negatively, if the counsel was naked, that is, simple, because by revocation the whole force of the counsel is removed.

If the counsel was clothed, or supported by motives, there is controversy. Probably also negatively, provided other motives were employed in the retraction, at least equally efficacious, because then the damage is only from the malice of the other, and the counsel is the occasion of the damage but not the cause. Thus Azor, etc., against others whose opinion St. Lig. says is more probable. Except if to a thief determined to inflict damage you showed the way of entering the house which otherwise he would not have found, or something similar; because your cooperation then was truly efficacious, especially if you foresaw that the thief would not change his depraved plan, unless nevertheless you warned him to whom the damage threatens, to which in the case you are bound, as the doctors cited by St. Alphonsus, 559, judge, if without equal or greater damage you can warn the one to be damaged about the impending damage. L. 564; Gousset 955.

1403. Whether one counseling a lesser evil to avert a greater is bound to restitution? Resp. Negatively, if the matter concerns the same person, because the counsel favors him, far from harming him; but otherwise according to many, if the matter concerns another person of whom the damager was not thinking, because this person is deservedly judged reasonably unwilling. L. 565, 577. Yet others hold the contrary, led by the reason that this is not to induce to a lesser evil, but to remove from a greater. Vasquez, Op. de Scand., art. 1, dub. 2, n. 14; Turrianus, de Fide, Spe, etc., disp. 95, dub. 6.

1404. What if another is already determined to damage, e.g., to killing, and you persuade only the mode, namely that he kill by poison, not by sword; in that place, not in another, or at that time? "There is a twofold probable opinion. The first says that you are bound to restitution, because by persuading the mode you concur to the substance of the damage; but by persuading that the damage be inflicted sooner, you are the cause of the whole damage, since the other could have changed his mind during that time.... The second opinion absolutely excuses from restitution, provided it is certain that the other would not have changed his depraved mind.... The reason is that the one counseling then is not an efficacious cause of evil as to the substance of the damage; and this is more probable to me.... And thus likewise they most probably excuse from restitution him who materially cooperates in damage to the owner, namely when the other would still certainly have inflicted the damage without his cooperation, e.g., if someone holds a ladder for him who would climb even without help." L. 563, 576.

1405. Whether one persuading damage from ignorance, but with grave fault, is bound to restitution? - If he gives counsel from his state or office, e.g., of advocate or confessor, he is bound, because then he is truly the unjust and efficacious cause of the damage. If he is not such a person, he is not held toward the one asking counsel, unless deceit is present, or he affects great expertise which he does not have; for that one ought to impute it to himself if he is deceived, since he asks counsel from an unskilled man. But he is held toward a third person if he foresees that damage will follow to him; for one inducing another into an error harmful to him is the unjust and efficacious cause of the damage. - But one giving inculpably a counsel harmful to another is afterward bound, when he adverts to the matter, from justice to do as much as he can, yet without great inconvenience, lest damage occur. L. 564; Gousset 954; C. A. 1299, 1300, 1315.

1406. Whether one knowingly counseling evil to another is held also concerning damages which the latter suffered by executing the depraved counsel? - Resp. Negatively, of itself. The reason is that he inflicted no injury on him, since no injury is done to one knowing and willing. Yet it is otherwise if

the one counseling so circumvented the executor by frauds or sophisms that the latter did not advert to the iniquity of the counsel. Cf. n. 1398.

1407. Whether one counseling is held primarily, or only secondarily, to restitution? - Of himself, he is held only secondarily, because the executor is the principal agent, as one who is judged, speaking of himself, to act in his own name and for his own utility. L. 560.

1408. What of one consenting? - One consenting is held to restitution whenever he knowingly and freely emits a vote or sentence on which the violation of another's right directly depends; that is, whenever he gives efficacious consent to the damage or injury of neighbor. Efficacious consent: because if the consent did not efficaciously influence the injury, he would not be held to restitution, since he would consent affectively indeed, but not effectively, to the harm. Likewise if, with fraud or special pact excluded, he by his vote impeded another from attaining a good to which he had no right. - He is not held concerning damage who authentically revokes the sentence or vote previously given before the wickedness is consummated; nor one voting in good faith, although when the error is detected he is bound from charity, indeed from justice, to revoke his vote, if by time this is permitted to him. - L. 566; St. Thomas, 2. 2, q. 62, a. 7.

1409. Whether one consenting, who gives an unjust vote, is bound to restitution if there are not lacking other votes already sufficient for the damage?

It is certain that all consenting are equally bound to restitution if they gave their votes by agreement, since, once the conspiracy is entered into, there is one moral action of all. It is also certain that all consenting contract the obligation of restoring when they cast their vote at the same time; because since none was then prior or posterior, the sentence resulting from the sum of votes is deservedly attributed to the individual voters. - It is also certain that those are not to be excused from restitution who first give a vote before the number is completed, even if they foresee that others who consent will not be lacking, because they truly influence the damage. For although without them it would have been inflicted, nevertheless through them it is in fact partially inflicted. But whether, with conspiracy and simultaneous casting of votes excluded, the last voters can be excused from the obligation of restoring when the number of votes required for the definition of the business has already been completed, is disputed. Several grave theologians affirm, because voters of this kind are in no way the cause of the damage, since it has already been sufficiently prepared and determined by others. Others deny, because since a sentence is never judged perfect unless it is concluded by the casting of all votes, the last influence the unjust sentence no less than the first. Lugo d. 19, nn. 17, 22; L. 566, 574.

1410. Whether he contracts the obligation of restoring who does not cast a vote when he can cast it? Resp. Negatively, when the right of casting a vote has been conceded to someone as a mere grace or favor to him, because no one is compelled to use a privilege, and consequently here he inflicts no injury on another. - Resp. Affirmatively, if it had to be given from office, and its omission were the efficacious cause of grave and unjust damage. Cf. n. 705.

In present civil society, Ministers, Senators, Deputies, and others of this kind have the vote from an office and public function undertaken. Likewise citizen electors, who are endowed with certain qualities required by law, have the vote from the privilege of the law. A right of voting of this kind is to be exercised for the common utility, from legal justice, which looks to the public good of the

community. Hence this privilege and right of voting, by reason of the conditions required by law, is at the same time an office or obligation of voting by reason of the public good, from legal justice. If Deputies before their election announce a program, e.g., of defending divorce, of expelling religious orders and usurping their goods, etc., are not their electors held for the damage as quasi-mandators? Do not Deputies publicly assert that they execute the mandate of their electors? But if electors abstain from casting a vote, they can indeed sin against legal justice; nevertheless they are not held to restitution, because they are not held to voting from commutative justice.

1411. What of the flatterer? - A flatterer is said to be one who by praising, flattering, or blaming moves another to inflict damage. He who has induced another to inflict damage, by proposing praise, or otherwise the disgrace that will follow, is held for the damages. For such cooperation has the character of counsel, since, namely, motives for acting, of themselves commonly efficacious, are proposed. Wherefore the flatterer is subject to altogether the same obligations as one counseling. - Those who represent to a man affected by injury the greatness of this injury in such a way that, moved by it, he takes revenge, are held to restoring, provided they adverted at least probably that damage would follow. But he is not held to restitution who approves or ratifies a deed already perpetrated, unless he is the cause why restitution is not made, or new damages are inflicted. L. 567.; St. Thomas, 2. 2, q. 62, a. 7.; E. M.

1412. What of recourse, or of one harboring, or providing refuge?

One harboring, namely he who knowingly and freely provides refuge and security to a robber, is held for the damages arising from this. For in this way he efficaciously and unjustly determines, or makes firmer, the will of the thief in the purpose either of stealing, or of not restoring, or of stealing again. In like manner merchants, and especially innkeepers, and all others who receive stolen things, the thefts of sons of the household, servants, etc., or conceal them, or even are accustomed to claim them for themselves in payment for merchandise, drinking bouts, etc., are held to restitution. - Among those harboring are not to be counted those who receive at home friends or blood relatives who are malefactors; nor those who conceal them under hope of amendment, or show them the way by which they can flee, when they are sought for prison or for death. L. 568.; St. Thomas, 2. 2, q. 62, a. 7.; C. A. 1314.

1413. What of one participating? - A participant is twofold: one in the prey, another in the damaging action. One participating in the prey is held to restitution of the part which he received and keeps with himself. For he is a possessor in bad faith of another's thing. One participating in the damaging action, or concurring with another, whether immediately or proximately, in physically inflicting damage, is held to restitution. For immediate cooperation, e.g., carrying off money together with a thief, helping him, is cooperation in the damage itself. But proximate cooperation is that which already begins to injure, e.g., breaking open the door of a house with a thief, and therefore contains injury and brings in the obligation of restitution; namely, unless fear of a graver evil excuses. One participating in the damaging action only mediately or remotely is excused from restitution. For mediate and remote cooperation contains no injury, and is forbidden by charity alone. Nor is it forbidden even by charity if the act in itself is not intrinsically evil, and one furnishes it to avoid grave damage. If the one inflicting damage would certainly have inflicted it in the same way without another's cooperation, the cooperator is excused from restitution, because cooperation is not understood if superfluous work is furnished; for instance, holding a ladder for one climbing, who

without such help would have climbed well enough by himself. L. 563.; Billuart diss. 8, art. 13.; St. Thomas, 2. 2, q. 62, a. 7.; L. 571.; C. A. 1313.

1414. Whether immediate cooperation to damage of neighbor in matter of justice is ever licit? As regards damage to life, it is never licit to cooperate immediately, not even with danger to one's life, because it is never licit directly to kill an innocent person. As regards damage to members, likewise it is never licit, even to avoid death, to concur immediately in another's mutilation, unless perhaps for averting his death; because then it is rather to save life for him. - As regards damage in goods of fortune, three cases are commonly admitted in which, from grave fear, cooperation is licit, for the reason that the owner is not judged reasonably unwilling: namely, 1. if the cooperator can and wills to repair the damage, when perhaps he is held to this; 2. if grave damage would equally and certainly have been inflicted by the principal agent without the cooperator; 3. if the damage is slight with respect to the owner: for then from charity he ought to bear it with an even mind.

But it is controverted whether it is licit for you to cooperate immediately in grave damage of neighbor from very grave fear, e.g., of death, if you cannot or do not wish to repair the damage. Some deny it, because the act seems intrinsically evil, since it injures the right of neighbor, who deservedly is supposed to be reasonably unwilling. And indeed the injured person is not held to consent to this cooperation either from justice, which does not oblige one to save the life of another with so great a burden to oneself, or from charity, which likewise does not urge with so great an inconvenience. Yet others probably affirm it. For one placed in extreme necessity can secretly take that by which he may avoid death, because then all goods are common.

Why therefore will he, to whom death is threatened, not be able to cooperate in the secret taking of the goods of neighbor, in order to rescue his own life from proximate danger? Can the owner be reasonably unwilling? Moreover, with the will of theft excluded, that material action, e.g., of taking and carrying away money, is in itself indifferent. - L. 563, 571.; H. A. tr. 10, n. 56.; St. Thomas, 2. 2, q. 78, a. 4.

1415. What of the silent one, the one not preventing, the one not revealing, or of negative cooperators? Negative cooperators are those who do not impede the damage of neighbor, when from pact or from office they are held to impede it. They are commonly called the silent one, the one not preventing, the one not revealing. The silent one is he who does not speak, does not cry out, does not forewarn the one to be damaged, while he is held to this from office or contract. One not preventing is said to be he who, while damage is being inflicted, does not resist, does not guard the thing, although he ought to furnish this from justice. One not revealing is called he who, after damage has been inflicted, does not denounce the damager to the injured owner, or to a superior, although from office and therefore from justice he ought to denounce him.

No one by reason of damage not impeded is held to restitution unless he is held from justice to impede it; for he who is not bound to impede damage from justice is obliged from charity alone, the violation of which does not oblige to restitution. All who are obliged from contract, or from office, to impede the damage of another, if they culpably neglect this, are held to restoring; for they ought from justice to impede damage. Therefore, if they omit it, they sin against justice, and consequently are obliged to repair damages. In order that one cooperating negatively be held to restitution, it is necessary that he could have impeded the damage without grave inconvenience; because neither a contract nor positive law is usually accustomed to oblige, at least for the most part, with a grave

burden. Nor likewise is he held who does not prohibit, because he would attempt this in vain. Here belong those who hire out their work to others for impeding damage, such as guards of fields, forests, etc. Those also are held to compensation of damage who ought to be over others in some office, if those others cause damage in it, so long as they remain under their vigilance; those who choose and admit incapable or dishonest persons in the management of some business, for by that very fact they assume upon themselves the damages which those persons can inflict in exercising that office; those who inhabit buildings, if someone from their household under their custody, e.g., if a boy not yet having attained the use of reason, throws something into the public way with damage to passers-by; those who do not impede the damage of others from their own thing, e.g., from their animal running through another's field and doing pauperies, from their buildings collapsed by ruin, etc. For from commutative justice each one is obliged that damage not be inflicted on others through his things just as through his actions. Namely these are held from quasi-contract, from quasi-delict. C. I. 1151. seqq.; C. G. 1328. seqq.; C. A. 1309, 1320.; C. L. 2380, seq. 2394. seqq.; C. B. 831, 839, 841.; L. 573.; St. Thomas, 2. 2, q. 62, a. 7.; Cf. 683. "Pauperies is damage given without injury of the doer; for an animal, which lacks sense, cannot have done injury." L. Si quadrupes 1. Si quadrupes pauperiem fecisse dicatur Dig.

1416. Whether a confessor is held to restitution if, from grave negligence or ignorance, he omitted to admonish a penitent concerning restitution to be made? Resp. More probably negatively. For although from office the confessor is held to instruct the penitent well, and therefore sins gravely if he omits this when it is necessary, nevertheless he is not held to this from an obligation toward a third party. Except if the silence of the confessor is equivalent to positive approval, e.g., if, having been questioned, he avoids an answer in such a way that the absence of obligation is suggested to the penitent. L. 578.

1417. Whether a counselor is held to restitution if, through omission of a vote, he did not oppose an unjust sentence? Resp. Affirmatively, if he ought to cast a vote from office, because an office is to be fulfilled from justice, at least commonly speaking, and with a just cause excluded, and unless one sees that he will accomplish nothing by his vote. Resp. Negatively, if he has the right of voting from mere privilege, or from mere favor; or if he could cast a vote only from mere charity; for then he can omit the vote without injustice. Lugo d. 19, n. 61 seq.; L. 574.

1418. Whether he is held to restitution who accepted money from a thief in order to be silent, if he ought not from office to cry out? Resp. More probably negatively, at least of itself. The reason is that he could be silent at the prayers of the thief without injustice, since he is not held from justice to cry out. Therefore, by parity, he can be silent on account of gifts promised or handed over without injustice. But it would have to be said otherwise if he accepted money in order to observe whether anyone was coming; because then he would cooperate positively in the theft. L. 571.

1419. Whether guards not denouncing damagers are held to compensate all damages and also to pay the fine? Resp. to the 1st: Affirmatively, of itself, because they are appointed to impede damages. Except if there is question of things of lighter moment, for which, from custom and the presumed will of the owner, secret admonition suffices. Resp. to the 2nd: More probably negatively, on account of the contrary practice, with which common sense agrees. But the reason is that, unless something else was expressly agreed, these men hire out their work that the owners not be affected by damage, not that they become richer. The same is to be said of a judge not exacting a punitive fine. For the

judge is held to this by reason of vindicative justice, not to enriching another or the treasury, which is altogether accidental. Nevertheless, if a denunciation of the damager has been made before the judge, he is held to punishing and to procuring reparation of the damage. L. H. A. tr. 12, n. 73. Cf. here 1394.

XXVIII. To Whom Restitution is to be Made

1420. To whom must restitution be made? Restitution must be made to the certain and known owner whose right has been injured, whenever it can be done without grave difficulty and injury to another, and no other cause excusing from restitution is present. For through restitution all things return to their former state.

Hence he who has taken away a thing deposited with another, or leased or lent, must restore not to the owner but to the possessor himself. For the possessor cannot without injury be deprived of the right of custody, use, or possession, unless he himself consents. L. 596, 599.; H. A. 64.; St. Thomas, 2. 2, q. 62, a. 5.; C. I. 1241.; C. G. 1239.; C. A. 1424. Cf. 1343, 1351.; D'Annib., ed. 3, p. 2, n. 242. From C. I. 1243.; C. G. 1241.; C. H. 1163.; C. A. 1424., payment made to a creditor is not valid if he was incapable, unless it is proved that what was paid fell to his utility. On the contrary, from C. I. 1242.; C. G. 1240.; C. H. 1164., payment made in good faith to him who possesses the title of the credit is valid, even if afterward the possessor of the credit suffers eviction, for the possessor is held as the legitimate owner.

1421. To whom is restitution to be made when it is uncertain, whether unknown or doubtful, to whom the thing owed belongs? "When goods to be restored, or whatever debts, are uncertain, i.e., you do not know him to whom they are owed, or you cannot approach him, or restore to him; then if you have them without delict, as if you found them, or from a merchant, e.g., through error received two ells of cloth for one, and now he has departed, nor do you know where he has gone, you are held to employ some diligence in inquiring; after which, if there is no hope of knowing the owner, it is probable that you are not held to give them to the poor ... but can retain them for yourself," as if found.

L. 580. And this is valid both then when the owner of the thing does not know with whom his thing is found, and then when he himself knows with whom his thing is, as, e.g., if an unknown traveler left a thing in a public inn. For if he in no way claims it, and otherwise it is impossible to know him, the thing is understood as abandoned. But since it has not been lost, it will have to be restored if it is sought again. For the cause of possession cannot be changed.

Without delict; for a possessor in bad faith restores to the poor or to pious causes. For no one can become rich unjustly from another's thing. And if there is question of debt by reason of damage inflicted, restitution is also to be made to the poor or to pious causes. But if the owners are uncertain or doubtful, restitution is to be made to those to whom the thing more probably or probably is owed.

If the owner of the thing is uncertain or doubtful only among a few, e.g., three or four, "then restitution cannot be made to the poor, but the thing is to be divided among those among whom the defrauded person exists." But if the uncertain or doubtful owner is among many, e.g., among the inhabitants of a place, "then restitution must be made to the poor, as is had in C. Cum tu de Usuris.... Moreover it suffices that it be made to the poor of any place whatever. It also suffices that it be made

to pious places, as they commonly teach.... But if many and various uncertain owners of some community have been affected by damage, then restitution is altogether to be made to the poor of the same injured community." L. 590, 595, 596.; St. Thomas, 2. 2, q. 62, a. 5 ad 3. "If, in the case in which you are held to restore a thing to the poor, you give it to yourself, truly needy, then indeed, even if afterward you are made richer, you are still not held to restore." L. 696.; Lugo d. 20, n. 8.; L. 580.

Whether, in the case of an unknown owner, restitution is to be made to the poor from natural law, from the presumed will of the owner, or from canon law, is a question among the doctors. From canon law. Namely, the restitution to be made to the poor of gain wrongly received from office, C. Cum sit 16. de Iudaeis etc., and from usuries, C. Cum tu 5. de Usur., is extended to all debts arising from delict. But this same disposition of canon law seems to be sought back from natural law, namely that, by that restitution made to the poor in place of the owner, society itself may be made harmless, and so provision may be made for its security; for theft both injures the peace and concord of private persons among themselves and injures the common good and commerce of society. Moreover, since the thing cannot be restored to its owner, nature itself and the presumed will of the same owner require that it yield to his spiritual utility.

"It is to be noted that concerning these uncertain debts a composition can well be made by the Bull of the Crusade.... This composition can also be made through the Sacred Penitentiary.... This composition is usually also conceded for ecclesiastical fruits wrongly received." L. 591, 593. Uncertain, namely, if the owner is unknown, and it is no longer probable that he will ever appear. Composition; to compound is for the Holy See to remit the debt in part, the other part having been expended for pious causes. In order that the composition be licit and ratified, a just cause is needed as regards uncertain debts; and when it has been duly made, even if the owner appears, no restitution any longer belongs to him. But in order that it be ratified as regards ecclesiastical fruits, when these are exacted from a canonical penalty, no just cause is needed, because it falls into a dispensation of the law. - Lugo d. 21.; E. M.

1422. Resolutions: If someone selling in some city has defrauded many in weight or price, restitution is to be made by increasing in the same way the weight or measure, or by diminishing the price toward ordinary buyers, who are presumed to have been damaged, if this can easily be done; otherwise restitution is to be made to the poor.

1423. Whether, when your creditor was forced to make cession of goods, you ought to restore to him or to his creditors? Generally speaking, you ought not to restore to your creditor, but your debt must be manifested by you to his creditors. The reason is that although the creditors of the one ceding do not have direct dominion over his goods, nevertheless they enjoy a strict right that they be preserved harmless from those goods. Yet sometimes you could restore to your creditor, e.g., if the debt is small, if he is upright, and you believe that he will restore to the creditors; likewise if he is in grave necessity, and greatly needs that debt in order to sustain life, because, as theologians commonly teach, one ceding his goods can withdraw those things which are altogether necessary for living. L. 699.; Gousset 772.; C. H. 1914.

XXIX. How Much is to be Restored

1424. What is the quantity to be restored? - As much must be restored as the other has been injured. The reason is that by force of commutative justice equality must be preserved, and when injured it must be repaired. But it is not repaired unless an equation is made between what was taken away and what is returned. Hence, if someone is damaged because that which he actually had is taken away from him, such damage is always to be restored according to the recompense of an equal thing. But if someone has been damaged by being impeded from acquiring what he was on the way to having, it is not necessary to recompense such damage equally, because it is less to have something virtually than to have it actually; but recompense is to be made according to the condition of persons and affairs. L. 614.; St. Thomas, 2. 2, q. 62, a. 1, 3, 4, 5.; C. A. 1323, 1411, 1412.; C. B. 249 seqq., 272.

1425. What is solidarity? Solidarity, or the obligation of restoring in solidum, is the burden incumbent of repairing the whole damage inflicted. For the reason for restoring, or repairing damage, is because one was the cause of the damage. Therefore he who was only partially the cause of the damage is held only to a partial restitution or reparation of the damage, namely in that part in which he himself was the cause of the damage, whether he himself alone injured, or whether others also partially injured separately from him, and then each one is held for the damage inflicted by himself. But he who was the cause of the whole damage must repair the whole damage. Therefore, in order that one be obliged in solidum to restitution or reparation of damage, he ought to have been the efficacious cause of the whole damage. But if only he himself is the efficacious cause of the whole damage, he indeed is held in solidum or to repairing the whole damage by himself alone, but with no solidarity with others. But if, together with other cooperators, he was the cause of the whole damage, then solidarity with others is present, and together with others he is held in solidum to repairing the whole damage. Together with other cooperators; nevertheless, if several, but separately one from another, were an adequate cause of the whole damage, each is held to repairing the whole damage, which however is to be divided equally among all if all restore; and so also all are held in solidum. But if one placed an inadequate cause of damage, e.g., wounded an ox non-lethally, and another an adequate cause by killing the ox, the former is held concerning the wounded ox, the latter concerning the killed one; the former concerning the damage inflicted by himself, the latter concerning the whole, or in solidum. - C. A. 1391, 1302.; C. B. 840.

1426. When is someone the total cause of damage? - Someone can be the total cause of damage either morally, by moving others to inflict damage, or physically, by inflicting and executing the damage, C. A. 1301. Someone is the physical total cause of damage when he places an action necessary and sufficient for the whole effect, as if someone fires upon another in order to kill him; when he places an action sufficient, although not necessary, actually influencing the whole effect, as when two at once fire upon another and kill him; when he places an action indeed insufficient, but necessary, as if four cannot carry away a beam, a fifth approaches, and they carry it away.

The reason is that in all these cases one influences the whole damage by his action. Someone likewise is the moral cause of the whole damage when by mandate, counsel, etc., he moves by an influence necessary and sufficient for inflicting the whole damage; when, together with another or with others acting morally, he concurs by a moral influence of itself sufficient for the whole effect, although not necessary, yet actually influencing the whole effect, as if several are at once commanding, counseling, etc., and any one of them by his mandate, counsel, etc., suffices for the execution of the whole effect,

and actually moves efficaciously to that execution; when he concurs toward the whole effect by an influence necessary, although not sufficient, as if someone shows the sole way of executing the thing.

The reason likewise is that in these cases one morally influences the whole effect. Someone is the cause of the whole damage, whether physical or moral, in the case of a common conspiracy, although he concurs toward the damage by only a partial influence. For with a moral conspiracy and unity of several among themselves standing, each one participates in the influence of the others, and so becomes the cause of the whole.

Someone is not the cause of the whole damage, whether physical or moral, if he is not sufficient for the whole effect, nor is necessary for it, because without him the whole effect would still follow; as if four carry away a beam, and a fifth approaches, helping them, with the case of conspiracy excluded, since the other approaching has an influence merely partial, and since no conspiracy is present, he is not morally joined to the others.

But the question is whether one is the cause of the whole damage who influences it by an influence sufficient for the whole damage, but not necessary, with the case nevertheless excluded that he influences at once together with others; e.g., if someone, without any conspiracy with others, sets fire to another's house, which others had already set on fire, gives counsel already given by others, etc. Others probably affirm, because since the influence is sufficient for the whole damage, then he is the cause of the whole damage, since he influences the whole. Others more probably deny, because since that influence is not necessary for the whole damage, and is added to another influence, the influence in reality is only partial in the whole damage, which would nonetheless have occurred without such concurrence. L. 579.

1427. Whether you are held in solidum in doubt whether you influenced the whole damage? Resp. Negatively, because a certain burden cannot be imposed for an uncertain obligation. L. 577. Cf. C. A. 1303.

1428. Whether you are held in solidum in doubt whether others restored their part pro rata? Resp. More probably negatively, if, after diligent inquiry has been made, the doubt perseveres, because a cooperator is held to nothing besides his own part, except in the defect of another; and if there is doubt about that defect, there is doubt about the obligation.

XXX. In What Order Restitution is to be Made

1429. How manyfold is the order of restitution? - The order of restitution is twofold: the first on the part of those who ought to restore, when several have cooperated in the same damage; the second on the part of those to whom restitution ought to be made. L. 579.

1430. What order is to be observed as regards cooperators? Cooperators in the damage of another are either held to restitution for a proportional part, or are held to restitution in solidum, namely each one to restoring the whole. If the first, no order necessarily has to be observed among them. If the second, order among them necessarily has to be observed. For then the obligation of restoring in solidum is an obligation by which one is held to restore or repair the whole damage inflicted by several, when several concurred together to inflict the whole damage. Therefore it is altogether necessary that order be observed. For he who has suffered damage has a right only to one integral restitution or reparation of the damage. Therefore several damagers cannot be obliged in solidum

absolutely, but only conditionally, namely if others who are held prior do not pay; or if others who are held at once together do not pay. L. 579.; St. Thomas, 2. 2, q. 62, a. 6 ad 3.; a. 7 ad 2.

1431. What order is to be observed as regards cooperators obliged in solidum? - If cooperators concur by a diverse species or grade of cooperation, then in the first place the principal causes of the damage are held; so that there is held: 1. The possessor of the thing, in individual form or in its equivalent, indeed even if he unjustly destroyed the thing without becoming richer from it. 2. The one commanding; yet if the one commanding was the principal cause both of the taking away of the thing and of its destruction, or only of its destruction, then he is held in the first place, as the principal damager. 3. The executor, namely the mere executor of the damage inflicted, as an instrumental cause.

But in the second place secondary causes are held; so that there are held 1. the remaining positive cooperators; 2. negative cooperators. The reason is that each one is held to restitution according as he influences the damage of another. Positive, secondary causes, such as one counseling, consenting, praising, participating, since some are not subordinated to others, are held equally, in the same place, yet more or less according to greater or lesser influence, if there is question of restitution for a proportional part. Among negative causes those are held first which influenced the damage more immediately and more. And so the guard is held first concerning the fire of a forest, then the steward. L. 560, 580.; St. Thomas, 2. 2, q. 62, a. 7.; C. A. 1301, 1302, 1304, 1312.

1432. Resolutions: Secondary causes are held to nothing if the principal cause has restored or has obtained remission of the debt. For secondary causes are held only in the defect of the principal cause. But when the principal ceases, the accessory ceases. Hence, if one of the secondary causes restores, the principal cause is held to make it harmless; likewise, if a secondary cause is freed by the creditor, the principal cause is not therefore freed. For the obligation of the latter is independent of the obligation of the former. St. Thomas, 2. 2, q. 62, a. 6 ad 2, a. 7 ad 2.

1433. What order is to be observed as regards several equal cooperators? - If cooperators concur in the damage of another by the same species of cooperation, or by the same grade of cooperation, then each equally ought to restore in solidum, yet conditionally, without any determined order; for none of them, as more influencing the damage of another, took upon himself a greater burden of reparation. But it is said conditionally, namely if the other cooperators do not restore, or no one pays in solidum. But all are held absolutely to satisfy for a proportional part, since all equally concur in another's damage.

1434. Resolutions: If one of the causes equally obliged has restored the whole debt, the others are held to pay back to him the part which he also gave for them, and each is held for his own part. For in regard to him the reason for restitution in solidum does not press; since each one is not the cause why he first restored the whole and the others do not restore. But if several from causes of this kind equally obliged were to restore, and one could not or would not restore his part, the others would have to divide it among themselves. If the creditor remits his debt to one of the debtors equally obliged, he is judged to remit to the others that one's part; for if he exacted the whole from the others, they would compel him to restitution, and so the remission would be frustrated. L. 581. But the others are still held to restoring their own part, unless the condonation was altogether full, or is deservedly presumed to be such. - From C. I. 1281.; C. G. 1285., remission made to one solidary co-debtor frees all the others entirely, unless the creditor expressly reserves to himself rights against

them. Likewise from C. I. 1195, 1196.; C. G. 1210, 1211., a creditor who consents to the division of a debt for one of his debtors preserves against the others a solidary action, with that part of the debtor whom he freed from solidarity deducted, according to C. G.; and without it being deducted, according to C. I., since the matter was done among others. Moreover, a creditor who receives from one the portion offered by him without any protest tacitly remits to him the solidary obligation. And if for ten continuous years he receives this portion, he will no longer be able to act for the solidary obligation.

1435. Whether the executor is held prior to one counseling for making restitution? - Resp. "If the counsel is useful to the one furnishing it, he himself is held first; otherwise, if it is useful to the executor alone. But if it is useful to each, each is held pro rata; and I think the same if no utility came to either from the damage inflicted. But in the defect of the other, that one is held in solidum." L. 560.

1436. Yet it must be noted that although the unlearned are held in solidum, it is rarely expedient to oblige them to the whole, since they will with difficulty persuade themselves that they are held to restoring the part taken away by their associates. Indeed it can be sufficiently presumed that the owners themselves, to whom restitution is owed, consent that they restore only the part taken away by them, since otherwise there is great reason to fear that they would restore nothing if they were obliged to the whole." L. 579, 580.; Gousset 977.

1437. What order is to be observed in restitution as regards creditors? - The order, as regards creditors, of restitution does not have place unless there are several creditors. In such a case, if the debtor can satisfy all, he can restore in whatever order, because the precedence of one inflicts no damage on another. But if the debtor cannot restore to all, the due order in restitution is to be observed, on account of the opposite reason, namely because the precedence of one inflicts damage on another. Moreover this order is determined by justice itself. For restitution is the reparation of an injured right. Therefore the preference of right determines the precedence of restitution. Now this injured right is the right of property. Therefore a more perfect right of property in creditors demands that they be preferred to others. L. 684.; C. L. 878. Wherefore, first, creditors who are still truly owners of the thing are to be preferred to all others, since they preserve in their own thing not only a right to the thing, but also a right in the thing, while the others have only a right to the thing. And so before all other debts stolen things, deposited things, leased or lent things are to be restored. Secondly, privileged creditors are to be preferred to the rest. For restitution is to be made by natural right, and on account of the private good of persons, which commutative justice directly regards. Therefore, if positive right is added to natural right, prescribing for the common good the preference of some creditors in particular, these indeed by reason of the privilege of the law are to be preferred to the rest, as privileged. And this law obliges in conscience according to the common opinion of theologians, since it is a legitimate law of a superior, passed for the common good. C. G. 2095.; C. I. 1945. Some privileged debts have a privilege over the generality of movables, others over determined movables, others over immovables. If there are several privileged creditors, their preference is determined by the law itself according to the quality of the privilege. And, if several enjoy the same privilege, they obtain payment of the credit pro rata. C. G. 2096, 2097.; C. I. 1953, 1954. Privileged debts over all movables, and subsidiarily over immovables, are in this order: expenses which are called those of justice, funeral expenses, expenses made for illness from the last six months, expenses

for support from the last six months, wages of servants also from the last six months, and credits of the State for direct taxes.

C. I. 1956, 1959, 1963. Cf. C. G. 2101, 2105.; C. H. 1924.; C. L. 880 seqq. - C. I. 1952 seqq.; C. G. 2092 seqq.; L. 14 § 1, L. 45 de Relig. et sumpt. etc. Privileges over determined movables are: certain determined credits of the State; of the emphyteutic canon; of leases of urban and rustic estates; of expenses for cultivation of fields; of the pledge creditor; of expenses for the conservation of the movables themselves; of innkeepers; of transportation and taxes; of indemnity to be furnished by public officials; of sums to be paid by public administrators. C. I. 1958 seqq. Cf. C. G. 2102.; C. H. 1922.; C. L. 880 seqq. Privileges over immovables are: credits for expenses of expropriation of immovables; of the State for land taxes, for rights of registration, for any other indirect tax. C. I. 1961, 1962. Cf. C. G. 2103.; C. H. 1923, 1927.; C. L. 887. Privileges over immovables do not have effect unless they have been legitimately inscribed in the conservatory registers of mortgages. C. G. 2106. Cf. Tropolong in h. a. Thirdly, mortgage creditors are to be preferred to the rest, for these have bound to themselves not only the person, but also the very goods of the debtor. Where there are several mortgage creditors, they have the order constituted by the law itself, either from the day of inscription in the conservatory registers of mortgages, or from the very day of the constitution of the mortgage, according to Reg. 54 of Canon Law in the Sixth: He who is prior in time is stronger in right. L. 690.; Laymann de Restit. c. 11, n. 3 seqq.; C. I. 1964 seqq.; C. G. 2114 seqq.; C. H. 1928, 1929. Fourthly, finally, the remaining creditors, who are called common or chirographary, are to be made harmless. But whether among these some order is also to be established from circumstances of time, persons, contract, delict, and of the things themselves, is a question; and some generally deny it, because commutative justice regards only equality of thing to thing, which is altogether independent of conditions of times, persons, contracts, and the things themselves; others on the contrary generally affirm, because restitution is for repairing an injured right and for making good the damage inflicted; but from various circumstances of time, persons, contracts, things, the right is various, and the damage is less; therefore according to those circumstances an order is to be established in restitution even of common creditors. But chiefly those circumstances are the ones about which the following particular questions are raised. L. 689, 694, 695. From C. I. 1948-1950, 2092.; C. G. 2092-2094.; C. H. 1911., whoever has obligated himself personally is held to satisfy his obligation from all his goods, whether movable or immovable, present or future. Therefore the goods of the debtor are like a common pledge of his creditors, and they are equal in the right of exacting what is theirs, unless legitimate causes of preference exist among them. But the legitimate causes are privileges and mortgages. Wherefore all the others are esteemed equally, and all concur pro rata, if the debtor cannot satisfy all. - C. H. 1921 seqq.

1438. Whether another's thing existing with the debtor must always be restored to its owner before all debts, however privileged? Resp. Affirmatively, if the thing is held by title of deposit, lease, etc. For that thing, existing in individual form, cries out for its owner. L. 684. If the thing is held by title of purchase, the price not having been paid, or at least not secured by pledge, surety, or given faith, it certainly must be restored to the seller according to Roman Law; for the seller still retains dominion of the thing. But when the seller has handed over the thing, and has received only credit concerning the price, it is controverted. "The first opinion says that then the seller is to be preferred....

The reason is both because natural equity demands this, and because the dominion of the thing, although in that case it has been transferred, nevertheless has been transferred under the condition of paying the price; hence such a thing remains mortgaged for the payment of the price. But the second and more probable opinion... holds that no preference is owed to the seller. The reason is that since dominion has already been transferred, there remains to the seller only a personal credit toward the buyer; and it is held by no right that the thing remains mortgaged to the seller until the price is paid to him."

L. 685. From C. I. 1512, 1513.; C. G. 2102, 2103., a thing sold, the price not having been paid, remains bound to the seller as regards the payment of the price against all other creditors, yet after the owner of the house or estate for the price of the lease, if the thing is movable. Indeed the seller can reclaim this, if no day for paying has been appointed, within 15 days from C. I., within 8 days from C. G., from the handing over of the thing; and from the same C. G. its price is always privileged, if the thing is movable. If the thing is held by theft and has been mixed with one's own things, satisfaction must be made to the owner of the thing before all other creditors, because the whole heap is specially bound to the owner of the thing taken away. L. 686. Cf. 907.

1439. Whether debts whose creditors are known are to be restored before other debts to the poor or to pious causes, because their owners are unknown? - It is controverted. The first opinion, probable and common, affirms; because the owner is not judged reasonably unwilling, both by reason of the debtor, who would often have to be pursued by another creditor, and by reason of the other creditor, who is made harmless, since he himself cannot be. Moreover, because certainly from justice it is owed to the former, and probably from canon law to the latter. The second opinion, also probable, says that restitution can then be made pro rata to the poor. For the preference of a known owner is demonstrated neither by positive right nor by natural right. For by natural right the poor or pious causes succeed to the unknown owner, that what is his may profit him; namely, that what cannot be restored to him may profit his soul. But probably restitution must first be made to uncertain creditors rather than to unknown ones; because first those must be made harmless who probably have suffered damage, rather than those who certainly have suffered no damage. - L. 687.

1440. Whether debts from delict are to be paid before debts from onerous contract? It is controverted. The first probable opinion affirms, because to retain a thing injuriously taken away is a graver injury than not to pay a thing owed from contract. The second, more common and more probable opinion denies it, but says they are to be paid pro rata; because from positive law no such preference is had; but from natural law the obligation which arises from commutative justice is the same in contract as in delict; and delict is blotted out by repentance, not by restitution. - L. 688.

1441. Note: It is certain that debts from a gratuitous title, even pious ones, are to be paid in the last place, because these always include the tacit condition: unless something prevents. - L. 688, 689.

1442. Whether common creditors, prior in time, are to be preferred to later ones? It is controverted. "The first opinion holds that satisfaction must be made to all these pro rata.... The reason is that not the goods of the debtor, but the person, is bound to these, and he is equally subject to all." But positive right establishes no preference among them. Indeed Roman Law establishes: "it is licit for someone, by adding a creditor to himself, to make the condition of his creditor worse." The second opinion "teaches that the earlier ones are to be preferred from Reg. 54 of Law in the Sixth: He who is prior in time is stronger in right. For although civil law speaks thus only of mortgage creditors,

nevertheless canon law speaks of all, and is founded on natural right; for an earlier personal creditor, although he directly has the person of the debtor bound, nevertheless indirectly also has his goods bound, in which he ought not to be prejudiced by a supervening creditor. Each is probable, but the second more probable." L. 690.

1443. Whether poor creditors ought to be preferred to the rich, or to those not in need? It is controverted. The first probable opinion denies it, because such preference is had neither by positive right nor by natural right; for commutative justice does not attend to persons. The second probable opinion affirms, "because the obligation of restitution is given for repairing the damage of neighbor; but a poor man suffers more damage if restitution is not made to him than one not in need." L. 691.

1444. Whether it is licit to pay first the one first asking, even if he is later in time? Resp. Negatively, if the creditor prior in time is privileged or mortgage-holding; and therefore one acting otherwise is held for the damage. If the creditor prior in time is common, and he asks for payment in court, affirmatively. Thus commonly, "because the laws give preference also in conscience to the matter, to him who first obtained sentence, and after it also the debtor must pay him in conscience." L. 692.; C. I. 1970.; C. G. 2123. But if he asks outside court, it is controverted. The first opinion denies it, because prejudice is done to earlier creditors, to whom preference belongs. The second opinion more probably affirms, because a personal creditor has action against the debtor, and, by asking for the whole debt, pursues his right. L. 692.

1445. Whether a debtor knowing his state to be tottering can satisfy integrally even one not asking? - Resp. Negatively. For since all are equal in right, and no one becomes stronger by diligence in asking, from natural equity restitution cannot be made to one with detriment to the others. Wherefore, speaking of itself, a debtor sins gravely against charity and justice by secretly admonishing one of the creditors about his tottering state, or in that case by offering integral payment to only one. Yet there are not lacking those who permit the debtor to admonish a creditor, because it is licit for him to advise what it is licit for the creditor to do. But it can be urged in reply that it is not licit for him to advise what he himself cannot do, and the adversaries themselves admit this. L. 692.; Lugo d. 20, n. 174.

1446. Whether a creditor who, in this last case, accepted payment is held to restitution toward the other creditors? - It is controverted. The first probable opinion affirms; because he has no right that payment be made to himself integrally with detriment to the others. The second probable opinion denies it, because he received his own; and since he has the right of exacting even outside court, he violates the right of no one by accepting payment. Except, however, the cases in which such payment is declared invalid by law. L. 692, 693. From C. I. 1237.; C. G. 1235.; repetition of what has been paid is not admitted as regards natural obligations which someone has voluntarily satisfied. Yet from the same C. I. 1235.; C. G. 1167., creditors have the right of impugning all acts which the debtor performed in fraud of them. From C. H. 1291, 1292, 1297, 1298., payment of this kind, as also generally such debtor's contracts, whether gratuitous or onerous, are rescindible. One receiving anything in bad faith in fraud of creditors is held to restitution and to reparation of damages. - C. L. 1030-1045.

XXXI. How Restitution is to be Made

1447. How is restitution to be made? For making restitution legitimately it is required and suffices that restitution be made in that mode by which violated justice is repaired to equality; and thus the injured owner is made harmless. This is clear from the very nature of commutative justice, from which restitution is owed. And so, speaking of itself, the very thing owed, not another although equivalent, or perhaps even greater, must be given. L. 676.; St. Thomas, 2. 2, q. 62, a. 1, 2.; C. H. 1166.

1448. Resolutions: It is not necessary of itself that restitution be made openly, that it be made by the debtor himself, that it be made with the owner adverting. Hence the debtor can restore by increasing the weight in selling, or the owed work in laboring, by simulating a donation, etc. L. 676.

1449. Whether, restitution having been made through a simulated donation, the debtor is held to restitution if the creditor, moved by gratitude, repays another gift to him? - It is controverted. The first probable opinion affirms; because the donation of the creditor is null, and therefore the gift must be restored; for it proceeds from a false motive cause, and consequently is not fully spontaneous. The second opinion denies it; yet it does not admit this mode of restoring unless restitution cannot be made otherwise than through a simulated donation, for instance because otherwise the debtor would suffer detriment to reputation; otherwise it will be illicit. The reason is that "since this redonation is from mere liberality, to which I neither induced nor obliged my friend, I am said to be only the indirect cause of it, or I am not absolutely its cause, but only the occasion; wherefore, since the danger to my reputation is a proportionate cause excusing me from cooperation in this new detriment which the friend suffers from the occasion of my fictitious gift, I will not sin, nor consequently will I be obliged to restitution." Tamb. Expl. dec. 1. 8, tr. 4, c. I, § 5, n. 2.

1450. In what place, and at whose expense, is restitution to be made? If the thing is owed from contract, one must stand by the convention made concerning the mode and place of transfer. If no special convention has been made, one must stand by the special laws according to the diversity of contracts; for then they are judged to have contracted according to these.

Cf. Lugo d. 20, n. 196 seqq. From C. I. 1249, 1250, 1508.; C. G. 1247, 1248, 1651.; C. H. 1168, 1171, 1500.; C. L. 744., payment is to be made in the place designated by the contract; and if no place has been preestablished, and there is question of a certain and determined thing, payment must be made in the place where, at the time of the contract, the thing itself existed. Outside these two cases, payment is to be made in the domicile of the debtor, and expenses are to be borne by the same. But as regards purchase in particular, if nothing has been established in the contract as regards the day and place of payment, this must be made by the buyer in the place and time in which the handing over of the thing is to be made.

Cf. C. A. 905, 1420.; C. B. 269, 270. - If the thing which is owed has been accepted in good faith and is retained, "all agree in this, that it ought to be done in the place where the thing is, or if the thing is to be sent to another place, that this be done at the expense of the creditor: because since the debtor was obliged neither from any fault nor from contract to anything else, he only ought to permit the owner to take his own thing." Lugo l. c. n. 193. If the obligation of restitution arises from delict, the thing must be restored in that place in which the owner would have possessed it, if it had not been taken away; or the price of the thing must be transmitted there, if the owner would have sold it; and

this at the expense of the debtor. The reason is that the owner must be preserved altogether harmless; for he is not held to suffer damage from another's delict. Lugo l. c. n. 180 seqq.; L. - 597, 677, 678.; St. Thomas, 2. 2, q. 62, a. 5 ad 3.; C. A. 1420.

1451. Whether a debtor from delict must still pay expenses for sending the thing back to the owner, if the expenses exceed the value of the thing itself? Resp. Affirmatively, if the damage of the debtor is equal, or the excess is not notable. The reason is, "for it is more equitable that the delinquent suffer that loss and lose one hundred from his own goods, than that the innocent creditor be forced to sustain the same loss in his own goods: for the thief suffers that evil from his own delict, but the creditor would suffer it without any fault." Lugo d. 20, n. 186. Resp. Negatively, if the excess is exceedingly notable. The reason is, "certainly justice, since it is a virtue and commands prudently, cannot oblige to this: because no prudent man will say that the creditor is then reasonably unwilling unless the debt is restored to him with such great expenses." Lugo l. c. n. 185. - Resp. Affirmatively, if the excess is simply notable.

But in order that some moral rule may be established, it seems it must be said that when, all things considered, the excess will not be twice as great, it does not seem sufficient that the owner be deprived of his thing; but it seems sufficient if it exceeds this proportion. The reason of fittingness is, "because, with the delict of the debtor and the innocence of the creditor supposed, there seems to be a cause twice as great that the debtor suffer at least, rather than that the creditor suffer."

Lugo l. c. n. 190. - All things considered; for one must attend not only to the material quantity of the damage of the debtor and of the creditor, but also to the quantity of the damage respectively to such a person. For it can happen that a damage of 100 lire to a rich creditor, with respect to a poor debtor, is estimated as 200 lire and more. Lugo l. c. n. 188.; L. 598, 677, 702.

1452. Note: A lesser damage of the debtor can suffice that he defer restitution; or restore in another species, e.g., when he can more easily transmit the price of the thing. Lugo l. c. n. 188, 191. But today there is a much greater facility for transmitting the thing or the price.

1453. Whether the debtor must restore again, if he sent the debt through a faithful person, and it perished by chance or by the fault of a third party? - Resp. Negatively, if the possessor was in good faith. For the thing perishes to the owner. Resp.

Negatively, if he owes the thing from contract. For again the thing perishes to the owner; unless it was otherwise agreed. But affirmatively, if he owes not the thing, but the price, from contract, for the debtor preserves dominion in it until it has reached the creditor. And the same must be said if he owes not a certain and determined thing, but a thing in general, of which consequently he still preserves dominion. It is controverted if he owes the thing from delict. The first opinion, which St. Alphonsus calls common and to be held, affirms. The reason is, "because a debtor from delict is held to every damage, even fortuitous, as is certain among the doctors, which comes to the owner from his unjust taking away." L. 705.; C. A. 335.; C. I. 1148. Except, however, if this person was designated by the judge, or by the creditor himself, or at least he gave the debtor the faculty of choosing a prudent and faithful person: "for then by force of his mandate he would have as accepted the debt given to such a person by his mandate, and therefore he would have remitted the right which he had to damages following, so long as the thing did not reach him." Lugo d. 21, n. 60. The second opinion denies it. The reason is that, since the debtor cannot restore in another way without detriment to his

reputation, the creditor cannot be reasonably unwilling if the debtor chooses this mode, and therefore by right is presumed to consent to it. Now this presumed consent of the owner extends even to the liberation of the restitution itself, if the thing is not restored by that person, e.g., by a confessor. For the owner of the thing, if he were questioned, would rather will that restitution be made by that means, although he would have to take upon himself the danger of such a means, than that restitution not be made at all; for since it could not be made otherwise because of the detriment to reputation which the debtor would suffer, he would be excused from it. Therefore. This opinion, to which St. Alphonsus once adhered and which he does not dare to reprove, several and grave theologians judge probable. Cf. C. A. 1425.; C. I. 1241.; C. G. 1239.

1454. How is restitution to be made for damages inflicted on the Republic? Restitution is to be made through the means established by the Government itself, if means of this kind exist. Therefore attend to the various laws of places. But if such means have not been established, some say restitution must be made through those set over taxes; others hold that the obligation of justice is satisfied if restitution is made to the poor or to pious places, from the presumed will of the government; others, and better, to the damaged persons themselves. Restitution can always well be made, as it seems, directly also to the Republic itself, namely by restoring to the fiscal office, commonly ministero delle finanze. Or restitution can also be made equivalently by burning, e.g., bonds of the public debt of the nation itself; etc. Cf. 1420.; Carriere 1240.; Ithur. Cas. 1, n. 12.

XXXII. When Restitution is to be Made

1455. When is restitution to be made? - As regards any debts whatever, generally restitution must be made as soon as it can be done without grave inconvenience. For natural right requires that you not retain another's thing, when the owner is reasonably unwilling, not even for a short time. St. Thomas, 2. 2, q. 62, a. 8. Hence 1. he who culpably and notably defers restitution remains in continuous sin, and cannot be absolved. Moreover, if damages come to the owner from delay of restitution, he is held to compensate them. 2. If someone, having the intention of restoring, defers for some short time without grave inconvenience of the owner, he is not easily to be condemned of mortal sin, indeed not even of venial sin, if there is some cause for deferring, e.g., hope of a more convenient occasion, etc. L. 678, 679.; H. A. 104, 105. 3. He who would wish to restore by parts, when he can easily restore the whole, would not be absolved, namely when the matter is grave; because the owner also in this is reasonably unwilling. The same must be said of him who, when he could restore during the course of life, nevertheless defers until death; or who, placed in danger of death, without sufficient reason would cast upon his heirs the obligation of restoring his goods; unless perhaps there is question of restitution of uncertain goods. L. 679, 681 seqq.; C. A. 1415.; C. I. 1246.; C. B. 266, 271.

1456. Whether, as regards debts from injury, damages arising from delay of restitution are to be compensated? - As regards debts from injury, generally all damages which have followed from delay are to be compensated. For one contracting debt by injury takes upon himself the burden of compensating damages of this kind. - But whether extraordinary damages also must be compensated, or those which do not necessarily follow from delay of restitution, is controverted. It seems probably to be denied, because these damages could not have been foreseen even confusedly, and therefore cannot be imputed. Vogler 426.; C. B. 286, 287. Cf. here 1453.

1457. What of time as regards debts from contract? As regards debts from contract, generally one must stand by the conditions placed on the contract concerning time, or concerning other circumstances, unless it is prudently presumed that the will of the other contracting party is different. L. 678. Hence 1. restitution, or rather payment, must be made at the time about which it was expressly or tacitly agreed. - 2. The debtor can anticipate, if the term assigned for payment is in his favor, as ordinarily is accustomed to happen; but otherwise if the same term tends to the utility of the creditor, as, e.g., in the furnishing of money with profit to be received. - 3. If the term has not been fixed, according to the opinion of many the debtor can without sin, at least grave sin, generally wait until he is admonished by the creditor, unless nevertheless the latter takes damage from this, or does not dare admonish out of fear, or omits admonition from forgetfulness or impotence. C. A. 1417, 1418.

1458. Whether a debtor deferring restitution from a just cause is held to render to the creditor legal interest, ceasing profit, emerging damage? It is controverted. The first opinion denies it, if the debt is from contract; because then the debtor is not the unjust and culpable cause of that damage, for he is not in culpable delay; but it affirms if from delict, "because then the first unjust acceptance truly was the culpable cause of the damage." Yet this damage also ought to have been foreseen at least confusedly. The second opinion denies it even in this second case, because "the damage then does not come to the creditor from that first unjust acceptance, but from the later retention, which is done justly." L. 680, 704. But this retention is always culpable in the cause. C. A. 1333, 1334, 1336. Cf. C. G. 1151, 1153.; Gousset in h. a.; C. B. 284 seqq.

XXXIII. On Causes Excusing from Restitution

1459. What things generally excuse from restitution? - All those things excuse for a time, or even exempt totally, which cause the creditor reasonably to have to be content, even if in fact he is not content. - L. 696, 700.

1460. Whether remission, whether express or tacit, freely made by the creditor, indeed even reasonably presumed, excuses from restitution? - Resp. Affirmatively. The reason is that if the owner is not unwilling, the omission of restitution will not then be unjust. Hence you will more easily excuse sons of the household in things of lighter moment, servants in common things to be eaten and drunk, etc.

L. 700.; Lugo d. 21, n. 51.; Ferraris v. Restitutio a. 5, n. 34. As regards the usurpation of ecclesiastical goods, a very ample faculty of condonation was made by Julius III, Lett. 28 June 1554, after the schism of Henry VIII, for England, and by Clement XI, 10 Nov. 1712, for Saxony. But toward the end of the eighteenth century in France, after the Concordat of 15 July of the year 1801, those who had bought those usurped goods from the Government before the mentioned Convention, or bought them after that Convention when alienated, but usurped by the Government before that Convention, could retain them altogether as their own, dispose of them freely, and transfer them to others. Freely, without any attached obligation of fulfilling the burdens of Masses, alms, and other similar things, Concord. art. 13.; Pius VII, Bull 27 July 1817, Brief 20 Oct. 1821.; S. Poenit. 20 Mar. 1818.; Gousset 937. The same is valid in relation to occupations continued by the French Government up to the end of the year 1814 on the left bank of the Rhine; this was afterward extended to ecclesiastical goods which in the whole kingdom of Prussia were secularized up to the end of the year 1824, and at

present are possessed by private persons as their own, or will be possessed in the future. From Concess. 27 Nov. 1891, 7 Feb. 1894. Likewise, those who in France at the time of the revolution toward the end of the eighteenth century acquired the goods called national, or the goods of emigrants, proscribed by the Government by decree 27 July 1792, are excused from all restitution, but for another reason. For the Government, by the law of 25 Apr. 1825, burdened itself with furnishing that indemnity, as a debt of the State itself. Gousset 938. For Belgium, to which the Concordat of the year 1801 was already extended, there is also the Brief Epistolam of Gregory XVI, 16 Sept. 1833, where first that Concordat or Convention is extended to any other goods whatsoever from those occupied, as above, which either were alienated by the Government after that Convention, or still remain with the Government itself. This extension perhaps was necessary for this reason, that not a few of those goods which were located in Belgium had been occupied after the Convention. Moreover, those who in Spain bought goods of the Church usurped by the Government before the year 1851 and 1859 possess the same goods with a safe conscience, and are bound by no obligation of pious burdens, on account of the Concordat of the aforesaid year 1851, and the Addition to the Concordat of the same year 1859. As regards the ancient dominion of Sardinia, for the County of Nice and the Duchy of Savoy, now united to France, there is the Concordat of the year 1801; for Piedmont and the Duchy of Genoa, the Brief Datis ad nos, 20 Dec. 1816.; and for the whole kingdom of Sardinia, the Bull Gravissimae of Leo XII, 14 May 1828, by which there is sanation of all ecclesiastical goods which had been occupied by the Government before the Conventions entered into and were alienated by the same before those Conventions or even after them, with likewise no obligation of fulfilling the pious burdens attached to those goods. Likewise, in the kingdom of the Two Sicilies, those who bought from the Government ecclesiastical goods usurped and alienated before the year 1818, on account of the Convention 17 Mar. 1819, art. 13, made them their own, so that thereafter they were altogether unchangeable in the possession of them and of others having cause from them. For a most full remission was made by the Supreme Pontiff for all ecclesiastical goods usurped in this way, and the pious burdens attached to them; this condonation is also had by force of the composition made as regards ecclesiastical goods usurped in more recent times after the year 1860 in Italy, namely as regards those who made the aforesaid composition. Likewise it is tolerated that parish priests receive a congrua from goods not of their own church, but of other moral bodies. A. S. S. v. 32, p. 505 seqq.; A. A. S. v. 2, p. 602 seqq. - Scavini v. 4, n. 219, ed. 12, Milan, 1874.; Gur. Baller. v. 1, n. 750 seqq., Barcelona, 1882.; M. E. v. 10, p. 2, p. 91. Composition is a certain partial remission of debt made by the Supreme Pontiff, as regards ecclesiastical things, and as regards profane things, when the owner is unknown or it is no longer probable that he will appear. - Bishops at present have from the Holy See a special faculty of admitting to composition the faithful who have unduly acquired ecclesiastical goods usurped by Governments, yet within the limits of the Indult granted.

1461. Whether damage to be impeded excuses from restitution? "It is most probable that you are not held to restore a thing which the owner is going to abuse for sinning: indeed if he is foreseen to be going to abuse it to the damage of a third party, you would sin by restoring it, when you could deny it without your own graver or at least equally grave damage.... And then you would sin by restoring not only against charity, but also against justice. The reason is that neighbor has a right that you not hand over anything to another for his destruction." L. 697. Yet others more truly hold that then there is sin only against charity and not also against justice, because the cooperation is material and not

proximate, which charity, not justice, forbids; since that action of restoring his own is not of itself illicit and unjust, but indifferent, which another abuses by his malice. - C. I. Poen. 63.; St. Thomas, 2. 2, q. 62, a. 5.

1462. Whether impotence excuses from restitution? - Not only physical impotence, which is had in extreme or quasi-extreme necessity, excuses from restitution, but also moral impotence, or grave difficulty of restoring, e.g., if you cannot live according to the decency of your state justly acquired by you, otherwise if unjustly acquired; if you cannot restore without danger to life or notable detriment of goods or reputation; if restitution cannot be made without danger to your salvation or that of yours. The reason is 1. because otherwise you would sustain more damage than you inflicted in several of these cases, if not in all; 2. more generally, because what is very difficult, and what cannot be done decently and honorably, cannot reasonably be urged by the owner; since justice does not exclude charity and prudence. And this indeed is valid, as is clear, although the debtor culpably cast himself into such straits. L. 697, 698, 702.; St. Thomas, 2. 2, q. 62, a. 8 ad 2.; Ithur. Cas. 16, n. 10, 11.; C. B. 275.

1463. Resolutions: "If a nobleman, e.g., cannot pay immediately unless he deprives himself of servants, horses, arms, etc.... or a craftsman unless he sells his tools, by which he lives, or undergoes great damage, he can defer and restore little by little without the loss of his state." L. 698. "Likewise you are excused from restitution... if there is danger lest wife or daughters prostitute themselves, lest sons give themselves to robberies, lest you yourself through impatience fall into despair." L. 648. "But you are held to restore even with your own damage if, restitution having been omitted, the owner is going to suffer equal damage." L. 697.

1464. Whether the debtor is excused from restitution by reason of necessity if the creditor also is in necessity? - "If the debtor cannot provide for himself otherwise than by the goods which he ought to restore, then he is not held to restore them and cast himself into extreme necessity, even if the creditor is placed in the same necessity unless the debt is restored to him.... The reason is that then all things become common.... Except unless precisely because of that taking away the owner has been cast into extreme necessity, because the condition of the owner possessing first ought to be better." L. 701. "If the creditor is already suffering grave necessity, and the debtor is not then laboring under it, but will labor under it by restoring, certainly he is held to restore, into whatever grave necessity he is to be placed," because in equal necessity the condition of the innocent is better, if the debt is owed from delict; likewise the condition of the creditor and owner is better, if it is owed from contract. L. 697, 698.

If the debtor is already placed in grave necessity, whether he is held to restore when the creditor likewise labors under the same necessity is controverted. The first opinion affirms, because again the condition of the innocent, the creditor and owner, is better, and therefore he is to be preferred. The second opinion denies, because since the debtor "already labors under grave necessity, certainly he could not restore except with very grave inconvenience, so that he would seem to cast himself as it were into extreme necessity." L. 703. Except again unless precisely through that taking away the creditor has been cast into grave necessity. L. 703.; St. Thomas, 2. 2, q. 62, a. 5 ad 4.

1465. Whether cession of goods made to creditors excuses from restitution if the debtor afterward becomes richer and can restore? Resp. Negatively. For if the cession is judicial, this is merely a benefit of law, so that one ceding goods may be immune from coercion in the external forum, as is clear from

Roman, Italian, and French Law. But if it is voluntary, because the creditors compose the matter with the debtor since they can have no more, they do not therefore renounce their right as regards integral payment, if the debtor can at some time make it. Except if the creditors expressly or at least implicitly truly free the debtor from payment of this kind. L. 699.; C. G. 1265-1270.; C. I. Comm. 815, 830.; C. H. 1175, 1920.

1466. Whether one ceding goods can secretly reserve something for himself? - Resp. Negatively, speaking of itself, if the thing is of great value, because he inflicts notable damage on the creditors. Affirmatively, if he reserves for himself only things necessary for the support of himself and his family. For as regards these the creditors cannot be reasonably unwilling. And this is admitted by C. I. Comm. 735, 752.; Gousset 772.; L. 699.; St. Antoninus 2 p., tit. 2, c. 8, § 3. Si tertio modo; Lugo d. 21, n. 41.; Ferraris v. Restitutio a. 5, n. 54, 55.

1467. Whether he is excused from restitution who, forgetful of the debt, gave something gratuitously to his creditor? The first probable opinion denies it. "The reason is that since he is debtor both by title of justice and by title of an accepted donation, he cannot satisfy these two obligations arising from diverse titles by one payment." The second probable opinion affirms. The reason is that in every liberal prestation each one has a certain prior general will of satisfying obligations of justice, and a later actual will of donating. But "the first will prevails as the stronger and preceding." L. 700.

1468. Whether entrance into religion excuses from debts to be paid? - If a religious gains something in religion, must he apply this to paying debts? - If a legacy comes to him, must he satisfy debts from it? - Resp. to the 1st: Entrance into religion does not directly free one, of itself, from debts to be paid, but indirectly; namely insofar as it licitly impedes the means by which debts can be paid. For, except in the cases prohibited by canon law, a debtor licitly enters religion, at least when he cannot easily and in a short time satisfy debts before entrance. Therefore by that very fact he is freed from the burden of restoring. For natural law no longer urges when the debtor cannot satisfy except with so great detriment of his freedom, and with danger of eternal salvation to be lost in the world. For the debtor is not held with so great an inconvenience to be deprived of the more perfect state of religion.

Resp. to the 2nd: Affirmatively, if he can easily labor, and the superior permits; for the state of religion does not of itself free from the obligation of restitution, but only licitly impedes it. Yet the superior is not at all held from justice to grant this permission, but only from charity, if no inconvenience opposes. Resp. to the 3rd: Negatively, if he has emitted solemn profession; because then he is incapable of dominion, and from canon law that legacy is acquired by the monastery. Affirmatively, if he has emitted only simple vows; because in that case the legacy is acquired by him. L. 1. 4, n. 71.; St. Thomas, 2. 2, q. 189, a. 6 ad 3.

1469. Whether a debtor is excused from restitution in doubt of payment? Resp. Negatively in a merely negative doubt, because then no prudent reason of payment made is present. - In a positive doubt or probability it is controverted. The first probable opinion affirms; because an obligation is not to be imposed unless it is certainly established concerning it. Moreover, because, as St. Alphonsus says, l. 4, n. 107, "no legitimate possessor of his own is held to restitution who has for himself a probable opinion." The second probable opinion denies it, because a certain obligation is not satisfied by a doubtful fulfillment. The third probable opinion says restitution must be made pro rata of the doubt; because it is not equitable that as much be paid from a doubtful right as would be

paid if the right were certain. The fourth opinion affirms in gratuitous contracts, denies in onerous ones. "Nevertheless," adds D'Annib. p. 2, n. 327, ed. 3, "if it seems probable that you or your author satisfied an obligation, even an onerous one, I judge that one can cease from payment, so long as the creditor, not ignorant of the obligation, does not ask." L. 1. 1, n. 82.; l. 3, n. 700.; l. 6, n. 477. Cf. here 1369, 1378.

1470. Whether he is freed from restitution who pays the debt to the creditor of his creditor; e.g., I owe you 100 francs, but you owe 100 to Titius: do I satisfy by paying 100 to Titius? Resp. Affirmatively of itself, to the strict point of law. The reason is that I, by paying to your creditor that which you owe him, acquire the right which he had of requiring from you the debt owed to him; hence the right which I have against you is equivalent to the right which you have against me, and compensation is made. For your creditor can transfer his right to me, or I can buy it, just as any other who owes you nothing. Of itself; because I am not freed if perhaps you are still compelled to pay, or you have privileged or mortgage creditors. To the strict point of law; because such payment, if it is made without cause, will be illicit on account of the various inconveniences to which it is liable. But there is sufficient reason if your creditor cannot recover his debt.

L. 700.; Billuart diss. 8, a. 14, § 1.

XXXIV. On Occult Compensation

1471. What is occult compensation? - Occult compensation is nothing other than an occult equivalent recovery of one's own thing, the occult reparation of damage unjustly suffered in one's own goods. This compensation is usually called extra-legal, to distinguish it from legal compensation, which touches certain particular cases, when two persons, debtors to each other, each receive in payment the thing owed to the other; which compensation, by force of the law itself, by full right, has place. Legal compensation obtains even when the debtors are unaware, up to the concurrent quantity of each debt, provided nevertheless that both are of the same nature and goodness and can be exacted immediately. But a delay which is conceded to the debtor for paying does not prevent compensation. - But legal compensation is not admitted 1. when restitution is sought of a thing of which the owner was unjustly despoiled; 2. when restitution of a deposit or loan is sought; 3. when there is question of a debt whose title has its origin from support payments which do not fall under seizure, such as wages, pensions, etc.; 4. when the creditor has renounced the right of compensation. But renunciation cannot be made to the damage of other creditors or sureties. C. I. 1285 seqq.; C. G. 1289 seqq.; C. A. 1438 seqq.; C. H. 1195 seqq.; C. B. 273, 274, 387 seqq. Cf. here 966.

1472. Whether occult compensation is licit? - Occult compensation, with certain conditions concurring, is licit according to the common opinion of the doctors. The reason is that it is nothing other than a just defense from injury, by which the debtor continually vexes you by unjustly retaining your thing, or that to which you have a right from justice.

1473. What are the conditions required for the lawfulness of occult compensation? The conditions commonly required that occult compensation be made justly and licitly are: 1. That the spiritual and temporal damage of the debtor be prevented; namely, lest he remain in an erroneous conscience and in sin, lest he again restore what he now does not owe; by admonishing him of the cessation of the obligation, by feigning, e.g., condonation, etc. Yet one is not held to this from justice, but only from

charity, which does not oblige with grave inconvenience. 2. That the grave damage of another be prevented, for instance if suspicion of theft threatens another. To this also one is not held from justice, but only from charity, since he is the cause of that damage not per se, but only per accidens. 3. That the thing which is accepted in compensation from the debtor is not another's; because otherwise you would not exact the debt from the debtor, but from another who owes nothing. 4.

That you cannot recover the debt otherwise, by asking it from the debtor, or before a judge, or certainly not except with great difficulty, expenses, lawsuits, annoyances, etc. The reason is that one cannot regularly by his own authority despoil the possessor, since this belongs to the judge, or magistrate, having public authority. Besides, the public good requires that no one declare right for himself where recourse to a judge is easy. St. Thomas, 2. 2, q. 66, a. 5 ad 3.; C. B. 227.; C. L. 2535 seqq. 5. That compensation be made, as much as can be done, in a thing of the same species as that which was owed. For otherwise the debtor, without his consent, is altogether unjustly compelled to exchange his own thing.

But if it cannot be made in a thing of the same species, it can indeed be made in another, but with lesser detriment to the debtor, as much as can be done. - 6. That the debt be certain; for in doubt the condition of the possessor is better, and therefore here he would be unjustly despoiled of his own thing. - Lugo d. 16, s. 5.; Ithur. Cas. 3, n. 14, 15.; L. 521.; St. Thomas, 2. 2, q. 66, a. 5 ad 3.; E. M.

1474. Whether compensation can be made by retaining a thing handed over to the creditor in deposit or on loan? Many deny it, relying on the positive dispositions of the law. C. I. 1289.; C. G. 1293.; C. H. 1200, 1747.; C. A. 1440.; L. ult. § 1. C. de Compensationibus; C. Bona fides de Deposito. "Yet others more probably teach that those laws proceed only in the external forum, in which it is presumed that the debt could have been recovered by another way, and the faith of deposit preserved.... The reason is that the fact that the thing has been deposited with you does not make it more its owner's than before, nor does it oblige you to defend it against the true owner, who wishes to vindicate it, or against him who has a true right to receiving it, if that right is certain to you: indeed you ought to give it, if damage threatens you from another source. Therefore similarly you will be able to take it for yourself, if you have true dominion of it, or a true right against its owner for recovering your debt." Lugo d. 16, n. 89.; Gousset in a. 1293.; C. B. 273, 274.

1475. Whether, with impossibility or grave inconvenience of recurring to a judge excluded, someone sins gravely against legal and commutative justice by secretly compensating himself? Resp. to the 1st: Negatively, generally speaking, because ordinarily, from this inversion of order, grave scandal or grave disturbance of the republic does not follow. Resp. to the 2nd: Negatively, if you accept your own thing, which still pertains to your dominion, or if you accept it in an equivalent in fungible things, as money for money, wheat for wheat, etc., because in these the debtor is not compelled to undergo any burden besides that to which he was held. But affirmatively, speaking of itself, if you accept a thing of another genus, e.g., a horse for money, without cause and necessity; because in the case you compel your debtor to sell the horse, and therefore to undergo a grave burden besides that to which he was held. But you have no right to impose this new burden upon him; yet per accidens you can permit it to follow, where a sufficient cause and necessity are present for recovering your own thing in the way you can. For then the debtor ought to impute this other burden to himself, since he does not pay what he was held to pay. Lugo d. 16, n. 91.; C. A. 1413, 1414.

1476. Whether a creditor can compensate himself before the time, for a future debt? - Resp. Affirmatively, if there is a true moral danger that the debtor will not satisfy his debt at its own time. "The reason is that defense by natural right is licit not only when you are already actually offending me, but also when you are prepared to offend me, and I cannot escape otherwise than by anticipating." Yet, "if some damage comes to the debtor on account of the anticipation of compensation... all of it must either be diminished from the principal debt, or restored to the debtor. The reason for this is that no one can be punished for a future delict before it happens." Lugo d. 16, n. 93.

1477. Whether someone can compensate himself with only a right to a thing? Resp. Affirmatively. For by a right to a thing, from a strict obligation of justice in another, although immediately and directly the person is obliged, nevertheless mediately and indirectly the thing itself is obliged to you. Wherefore, as you can licitly compel the person to pay you by recurring to a judge, so also you can licitly compel him to pay you by taking the thing which is owed to you, when recourse to a judge is impossible. And indeed the matter is evident, that there is no injury of commutative justice if you take for yourself what another from the same justice owes and does not wish to give. - L. 614.; Lugo d. 16, n. 97.

1478. Whether occult compensation can licitly be made when only probability of right stands? Ithur. Cas. 3, n. 11, has this: "Whenever the opinion has been equally probable for each party, or, as frequently happens, one's own is more probable to each, compensation is made justly not in the whole, but certainly in half of the debt." The 1st reason is because in such a case "a judge can adjudicate the whole to neither, but ought to divide the thing between the litigants....

But it is licit for no one through occult compensation to acquire more than what could be adjudicated to him by a judge after allegations and proofs." The 2nd reason is because "whenever the right to the same thing is equal, the advantage of each party ought to be equal, justice so requiring, whose office it is to consult equality." But Cardinal Lugo, after reporting the common opinion which requires a certain right for compensation, then adds these things: "This doctrine, if it is understood as it sounds, is difficult, nor does it seem to be constantly retained by its own authors....

I will add some examples: first, concerning him who has been defamed by Peter, it is asked whether for the reputation which Peter does not wish or is not able to repair for him, it is licit for the defamed person to make compensation by denying monies which he owed to the same Peter. Lessius responds that he can, because the opinion is probable which teaches that infamy must be compensated by money when it cannot be restored in its own genus... although the truer opinion denies this.... Secondly, when two have mutually defamed each other, they can, when the damage is equal, compensate for themselves, so that neither is held to restore as long as the other does not wish to restore.... Which compensation in that case is founded only on a probable opinion, since the contrary is also very probable. Thirdly, he who ought to have a legacy from a less solemn testament, since it is a probable opinion that those legacies are owed in the forum of conscience, although the contrary opinion is sufficiently common and probable, can nevertheless retain the legacy, or accept it anew, or secretly compensate himself." Hence Lugo generally concludes: "it seems probable that a creditor, before the matter is brought to judgment... can secretly compensate his debt to himself.... Reason also seems to prove this, because, notwithstanding the possession of the debtor, the judge would pronounce sentence, or certainly could pronounce it for the creditor, by embracing the probable or

more probable opinion which favors him.... Why therefore will the creditor himself, when he cannot recur to a judge without grave inconvenience, not be able to embrace the same opinion which the judge ought or could have embraced, and compensate the debt to himself?"

But the same Lugo notes that although a judge in judging is held to follow the more probable opinion, nevertheless the creditor in occult compensation does not seem to be obliged to this, because the reason on account of which especially a judge cannot do this is that "from office and from an implicit pact toward the Republic he seems to be held to inquiring into the truth as much as he can, which reason does not militate in the creditor, who is held by no such pact toward the Republic. Yet concerning this I wish to assert nothing; indeed I willingly abstain from final judgment concerning this whole point about compensation to be licitly made with an opinion only probable." d. 16, n. 94 seqq.; L. 521, 544, 700, 817, 928.; l. 1, n. 30. But the reason of the common opinion is: 1.

The danger in this matter of easy deception; hence, practically speaking, there is present a grave danger of injuring another's rights. 2. Because if the other truly possesses the thing in good faith and by a title at least reasonably presumed, he now has a certain right at least of detention of the thing, and consequently he cannot be despoiled of the thing until there is certainty concerning another's right and dominion of the thing. - Hence, as is clear, when there stands only probability of fact from which a right arises, it is in no way licit to despoil the peaceful possessor of his thing.

On the Eighth Precept of the Decalogue

I. On Rash Judgment

1479. What is the eighth precept of the Decalogue? - The eighth precept of the Decalogue is: You shall not speak false testimony against your neighbor. Ex. 20:16.; Matt. 18:19. By this precept, insofar as it is negative, false testimony is primarily prohibited, especially in judgment; but secondarily every unjust injury of neighbor in the goods of reputation and honor is prohibited, which is reduced to false testimony as to a principal injury; such are rash judgment, detraction, contumely, lying. But insofar as it is affirmative, it commands that, all simulation and fallacy removed, simple and naked truth be spoken. Catech. Rom. n. 2.; L. 961.

1480. What is reputation? What is rash judgment? Reputation is: the common opinion about the life, morals, and other qualities of someone, which can increase or diminish his moral estimation. Good reputation therefore is the common opinion about the virtue, wisdom, or deeds excellently performed by another; if this goes out into external verbal testimony, it is called praise; but if into testimony, whether verbal or real, it is called honor. Hence the good reputation of someone can be unjustly injured not only through detraction and contumely, but also through an internal rash judgment about some crime or moral defect of another. One must distinguish rash doubt, suspicion, opinion, and firm judgment. Rash doubt is had when someone without sufficient reason remains suspended, yet without inclining rather into judgment of vice than of virtue. Rash suspicion is given when someone without sufficient motive inclines rather into a judgment of vice than of virtue of another; yet he suspends actual judgment. Rash opinion is given when someone without sufficient motive elicits assent concerning the vice of another, yet with fear concerning the opposite. Finally, rash judgment is given when someone without sufficient motive elicits a determined judgment concerning the vice of another without fear concerning the opposite. L. 962, 965.; St. Thomas, 2. 2, q. 60, a. 3.

1481. What kind of sin is rash judgment? Rash judgment is a sin opposed to justice, and from its genus mortal.

The 1st part is proved, because anyone has the right not to be judged by another to be evil as long as he does not give to this other a sufficient motive of judging that he is evil; and therefore rash judgment from its generic concept, and with any other malice prescinded, is repugnant to justice. The 2nd part is proved, because good reputation is a notable good of man; and rash judgment, although it takes away the estimation of only one person, namely of the one judging, and not also the common estimation of others, nevertheless, since it always contains contempt of neighbor, hence even only partial injury of the aforesaid reputation is grave of itself, as detraction would be grave of itself even if made before only one person. He who judges another ill from slight judgments, in a grave matter, contemns him, which is a mortal sin. Hence in 1 Tim. 6:4, evil suspicions also are numbered among mortal sins. From its genus, because more often it is only venial on account of smallness of matter, whether according to itself or with respect to the persons about whom there is question, or on

account of imperfection of the act. Matt. 7:1.; L. 962.; Lugo d. 14, n. 11.; St. Thomas, 2. 2, q. 60, a. 3, 4.

1482. When is rash judgment a grave sin? - In order that rash judgment be a mortal sin in the individual case, three conditions are required: 1. That it be firm and deliberate. 2. In grave matter. 3. Rashly conceived, without a grave indication, about a person known to you, not about an indeterminate person or one unknown to you. This is proved, because rash judgment, unless it is firm, in grave matter, and rashly conceived, is not a grave injury of neighbor against the reputation of neighbor; but if it is not sufficiently deliberate, it is not perfect on the part of the act and the consent of the will. Therefore, unless it has the aforesaid three conditions together, it is not perfect on the part of the act and the consent of the will. Therefore, unless it has the aforesaid three conditions together, it is not a mortal sin. L. 962.; Lugo d. 14, n. 11, 23.

1483. What kind of sin is doubt, suspicion, rash opinion? Positive doubt, suspicion, or rash opinion about another's sin is of itself only venial. This is proved, because even an opinion, if it is fearful, concerning another's crime, speaking of itself, does not inflict grave injury on him, since, simply speaking, it does not take away by judgment another's reputation; for it is not a firm judgment. - Positive rash doubt is given when someone ought from graver motives to judge someone to be good and innocent; nevertheless from other lighter motives he positively doubts, or reflexively judges that it is doubtful whether he is good or evil, innocent or guilty.

Of itself, for per accidens it can sometimes become grave; if, e.g., these acts are concerned with very extraordinary sins, or graver ones by reason of the condition of the persons whom they regard, and the opinion or suspicion proceeds from slight indications, the doubt from very slight indications; because such opinion, suspicion, or doubt is a greater injury than even a firm judgment concerning less grave ordinary sins. Thus also such acts are a grave sin if they proceed from malevolence without cause; for then they proceed from contempt of another, and therefore are reckoned a grave injury. Moreover, because for the most part thoughts of this kind creep into the mind even without deliberation, whoever does not advert with full deliberation both to the gravity of the thing thought and to the lightness of the indications is excused from grave sin. 1 Cor. 13:5.; L. 963, 964.; St. Thomas, 2. 2, q. 60, a. 3.; Cajetan ib.; Quodl. 12, a. 34.; Lugo d. 64, n. 17.

1484. What of negative doubt? - A purely negative doubt concerning the innocence or crime of another is no sin. This is proved, because in such doubt, arisen from some indication concerning another's crime, no graver motive existing, no one is held positively to judge another to be good and innocent, and so to expose himself to the danger of error; and therefore by suspending every judgment concerning the goodness or malice, concerning the innocence or crime of another, he does not sin. St. Thomas, 2. 2, q. 60, a. 4.; Less. l. 2, c. 11, n. 32-36.; Lugo d. 14, n. 21.

1485. Note: Practically, in doubt that axiom of prudent men is to be observed: In the order of caution worse things are to be presumed, but in the order of charity and justice better things. The reason of the first part is: because each one has the right to guard against evil, especially his own or that of his own; and therefore in the order of caution he can presume worse things, at least practically, and precisely in order to avoid evil. But this does not rest on a rash judgment against someone in particular, but on a general judgment by which someone thinks it can happen that someone who is judged good is truly evil. But the reason of the latter part is: because an error precisely speculative, against truth, is a lesser evil than a practical one against charity and justice; and therefore in the

order of charity and justice toward another, better things are to be presumed. St. Thomas, 2. 2, q. 60, a. 4 ad 3.

II. On Detraction

1486. What is detraction; what is calumny? - Detraction is: the hidden and unjust violation of another's reputation. Hidden, i.e., in the absence of the other from whom reputation is taken. Hidden; for if it is manifest, it is contumely. Of another's, for he who injures his own ordinarily is not unjust, since he is its owner. But reputation is the public opinion about the excellence of another.

Violation of reputation can be done in various ways: 1. Positively, if a false crime is imposed, if a true crime is amplified, if a hidden one is manifested, if a good work is taken in a sinister way. 2. Negatively, namely by denying the good works of neighbor, or by diminishing them, or even sometimes by being silent when others are praising, or by praising coldly. If reputation is taken from someone by opening a true crime, it is called simple detraction; if by imputing a false one, it is called calumny, which is graver and differs in species from simple detraction, because it adds to detraction a lie damaging to neighbor. Yet this diverse species, "precisely insofar as it is against truthfulness, is not mortal malice, and therefore does not bring a diverse mortal species necessarily to be explained in Confession." Lugo d. 14, n. 36. Detraction differs from whispering, which is a word sowing discord among friends. Yet whispering agrees with detraction on the part of the matter, because each says evil about neighbor; but it differs in species on the part of the end, because whispering moreover intends the dissolution of friendship. And therefore it is from its genus mortal, of a species diverse from and graver than detraction; hence it is to be expressed in Confession. Prov. 6:16, 19.; Eccli. 28:15.; St. Thomas, 2. 2, q. 74, a. 2.; L. 966.; St. Thomas, 2. 2, q. 73, a. 1.; E. M.

1487. What kind of sin is detraction? - Detraction is a sin opposed to justice and from its genus grave. This is proved, because it is opposed to the right which another has to his reputation, or good name, by the lack of which a man is impeded from doing many good things; therefore it is a sin opposed to justice and, from its generic concept, mortal. 1 Cor. 6:10. Moreover detraction of itself is worse than theft, just as reputation is better than money, according to that saying of Prov. 22:1: A good name is better than many riches. And Eccli. 41:15: Have care for a good name, for this will remain for you more than a thousand precious and great treasures. - That calumny is opposed to justice is manifest. For since the crime is false, someone is in peaceful and legitimate possession of his reputation.

But as regards detraction there is difficulty; yet it is clear from this, that as long as the crime is not public, since reputation is not something consisting in the truth of the thing, but in the opinion of men, one is still in peaceful and legitimate possession of his reputation, of which he is despoiled through detraction. - But the same is always a sin in species, whatever the person may be from whom reputation is taken, because the reputation of a man is not distinguished into species; whatever the sin may be in which someone takes reputation from another; and whether in one thing or in several; because always it is one and the same thing which is injured by all these, namely estimation: hence in Confession it is not necessary to explain from whom and in what someone took reputation. L. 966, 967.; St. Thomas, 2. 2, q. 33, a. 7 c., q. 73, a. 2.; E. M.

1488. Whether it is grave to reveal the natural defects of another? To reveal another's natural defects, speaking of itself, is not a mortal sin. This is proved, because such defects are inculpable and ordinarily known to many; and therefore to reveal them is not usually gravely harmful to reputation. Thus it is not usually gravely harmful to reputation if someone says that another is ignorant, imprudent, etc.; nor if he says that another is one-eyed, lame, hunchbacked, etc. Speaking of itself; for if from the revelation of some natural defect another would suffer damage, or be gravely saddened, the revealer would sin gravely against justice or charity, unless he had a just cause for manifesting such a natural defect to someone. L. 967.

1489. Note: The same must be said, generally speaking, of all those moral defects which, although without sin and without crime, can nevertheless render a person less worthy of honor; and the same must be said of merely civil defects in the same case, e.g., if someone says of an honorable girl that she suffered violence, or of an honorable and grave man that he exercised the butcher's trade.

1490. Whether it is grave to reveal another's light sin? - To reveal another's venial sin, or to speak about sins by general words, speaking of itself, is not a mortal sin. This is proved, because in many things we all offend; and therefore to reveal another's venial sin, or sins by general words, from which it cannot be gathered that another has sinned mortally, is not usually gravely harmful to reputation. Speaking of itself; for the condition of some person can be such that in him even venial sins are judged to be of great moment; e.g., if it is said of a grave and religious man that he is mendacious, or lies frequently; or if certain sins are reported about some religious community by words even only general, e.g., I know many things about it which charity forbids me to disclose, etc.; or if so many things are said, although not individually grave, that the reputation of some person established in conspicuous dignity is notably injured, even if this is done over a long time. L. 997.

1491. Whether it is always grave to reveal another's grave sin? - To reveal another's mortal sin is a mortal sin when on account of it he suffers grave detriment to reputation, but not when he suffers only slight detriment. The reason as regards the 1st part is clear of itself. The reason as regards the 2nd part is that certain mortal sins are so frequently committed by persons of a certain condition that they are now almost presupposed concerning them; and therefore to report a certain mortal sin about a person of like condition diminishes his reputation little; as, e.g., if it is said of a soldier that he committed a duel or seduced a girl. It would be the same if someone revealed a delict about which another is accustomed to boast, or one of the same reason, or species, concerning which he was already publicly defamed before. - L. 967.; St. Thomas, 2. 2, q. 73, a. 2, 3.

1492. Resolutions: It is inferred that he does not sin mortally who reports another's grave crime, if he is of so low a condition and authority that he can prudently persuade himself that those hearing will not believe him. The reason for this is that such a person does not cause in the hearers a firm judgment concerning another's crime, but at most some light suspicion. But if the detraction is atrocious, even to excite only suspicion is grave. He does not sin mortally who narrates to a friend an injury inflicted on himself by someone, in order that he may receive some consolation from him, and by the complaint set forth may lessen the bitterness of the pain.

The special reason for this is that it would be too difficult if someone had to digest a grave injury in silence, and under grave obligation could not report it even to a friend for the sake of consolation. There is a certain collision of rights; nor is the reputation of another properly and strictly injured. Hence servants disclosing to someone injuries inflicted by masters, wives by husbands, sons by a

father, religious by a prelate, only for the sake of mitigating pain, are excused at least from mortal sin. L. 973.; St. Thomas, 2. 2, q. 73, a. 3.; 1. 2, q. 38, a. 2. Cf. 1494, 1496. It is not mortal to speak ill of someone unknown or indeterminate, if such is not the case that infamy redounds upon others known and determinate.

Thus, e.g., he sins who detracts from a religious order, or names a monastery in which someone committed a grave hidden sin. For this gravely harms such an order or monastery. They make exception if there is question of some large order, and it is not of stricter observance, since in any large place there are almost always some unruly men. L. 978. It is not a sin against justice, at least not a mortal one, to ask the cause of someone's captivity or to speak about it; for just as the captivity is public, so also the cause seems to have been made public. L. 974. To defame a dead person is less grave than a living one, since he no longer needs reputation for living and working rightly for the utility of others; nevertheless it can still be mortal and obliging to restitution, because no one wholly dies, and the estimation of the dead often pertains to the living.

And scandal can also easily be had from the publication of a thing hitherto unknown. Nor does the reason avail against this that if you do not narrate that evil deed, others will narrate it. The fact that others do an illicit thing cannot make it licit for you. L. 978. Cf. here 1493, 1494. To call back into memory crimes already given over to oblivion is grave of itself against justice, since it takes away recovered estimation. But constantly to renew the memory of crimes which have not yet been given over to oblivion is grave of itself against charity, since this, without just cause, as is supposed, affects neighbor with grave sorrow.

1493. Whether calumny or detraction is ever licit? - It is never licit to place a false crime upon another, as is clear from propositions 44 and 45 condemned by Innocent XI. Yet for a just cause it is licit to manifest another's hidden crime, even with loss of his reputation; because sometimes the public or private good requires this, and then the right of neighbor to preserving reputation is overcome by a stronger right. L. 972.; St. Thomas, 2. 2, q. 69, a. 2.; E. M.

1494. For what causes is it licit to reveal another's crime? - The causes on account of which another's crime can licitly be revealed, indeed sometimes even ought to be, are the following: 1. The notable utility of the revealer himself, e.g., for asking counsel or help in a grave matter, with any affection toward detraction nevertheless excluded. 2. The utility of the delinquent, namely for his instruction or correction, etc. 3. Public utility, as for impeding evils threatening the republic or religion or some community. 4. Grave utility also private, whether of those hearing or of others, e.g., that they may be freed from evils, damages, or inconveniences certainly or probably going to occur. The reason of these things is that then one manifesting the sins of another injures neither justice nor charity. He does not injure justice, because neighbor does not have so strict a right to his reputation that others are obliged to cover the truth when its manifestation is necessary for avoiding grave damage, whether one's own or that of others, to which others also have a right. Hence a collision of rights occurs. The good of others altogether prevails over the good of one's own reputation, which is a false reputation. Nor does he injure charity, because charity does not oblige with grave inconvenience; and just as you are not held to impede the damage of your neighbor, even if great, with grave damage to yourself, so neither in the case are you held to conceal the hidden crime of neighbor.

L. 968.; St. Thomas, 2. 2, q. 73, a. 2.; Lugo d. 14, n. 97, 112, 113.; Gousset 1070.

1495. Resolutions: If someone unjustly injures your reputation, either by calumny or by simple detraction, by denouncing your altogether hidden delict, and you cannot defend it or recover it by another way than by diminishing his reputation also, this is licit, provided you do not say false things, and only insofar as is necessary for preserving your reputation, and you do not injure more than you are injured, with your person and the other person's compared. L. 972. It is licit to defame another in order to avoid grave torments, if the crime is true; because you do no injury to another, since you have the right of revealing it in necessity; but it is not licit if the crime is false, because it would be a pernicious lie. L. 982.

You also licitly diminish someone's reputation if the estimation falsely conceived of his doctrine and probity is pernicious to others, provided there is no other more suitable reason for impeding the evil, and the damage which is feared for neighbor is greater than, or at least equal to, the damage which would come to the other from the manifestation of his defect or crime. Less. 968. Indeed, according to Lugo d. 14, n. 112, neither excess nor equality of your damage or that of others is required, "provided the damage which you fear for yourself or others is not slight, but grave and notable." Thus also St. Alphonsus 968. For the correction of the delinquent himself, it is licit secretly to reveal hidden delicts to parents, prelates, teachers, masters. It is also licit by reason of avoiding damage to manifest to some master that a servant is a thief, that a maidservant admits a lover at home when the master is absent.

1496. Whether it is mortal to reveal another's grave sin, which gravely dishonors him, to one prudent and discreet man, with special malice excluded? The first opinion, more common and more probable, says that one sins gravely, unless inadvertence or great levity excuses. The reason is 1. because injury of reputation even before one grave person is judged grave, as is clear from rash judgment, which of itself is grave. 2. Because often men bear more painfully that they are injured before one grave person than before three or four others. Indeed it is grave to be held as good or as evil by a grave man. The second probable opinion denies it. The reason is that since reputation consists in the common estimation of men, he is not judged absolutely defamed who has lost his good name only before one or another. But the parity of rash judgment does not stand, because in it there is the imposition of a false crime; and in the case at issue, the naked manifestation of a true crime. Except unless one reveals it to him from whom the guilty person most and before all others would wish to be hidden, and it gravely concerns him that it not be revealed to that person. Cf. n. 1481.; L. 973.; St. Thomas, Quodl. 11, a. 13 ad 3.

1497. Whether another's hidden crime can be revealed by also narrating the penance performed? Resp. Negatively. For that manifestation of the delict is not equally compensated by the subsequent penance. For always a certain sinister opinion is introduced into others. - L. 974.

1498. Whether it is grave to manifest a hidden grave sin of a certain person, who is already defamed by another known grave sin? Resp. Affirmatively of itself, if the sins are disparate among themselves. For one infamous in one genus of vice has not lost the right of reputation as regards other virtues. But negatively if they are connected among themselves and one implies the other, because then the infamy is not notably increased. Yet it must not be denied that it can be a grave sin to manifest even a crime committed by someone a second time, because again grave detriment is inflicted on his reputation; as if someone says of another, of whom it is known that he committed theft only once, that he stole again. L. 976.; H. A. 14.

1499. Whether, in order to avoid grave damage of your own, you can reveal the hidden crime of another, if you received the knowledge unjustly through force or fraud, for instance by opening letters, etc.? These are St. Alphonsus's words, 969: "In this question there are several opinions. But among these so various ones, the opinion of Lugo pleases me more. This great theologian teaches that you cannot, generally speaking, use that knowledge unjustly received with the damage of another for escaping any damage whatever of your own. The reason is that the unjust action by which you received the secret obliges you to restoring all damages about to come to neighbor on account of it. Only then do Lugo etc. rightly admit that you can manifest the crime: 1. If the revelation were necessary for the common good of the republic. 2. If the other were held from justice to reveal the secret, for repairing your damage. 3. If he were unjustly vexing you."

1500. Whether a public crime can be revealed to those ignorant of it? Resp. Affirmatively, because this seems to be neither against justice nor against charity, whether it is public by publicity of law or by publicity of fact. L. 974.

1501. Whether a crime public in one place can be revealed in another place, where it is unknown? - Resp. More probably affirmatively of itself, at least without grave sin, if there is question of a neighboring place, or of a place where it is easily and shortly to be made public. The reason is that a reputation shortly and necessarily to be lost is of no or certainly of no great estimation, and morally speaking, it has already been cast away. Except, however, unless someone is going to suffer grave damage from it. - If there is question of places to which the divulgation is not going to arrive, or not except after a long time, one must distinguish.

As regards notoriety of law, or through the sentence of a judge, it is not against justice, because when the judge publicly condemns someone, he intends to despoil the guilty person of reputation, so that he may be everywhere an example to the rest. Nor more probably is it against charity, at least gravely, because it greatly contributes to the common good that the sentence be spread everywhere, so that the punishment may be more efficacious, and the guilty person may be known also by the inhabitants of a remote region, who could have business to transact with him. L. 974. As regards notoriety of fact, or through the mere knowledge of many, it is controverted. The first, very probable opinion says that it is not of itself illicit, because one sins neither against justice nor against charity, at least gravely, provided there is question of crimes which render a man pernicious. The reason is that infamy, from whatever source it has arisen, simply takes away good estimation; and it conduces to the public good that wicked men be known, so that all can beware of them. L. 974.; H. A. 12.; In Retr. n. 12. The second opinion, on the contrary, says that it is a sin both against justice and against charity. Against justice indeed, because one defamed in one place has not lost the right to reputation in another remote place, to which the reputation of the crime is not shortly going to arrive; therefore he does injury to him who defames him there. Moreover, as infamy begins by the fact of divulgation, so it ceases by the fact of silence. Against charity, because the one defaming harms neighbor in a grave thing, or in reputation, which elsewhere he continues to possess without injury to anyone; nor at least always is there any necessity of the public good for the crimes of others to be spread more widely; indeed it concerns public tranquility and order, and the delinquent, namely that he may more easily be amended, that hidden crimes not be spread abroad without just cause, and that crimes already spread abroad not be published more and more.

1502. Note: From St. Alphonsus, H. A. 12: "A delict published in one monastery cannot be called absolutely public; hence it cannot be manifested elsewhere, and not even in another monastery of the same Order, which would have frequent communication with that one." From the same holy Doctor, l. c. 13: "A delict of someone public at one time cannot be published at another time, in which it has become hidden, without grave fault, at least against charity, unless the delict were public not only by notoriety of fact, but also by notoriety of law, i.e., through sentence of a judge, or confession of the accused in court." Yet this does not prevent public delicts from being narrated in public histories for the public good, for preserving the truth of facts, for instilling horror of vice, for commending divine mercy, etc. Cf. n. 1492.; Lugo d. 14, n. 87.

1503. When can a crime or fact be called public or notorious? - It is called altogether public or famous when it has become known to the greater part of the community or city, town, village, etc. It is called simply public or notorious when it has become known to so many persons that it cannot be hidden by any evasion, and it is morally impossible that it not come into the knowledge of the community. But it is very difficult to determine the knowledge of how many persons is required that a crime ought to be judged public. Theologians have assigned various rules according to the various number of persons who compose the community. According to the more common opinion a crime can be called public if fifteen know it from a community of one hundred persons; or twenty of diverse families in a community of a thousand persons; or forty dispersed in a town of five thousand persons. Thus St. Liguori 975. But, as Billuart better says, de Iust. diss. 15, art. 2, § 5, this is remitted to the judgment of a prudent man, who, with attention to the number of the community, the talkativeness of men, and other circumstances, judges whether it is possible that the matter remain secret. - L. 11 App. n. 33.; l. 6, n. 593, 1111.; l. 7, n. 76, 78.

1504. Whether one who merely reports another's grave sins heard from others sins gravely, e.g., if he says: It is reported, they narrate, I heard this or that about such a person? He sins gravely against charity and justice if he reports it in such a way that others are more likely and deservedly going to believe it, e.g., if he asserts that he heard the things which he narrates from a trustworthy person, because then he furnishes a sufficient cause of believing evil; otherwise, if probably no faith is given to the words, because no infamy will arise from it. But he will much more easily sin gravely by reporting, even as merely doubtful, another's enormous sin, e.g., of heresy, sodomy, etc.; because the mere suspicion of these enormous crimes greatly defames. He sins gravely against charity if he reports things heard before those who will probably believe them from levity or malice of their own; because each one is held under grave obligation from charity to remove the occasion of another's damage, when he easily can. Yet he does not seem to sin against justice, because he is not the efficacious cause of the damage. L. 977, 978.; Billuart ib. art. 2, § 4.

1505. How does one hearing detraction sin? - He who efficaciously induces another to detract certainly sins gravely not only against justice, but also against charity. The reason is that he is not only the unjust cause of further detriment to the reputation of him from whom reputation is taken, but also of the further sin of the detractor. Therefore, with respect to the first he sins against justice, with respect to the latter against charity on account of scandal and cooperation. - He sins gravely against charity, as regards him from whom reputation is taken, who rejoices in grave detraction done by another, because he rejoices in the grave damage of neighbor.

Except if he rejoiced only in the hearing of a new or curious thing, but not in the detraction itself. He also sins against charity as regards the one detracting; for he furnishes to him the occasion of consummating the exterior sin. St. Thomas, 2. 2, q. 73, a. 4. A superior, in the spiritual order, sins against charity if he does not impede detraction insofar as he conveniently can, even if he does not rejoice in it; because a special obligation is incumbent on him of correcting the detractor, or of meeting the damage of the defamed subject.

But more probably he does not sin against justice: 1. the superior of the detractor, because he is not held to watch over the good of another not subject to him; 2. the superior of the defamed person, because it is not incumbent on him from justice to attend to the temporal good of the subject. L. 979. Yet the superior of the detractor "is not excused from grave fault against charity, and also against justice, if he is a Bishop or pastor and does not correct, because these are held from justice to correcting subjects."

L. 580.; Struggl 40. It is the office of the civil magistrate also to protect our estimation; but with the order of law observed, and therefore regularly at the instance of the party. A private person is for the most part excused either altogether or at least from grave sin if he does not impede detraction, whether from shame or fear or from some negligence, even if he conveniently can, provided he does not rejoice in it, nor does another damage besides infamy accrue.

The reason is that in this matter it often cannot be established that correction is going to profit; indeed often it is dangerous, and it can deservedly be feared lest the detraction rather be increased or prolonged. Likewise someone is excused at least from grave sin if he is silent because he does not know whether the things which the detractor reports are hidden. But those are excused even from venial sin who, when they advert to detraction, depart, break off the conversation, or turn away the face and show themselves sad, according to that saying of Prov. 25:24: A sad face dissipates the detracting tongue. Yet he will not be without some fault if he can easily apply efficacious correction. "And therefore it is turned into fault for him if he does not resist when he can resist, for the same reason by which someone is held to lift up the ass of another lying under a burden, as is prescribed in Deut. 22." St. Thomas, 2. 2, q. 73, a. 4.; L. 980, 981.

1506. What obligation of restitution is present in the detractor? - The detractor is held from justice, as much as can be done: 1. to repair the reputation unjustly taken away; 2. to compensate all temporal damages arising from the defamation and in some way foreseen. The reason for the first is that through the taking away of reputation a damaging injury has been inflicted; for the right which each one has to reputation cannot be taken away by private authority: therefore, since restitution of a good unjustly taken away is necessary, on that account that injury must be repaired. The reason for the second is that all damages arising from detraction are to be attributed to the detractor as their efficacious cause, whether the crime revealed is false or true, since in either case the detractor has unjustly injured reputation. The obligation of restoring reputation is personal. But the obligation of repairing damages which have arisen from defamation is real, and therefore passes to heirs. - L. 613, 991, 994, 995, 996.; St. Thomas, 2. 2, q. 62, a. 2, q. 73, a. 2.; C. B. 824.; C. L. 2389, 2390.

1507. How is reputation to be restored? Restitution of reputation is to be made in one way by a calumniator, and in another by a simple detractor. Hence 1. the calumniator is held to retract what was said, and indeed of itself even with loss of his own reputation, if reparation cannot be made otherwise; the reason is that the condition of the innocent is better than that of the guilty, and he

ought to impute to his own malice whatever he is going to suffer on that account. 2. A simple detractor cannot retract what was said, because thus he would lie; but in another way, as much as is in him, he ought to restore reputation, by saying, e.g., that he spoke badly, that he erred, or something similar; for not only those err who depart from truth, but also those who depart from rectitude, according to that saying of Prov. 14:22: They err who work evil. But often that mode does not suffice among intelligent and crafty persons, who rather gather from these formulas that the crime is true which is not openly asserted to be false. Therefore then the detractor, by being silent about what was said, ought, when the occasion is given, with dexterity and truth, to praise and honor him from whom he took reputation. L. 992.; St. Thomas, 2. 2, q. 62, a. 2 ad 2, q. 73, a. 2.

1508. Whether someone ought to restore reputation even with inconvenience to himself? - He who, by injuring another's reputation, sinned only venially, is not held to restore the same with grave inconvenience to himself. But he who sinned mortally is held to restore the same even with grave inconvenience, yet one proportionate to the damage of the other. The 1st reason is that from only light and venial fault, in the simple damaging of neighbor, there cannot arise a grave obligation, and under mortal sin, of restitution in the forum of conscience, at least from justice. Yet if he who sinned venially in detracting from half-full advertence can conveniently restore reputation in a grave matter, he is held from charity and from justice under mortal sin to restore this; for charity obliges gravely to avert the grave evil of neighbor even if someone is in no way the cause of it; and justice obliges gravely that our action not continue gravely to influence the damage of neighbor. The 2nd reason is that such a one is held to restore reputation from justice, and on account of preceding mortal fault; but an obligation from justice and from mortal fault and in a grave matter obliges with grave inconvenience. The 3rd reason is that if the evil which the detractor would have to suffer is of a higher order, or in the same order is by far notably greater than the evil which the innocently defamed person ought to suffer, the defamer could, in the order of charity, prefer his own greater good to the lesser good of the innocent, as theologians commonly note. Yet if direct restitution of reputation by retraction of words cannot be made, or is not expedient, at least indirect restitution is to be made, by praising, honoring the injured person, etc. L. 994.

1509. Whether one defaming is held to restore reputation also before those who received the crime revealed by him mediately? - Resp. Affirmatively, if he violated reputation before hearers whom he foresaw would easily spread the infamy. The reason is that then he himself was the first and efficacious cause of the damage. But with secondary causes failing, the first cause always remains obligated. But otherwise he is not held; rather those are held who afterward detracted before others. L. 991.

1510. What are the causes excusing from restitution of reputation? The following are commonly admitted: 1. If the delict which you revealed to one or several has become public by another way, or if reputation has been repaired in another way, e.g., through sentence of a judge, etc. 2. If it is prudently judged that the memory of the crime has been erased by oblivion through the course of time. 3. If restitution of reputation cannot be made without danger to life; because life is a good of a higher order than reputation; likewise if restitution of reputation is of far much less value than the loss which the defamer would have to suffer, e.g., if he were an honored man and especially very useful to the public good or religion. 4.

If reparation is morally impossible on account of too great distance of places or other special difficulties, which are found especially in the reparation of simple detraction; e.g., if those who heard the detractor cannot be recalled from a preoccupied opinion. 5. If it is judged that no faith was given by the hearers to the detraction, as happens more often when detraction is done in the heat of anger. 6. If the defamed person has expressly or tacitly remitted the obligation, provided he can remit it; indeed sometimes presumed condonation suffices. But he cannot remit it when from his infamy there follows scandal, or damage either common or of his own, etc.; e.g., if there is question of the infamy of a priest, etc. L. 997, 998, 1003.; St. Thomas, 2. 2, q. 73, a. 4 ad 1.

1511. Whether you are excused from restitution of reputation if the injured person also violated your reputation and does not wish to restore? - Navarrus, Sporer, and certain others deny it; but it must more probably be affirmed with St. Alphonsus 999, because you are not held to render his right to another if he refuses to render yours to you. "Equal delicts are dissolved by mutual compensation." L. 40. de Sol. matr.

1512. Whether you are held to compensate reputation by money if you cannot restore it? - Resp. More probably at least negatively, because justice obliges only to rendering what was taken away, or an equivalent; but money was not taken away through detraction; nor is it itself equivalent to reputation, since it is of another order.

L. 1000.; St. Thomas, 2. 2, q. 62, a. 2.

1513. What is to be done if it is doubtful whether the defamation has been given over to oblivion? - These are St. Alphonsus's words, 998: "Retraction of itself brings infamy on the one retracting; hence, when there is doubt about the oblivion of the defamation, it does not seem that someone is held to suffer certain damage in order to repair the uncertain damage of neighbor. And although the injury inflicted is certain, and therefore possesses, nevertheless, because restitution is not owed on account of injury alone, but on account of damage truly inflicted, as we say with St. Thomas, there does not seem to be an obligation of repairing doubtful damage with certain damage of the one restoring, unless when only the danger of another's infamy in some case would be esteemed more than the certain infamy, or damage, of the detractor." Add that if the defamation has truly been given over to oblivion, the defamed person certainly prefers that its memory not be recalled further.

III. On Contumely

1514. What is contumely, how manyfold is it, and what kind of sin is it? Contumely is: the unjust violation of the honor of a present person. Therefore contumely differs from detraction first in this, that detraction directly injures reputation, or the internal estimation which others have of neighbor; but contumely directly injures honor, or the external attestation of such estimation, whether it is done by words or deeds. Secondly, contumely differs from detraction in this, that detraction is done secretly and in the absence of the other; but contumely is done openly and in the presence of the other, through contempt of him, whether in himself, who is present, or in another, e.g., in his legate or statue; for contumely is so called from contemning. Nevertheless, as honor can be shown to an absent person, e.g., by a laudatory oration before many, so also contumely can be done to an absent person by an atrocious injury before many, because namely it is foreseen at least confusedly that the offended person will find it out. L. 1. 3, n. 334.

Contumely is done in three ways, namely by word, writing, and deed. Moreover, under contumely which is done by word are comprehended reviling, reproach, opprobrium, and curse. Under contumely which is done by writing from the mind of defaming another is comprehended a defamatory libel. And finally under contumely which is done by deed are comprehended mockery, derision, and scoffing. "Meanwhile, however, these species of contumely in the theological forum are only material; for formally all pertain to the unjust injury of another's honor." Struggl 33. But from St. Thomas, 2. 2, q. 75, a. 1, "derision is a special sin." For "just as someone by reviling intends to depress the honor of the one reviled... so also by mocking someone intends that the one mocked blush." Hence derision, which is done by mouth, word, and laughter, and scoffing, which is done by wrinkled nose, "differ from contumely as shame differs from dishonoring: for shame is fear of dishonoring." St. Thomas ibid. ad 1. Indeed, "from a virtuous work someone merits among others both reverence and reputation, and within himself the glory of a good conscience; according to that saying, 2 Cor. 1:12, this is our glory, the testimony of our conscience." St. Thomas, 2. 2, q. 75, a. 1 ad 2. Hence conversely "from a base or vicious act, a man's honor and reputation are taken away among others; and to this end the contumelious man and the detractor say base things about another; but within himself, through the base things which are said, someone loses the glory of conscience through a certain confusion and shame, and to this end the mocker says base things." Now security of conscience and its quiet is a great good. "And therefore he who disquiets someone's conscience by confounding him inflicts on him some special harm." Injury of due honor is not only against charity, but also against justice; for individuals have a right to a certain honor, and not to be held in contempt. Yet greater honor and a certain quasi-worship is owed to Prelates and persons excellent in dignity, and to parents; which in the former belongs to observance, in the latter to piety. But any injury of honor, if only that is considered and not other extrinsic effects, is of the same lowest species, except that which is against parents and which also violates observance or piety. Lugo de Poenit., d. 16, n. 265.

St. Thomas, 2. 2, q. 72, a. 1.; q. 73, a. 3.; q. 75.; q. 103, a. 1, 2.; L. 966.; Struggl 23-27.; Ithur. Cas. 30, n. 5.

1515. What are reviling, reproach, opprobrium, mockery, scoffing, derision, imprecation? "Reviling, as if called a clashing of voices, properly signifies voices of several persons striking against each other, or a disordered clamor; and because reproaches are often hurled with contention employed, therefore in strictness it ought to be used for contumely done by several; yet usage bears that reviling be confused with contumely, as if it is an injury by which some crime, or also an evil either of punishment or of nature, is thrown in the face of someone present.... Reproach is an injury by which someone objects to another a benefit previously conferred upon him, upbraiding his ungrateful mind toward the benefactor.... Opprobrium in law means the same as reproach, L. Probrum ff. de Verbor. signific.; it is as though a reproach objected; hence, since reproach signifies dishonor or infamy from delict, opprobrium is an injury by which someone objects to another the dishonor with which he is affected on account of a crime.... Mockery and derision mean the same thing and are derived from deriding and mocking, which signify laughing with contempt of another. And according to St. Thomas, 2. 2, q. 75, it happens when someone turns another's evil or defect into play and laughter so that the other may blush. If laughter or loud laughter is added to words, it is properly called derision; it should be called scoffing if a movement of the nose, head, or some other member of the body is added, indicating another's vice, so that he is suffused with shame; but if other deeds are added to

words for this same end, derision will be called mockery. But it will be called irony if you then especially blame another when through derision you praise him.... To these add imprecation, that vice... by which someone calls down upon another some evil of fault, punishment, or nature." Ithur. Cas. 30, n. 5. A curse, made against an absent person, is repugnant only to charity; for through a curse evil is pronounced against someone either by commanding or by wishing. But made against a present person, it often is repugnant also to justice; namely when it injures the honor owed to another, and takes on the nature of contumely. Struggl tr. 4, q. 5, n. 13.; Lugo d. 14, n. 193.; St.

Thomas, 2. 2, q. 72, a. 1; q. 75, 76. "Reviling and reproach consist in words, as also contumely does, because through all these some defect of someone is represented to the detriment of his honor. But a defect of this kind is threefold: namely a defect of fault, which is represented through contumelious words; and a defect generally of fault and punishment, which is represented through reviling.... But sometimes someone represents to another a defect of diminution or indigence...; and this is done through the word of reproach, which properly is when someone injuriously recalls to another's memory the help which he conferred upon him while he was suffering necessity." St. Thomas, 2. 2, q. 72, a. 1 ad 3.

"It happens that a word of curse uttered is a venial sin either on account of the smallness of the evil which someone calls down upon another by cursing, or also on account of the affection of him who utters the words of cursing, while he utters such words from a slight movement, or from play, or from some surreption, because sins of words are weighed especially from affection." St. Thomas, 2. 2, q. 76, a. 3.

1516. Whether contumely and mockery are grave sins? - Contumely is a mortal sin from its genus. For from the fact that someone openly utters words against another, he seems to make little of him; hence from this very thing he is dishonored, and therefore contumely brings detriment to the honor of him against whom it is uttered. Therefore from this it is per se a mortal sin no less than theft or robbery. For man does not love his honor less than a possessed thing. And it is a graver sin than detraction itself, as robbery is graver than theft. For it brings greater contempt of neighbor. This is clear besides from the words of Scripture, Matt. 5:22: But whoever shall say to his brother: Raca, shall be liable to the council; and whoever shall say: Fool, shall be liable to the gehenna of fire. From its genus; for it will be venial both from imperfection of the act, and "if it is a light reviling, not much dishonoring a man, and is uttered from some levity of mind, or from slight anger, without a firm purpose of dishonoring someone." St. Thomas, 2. 2, q. 72, a. 2.; q. 73, a. 1, 3.; L. 966.; E. M.

Mockery, or derision, or illusion is done only concerning some evil or defect which is turned into laughter or play, and therefore is taken as if small. For what is great is taken not for play, but seriously. Therefore when someone puts the evil or defect of another person into play or laughter, because according to itself it is a small evil, it is a sin according to itself venial. But if he puts the evil or defect into play or laughter as small by reason of the person, then to mock or deride someone in this way is to make altogether little of him, and to esteem him so vile that there is no need to care about his evil, but it is to be held as if for laughter and play. And thus derision and mockery are per se mortal sins, and graver than contumely; because the contumelious man takes another's evil seriously, but the mocker turns it into play and laughter; and therefore there is greater dishonoring and contempt. But the sin is so much graver as the reverence owed to the person who is mocked is greater. St. Thomas, 2. 2, q. 75, a. 2.

1517. Whether an obligation of restitution arises from contumely? - Contumely of itself induces a strict obligation of restoring honor and repairing damages, if any have followed, at least if they were foreseen confusedly. The reason is that contumely contains injury, and any injury requires satisfaction, and if it is damaging, moreover compensation of damages. - Cf. 1506 seqq.; L. 966.; St. Thomas, 2. 2, q. 62, a. 2 ad 3.; C. A. 1330.

1518. Resolutions: Honor publicly taken away through contumely is to be restored publicly before those who were witnesses of the dishonoring, or at least in such a way that the satisfaction can come to their knowledge. But it suffices that satisfaction be made through another person, who asks pardon in the name of the one dishonoring. L. 894. That restitution of honor is required which is judged sufficient for manifesting estimation according to the condition of the offended person. For if he who dishonored was a superior, it will regularly suffice if he greets the one dishonored, visits him at home, or shows benevolence to him.

But if he was an equal, or a fortiori an inferior, greater satisfaction is required, namely that he anticipate in greeting, yield place, ask pardon, etc., if he cannot sufficiently satisfy in another way. L. 986.; Lugo d. 15, n. 57. If the one dishonored has taken revenge, e.g., by striking, wounding the other, for the most part further satisfaction is not required for honor; because that one seems to accept revenge as satisfaction, and the other, by not resisting, seems to confess his fault and his estimation of the other. L. 989.

Likewise rustics are exempted from restitution of honor if equal revilings or reproaches have been mutually hurled among them, because by that very fact compensation is made. In practice many times it is expedient that the confessor omit admonishing a penitent existing in good faith concerning the obligation of satisfaction, especially if he foresees that admonition is not going to profit; or if he thinks that he who was dishonored will easily condone it, or will refuse reparation, especially public reparation, lest the memory of the injury return among others, or lest he himself be more affected with shame, etc. L. 988.

1519. Whether, if the offender is publicly punished by a judge, he is still held in conscience to furnish satisfaction for the injury inflicted? Lugo, with the common opinion, most probably denies it. The reason is that the punishment itself inflicted for the honor taken away from you seems sufficiently to repair your honor. Thus also, if the offender, compelled by a judge, furnished due satisfaction to you; for then, although compelled, he has now truly furnished testimony of the estimation of your dignity. L. 990.

1520. When contumely was hidden, is satisfaction owed? Molina, Laymann deny it. But it must altogether be affirmed with the common and true opinion, which Lessius, the Salmanticenses, etc., hold; because in every contumely, even still hidden, besides injury there is damage of honor unjustly injured, since each one has a right that due honor be preserved for him. L. 985.

1521. Whether and when contumely is licit? - Contumely is licit in the following cases: 1. If for the sake of a joke, through suitable recreation, light defects are objected, it is urbanity, according to St. Thomas, provided the other is not saddened, nor moved to anger. 2. If it is done with the mind of correcting, humbling, or for another reason; thus Christ called the Apostles foolish; and the Apostle called the Galatians senseless. Thus St. Thomas, 2. 2, q. 72, a. 2 ad 2, who says "that just as it is licit

to strike someone for the sake of discipline, so also someone can say to another whom he ought to correct some reviling word." L. 966.

1522. How ought one affected by contumely to conduct himself? - "We are all held to tolerate contumelies, casting away the mind of revenge. Yet sometimes it will be expedient to repel contumelies, namely when tolerance is foreseen to be ascribed to inability to resist, or to foolishness; or if it can harm the common good, as if a prelate by tolerating would be rendered contemptible, and thus the insolence of subjects would be increased." L. 966.; St. Thomas, 2. 2, q. 72, a. 3.; q. 108, a. 1 ad 4.; Quodl. 5, a. 26.; Quodl. 10, a. 13.

IV. On Lying

1523. What is lying, and how manyfold is it? - A lie is a false word, i.e., against the mind; false, with the intention of saying what is false. The intention of deceiving does not pertain to the essence of a lie, otherwise jocose lies would be excluded from lying, since they are not said for deceiving, but for joking; and because it is evident that he lies who, with you present, did something, and immediately afterward denies to you even that he did it, although there is no will or faculty of deceiving.

Wherefore from lying are excluded jokes which are uttered or done in such a way that from the very mode of uttering or acting, it is sufficiently understood that what is outwardly stated is false; although the hearer, from his own excessive simplicity and stupidity, takes the joke seriously, and is deceived rather by himself than by the one joking. Likewise excluded from lying are tropical and figurative locutions, ironies, fables, and parables; because they contain the true sense which the speaker intends to express, although sometimes he observes that it is not immediately apprehended by the hearer, but another false sense is conceived, which the speaker does not intend, but only permits. St. Thomas, 2. 2, q. 110, a. 1.; Quodl. 6, a. 17. A lie is threefold, namely jocose, officious, pernicious.

A jocose lie is one which neither profits nor harms, but is uttered so that it may delight. An officious lie is one which is done without injury to another, so that it may profit a third party. Finally a pernicious lie is one which is done with injury and harm of another, even if it profits some third party. - St. Thomas, 2. 2, q. 110, a. 2, 3. No one regularly lies by silence and dissimulation, by not speaking, not acting, St. Thomas, 2. 2, q. 111, a. 1 ad 4.; because he who is silent, does not act, neither affirms nor denies. Regularly, for sometimes not to speak, not to act, is not without deceit and fraud. Lugo d. 23, n. 82.

1524. What is mental restriction and how manyfold is it; what is equivocation or amphibology? Mental restriction is an act of the mind turning or restricting the words of some proposition to another sense than the natural and obvious one; if, e.g., when asked whether you received Easter Communion, you answer that you received, understanding internally in the preceding year. - Mental restriction is: 1.

Purely or strictly mental, if the sense of the speaker added by the speaker's mental addition alone can in no way be perceived, neither from the obvious signification of the words in themselves, nor from the circumstances; and this is properly called mental; e.g., if someone is asked by a Protestant friend whether he is a Roman Catholic, and answers that he is not, because he was not born at Rome. 2. Broadly or improperly mental, if the sense of the proposition can be gathered either from the very

signification of the words, because they are ambiguous, or from the circumstances; e.g., if someone is asked whether he received a benefice from the Bishop, and answers that he did not, because he properly received that benefice from the Holy See, to which it was reserved; and if someone has secretly compensated himself, and is asked whether he accepted anything, he can deny it, because he accepted nothing except what was his own. Equivocations or amphibologies are referred back to mental restriction; these are locutions having of themselves a double principal sense, but one more and the other less obvious; e.g., if someone answers nothing to a question about some matter done, and then to one insisting: what do you say? he answers: I say no.

1525. What is simulation? - A lie not by words, but by deeds, is called simulation. Yet not every simulation is a lie: for to simulate is indeed to do one thing and to will to signify another, and consists in this; but deeds are not, as words are, destined to signify the mind and to speak to others; therefore by these no one lies unless he uses them to deceive someone. Wherefore, if someone uses them only for concealing the truth, every lie is absent. And if a lie is sometimes absent from the very words, when someone is not questioned by right concerning some matter, how can that right always be present in deeds, so that you must do this or that, lest another be deceived? To simulation or to lying pertain hypocrisy, boasting, irony. All are opposed to the virtue of truth, which is a special virtue through which man duly orders his outward things, whether words or deeds, to something as sign to thing signified. St. Thomas, 2. 2, q. 109, a. 2.; q. 110, a. 2.; q. 111, a. 1.; Quodl. 6, a. 17.; Quodl. 8, a. 14. "Hypocrisy is a simulation by which someone simulates the person of another, as when a sinner simulates the person of a just man." St. Thomas, 2. 2, q. 111, a. 2. Generally and of itself hypocrisy is a light sin. It becomes grave from a gravely depraved end, or another gravely evil circumstance. St. Thomas, 2. 2, q. 111, a. 4. Boasting is properly said "when someone extols himself above that which is in him." And it is grave or light by reason of a grave or light object. St. Thomas, 2. 2, q. 112, a. 2. Irony is had when "someone says lesser things, departing from truth, for instance when he asserts about himself some vile thing which he does not recognize in himself, or when he denies about himself some great thing which nevertheless he perceives to be in himself; and it is always a sin," light of itself, grave per accidens....

St. Thomas, 2. 2, q. 113.

1526. Whether lying is illicit? A lie is intrinsically evil, because a lie formally imports the intention of stating what is false, contrary to the institution of words. Besides, a lie is immediately opposed to the virtue of created truthfulness, which establishes truth in signs, and mediately to the virtue of divine truthfulness; and therefore it is intrinsically evil and in no case licit. Hence Innocent III, C. Super eos de Usuris, says: "Not even for protecting life is it licit for us to lie." Indeed truthfulness is a special virtue, through which man duly orders his outward things, whether words or deeds, to something as sign to thing signified. Cf. Eccl. 8:14.; Lev. 19:11.; Eph. 4:24.; Col. 3:9.; St. Thomas, 2. 2, q. 109.; q. 110, a. 1, 3.; Quodlib. 8, a. 14.

1527. What kind of sin is lying? A jocose and officious lie is a sin from its genus venial, but a pernicious lie is from its genus mortal, because a jocose and officious lie is opposed only to the virtue of natural truth or truthfulness; and a pernicious lie is opposed also to charity and justice; hence the first two are sins slight of themselves, but the third is grave of itself. But a pernicious lie in the individual case is often a venial sin, not only from imperfection of the act, but also from smallness of

matter, or of the harm inflicted on neighbor through the lie. St. Thomas, 2. 2, q. 100, a. 3, 4.; Quodl. 8, a. 14.

1528. Whether purely mental restriction is licit? - It is never licit to use purely or properly mental restriction. Wherefore neither is it licit to swear with it, because it is simply a lie. For it states what is false simply, although it is internally determined to a true sense by the mind of the speaker. Thus, when someone questioned about theft answers that he stole no money, understanding gold, silver, bronze, when he stole paper money: he certainly lies. This is also clear from propositions 26, 27, 28 condemned by Innocent XI. L. 152.; E. M.

1529. Whether broadly mental restriction is licit? It is sometimes licit from a just cause to use restriction broadly, i.e., improperly mental, when the sense intended by the speaker can be understood. The reason is that by this very fact that the truth can be prudently gathered from some circumstance of the thing, place, time, or person speaking, the aforesaid restriction is not evil in itself, since neighbor is not properly deceived, but from a just cause only his deception is permitted. Moreover, for the good of society it is required that a means be present of licitly concealing a secret and of avoiding damage from its manifestation; and sometimes no other means is at hand besides broadly or improperly mental restriction. And so in a case of this kind it is licit to use restriction not purely mental, by answering according to the mind of the questioner, or according to those things which appear and are commonly believed, or according to the ordinary non-authoritative mode of speaking, or finally according to received custom; e.g., if someone denies that he entered such a house, namely in which he himself committed no theft, as is believed, although truly he entered it; if those joined in civil marriage and commonly judged to be joined in legitimate marriage are mutually called husband and wife; if someone, asked by a friend about another's crime injuring reputation, answers that he does not know it; if a servant answers importunate visitors that the master is not at home. Struggl tr. 5, q. 3, n. 17.; Ithur. Cas. 37, n. 11 seqq.

1530. Note: It is licit to use a broad restriction of this kind even with an oath, although a greater cause is then required, since divine testimony is not to be used without judgment. L. 151.

1531. Whether amphibologies are licit? - Amphibologies, or equivocations, altogether discordant and remote from the matter at issue, so that they cannot be noticed and understood in a human way, are illicit; since then human commerce would utterly perish, as if someone asserted that he does not have a dog at home, because he does not have the constellation of the Dog. But if the aforesaid amphibologies or equivocations are perceptible of themselves, although not altogether easily and immediately, they are not illicit of themselves; but sometimes they are licit, unless they are done from the positive intention of deceiving another; for then they are not against the mind of the speaker and the virtue of truthfulness.

1532. When are restrictions and amphibologies not purely mental illicit? Restrictions and amphibologies, or equivocations, even not purely mental, are not licit: 1. if they are done without an honest and proportionate cause; 2. if from them damage to neighbor would emerge against the order prescribed by charity; 3. when mutual contracts are celebrated; 4. if the one questioning has the right of inquiring or commanding the confession of truth. Proof. The 1st reason is that, if without any honest cause and always it were licit to speak amphibologically, equivocally, and with restriction even not purely mental, all sincerity and human faith would perish; but men are held by natural law to

preserve human faith. The 2nd and 3rd reason is that this is required by charity and justice. The 4th reason is that to that right there corresponds an obligation of confessing the truth without ambiguity.

1533. Resolutions: Public persons questioned about matters committed to their trust can especially use restriction of this kind; such are secretaries, legates of Princes, leaders of armies, magistrates, advocates, physicians, surgeons, midwives, and whoever has office and reason for concealing some truth. For if the secrets committed to these persons were violated, very grave inconveniences in society would follow. L. 165.

1534. Whether simulation is licit? "Formal simulation, namely when someone intends through an external deed to signify something other than he has in mind, is never licit, because it is a true lie of deed; but material simulation, that is, when someone does something, not intending the deception of another, but some end of his own, is licit with a just cause, always and when from the circumstances others can conjecture that it is done for another end; as was said about restriction not purely mental. Thus Christ the Lord, Luke 24, at Emmaus feigned that he would go farther, not intending that the Disciples believe this, but wishing to signify that he truly would have gone farther unless he were invited by them." L. 171. - St. Thomas, 2. 2, q. 111, a. 1. Dissimulation is had when, by not speaking, not acting, something is covered and someone is deceived from it. Of itself it is licit, for there is no obligation of always manifesting the truth.

1535. Whether a superior has in every case the right of knowing the truth, so that one questioned cannot licitly use broadly mental restriction? Resp. Negatively, as is clear from the following exceptions. For: 1. A confessor questioned by a tyrant whether Titius confessed homicide can and ought to answer: I do not know; because the Confessor does not know this with communicable knowledge. Indeed even if the tyrant insisted and said: Do you not know this with communicable knowledge? He could still answer: I do not know. The reason is that the tyrant knows well that he does not have the right of questioning about this, nor does the Confessor understand that he knows it as a man, but as vicar of God and therefore by incommunicable knowledge.

Almost the same must be said of him who knows a matter from a committed secret, for the sake of asking counsel. 2. A penitent questioned by a Confessor about a sin confessed can swear that he did not commit it, understanding internally that which he did not confess. Thus Cardinal, the Salmanticenses, Sanchez, etc. Yet this must be understood unless the Confessor justly questions in order to know the state of the penitent. From proposition 58 condemned by Innocent XI. L. 157. - "But if the penitent has not sinned mortally since the last confession, the Confessor sufficiently knows his state, and then he has no right of questioning about the past life."

Gur. Cas. v. 2, n. 442. 3. "The opinion of Cardinal de Lugo, de Iust. d. 40, n. 15, Tamburini, Cardenas, Sporer, Mezger, Babenstuber, Elbel, and several others is sufficiently probable; they admit that the accused, when the proof stands only half-full, and when there is hope of escaping death, can use amphibology and deny the crime even with an oath, understanding internally: so that I am held to confess, as long as hope of escaping death appears. The reason for this is that the precept of obeying a legitimate judge cannot oblige the accused so that he acts against himself and by his own confession completes the half-full proof of his capital crime, when otherwise it cannot be sufficiently proved.

Nor is the aforesaid restriction, in such a circumstance of the case, purely mental; because it can prudently be gathered by a sagacious judge and assessors. Hence a Confessor will be able safely to follow this opinion, at least so that he not deny absolution to an accused person wishing to follow it; as the cited doctors note." Struggl de 8 Praec. 46 and de Virt. relig. q. 3, n. 22.; L. 154.; l. 4, n. 57.; St. Thomas, 2. 2, q. 33, a. 7 ad 5. 4. A witness can swear that he does not know what he truly knows, understanding internally that he does not know a crime about which inquiry can legitimately be made, namely if it is certain to him that the crime lacked fault; or if he knows the crime, but under secret, with no preceding infamy; or if the crime is altogether hidden.

Struggl de Virt. relig. l. c. 21, 22. 5. The truth cannot be denied or hidden if one contracting marriage is questioned by the pastor or by the Bishop whether he is bound by any diriment impediment; if one to be promoted to orders is questioned by the Ordinary whether he is affected by some censure or irregularity. One to be promoted to a magistracy or public office, when there is no obligation of accepting it but it is free to accept it, cannot, if he is questioned, deny a hidden crime. Proposition 28 condemned by Innocent XI. - E. M. 554.

V. On Violation of Secret

1536. What is a secret, and how manyfold is it? A secret in general is called whatever is hidden. As pertains to the present question, a secret is: some hidden thing revealed to someone, or known in any way, with the burden of silence. - A threefold secret is distinguished: natural, promised, committed. A natural secret exists if by chance you know something which you cannot reveal without the just sorrow or damage of another. It is promised if by a gratuitous promise you promise another that you will reveal to no one a thing which you already knew or of which you receive knowledge; or by an onerous promise of revealing the thing to no one, another manifests it to you under this condition. Finally it is committed when you reveal a matter to another for the sake of counsel or help, with this express or tacit condition, of revealing it to no one. L. 970.; St. Thomas, Quodl. 12, a. 21.

1537. How does a natural secret oblige? - In a grave matter it obliges of itself under grave sin, and indeed for the most part from justice, sometimes from charity alone, unless a just cause excuses. The reason is that from the revelation of the secret damage to neighbor follows for the most part, and he has the right not to be injured without just cause. Moreover, he is affected with just sorrow who, as if deprived of his own thing, is deprived of a secret without just cause. Without just cause; for a natural secret obliges insofar as in that case justice or charity obliges; when this obligation ceases from a just cause, the obligation of the secret will cease. L. 970.

1538. How does a promised secret oblige? - It obliges of itself gravely or lightly, according as someone by promise willed to oblige himself --- gravely and from justice in grave matter; or lightly and from mere fidelity, which from its genus is light. The reason is that the aforesaid obligation arises spontaneously from the promise made. Wherefore a gratuitously promised secret regularly does not oblige with grave inconvenience; whether an onerous one obliges even with grave inconvenience depends on the intention of the one exacting it and of the one promising it, and on the damage of each. With very grave damage it regularly does not oblige, unless someone expressly promised it in such a way; and it is licit that he extorted it by injury, if nevertheless from the revelation the other would not undergo the same damage. Cf. 987.; Ithur. Cas. 37, n. 2, 5, 6.; L. 970.

1539. How does a committed secret oblige? It obliges of itself under grave sin from justice, and indeed more strictly than a merely natural secret, and also than a promised one. The reason is that besides the natural obligation, there urges also an obligation from onerous contract; for another would not commit knowledge of the matter to you unless he received from you a promise of secrecy. Moreover, in miserable affairs also to snatch away counsel and help is dreadful and publicly ruinous. Hence by civil law also it is prohibited to reveal a committed secret, and magistrates are forbidden to question about those things which by reason of the office one exercises, e.g., of pastor, advocate, etc., have been entrusted to someone. C. I. Proc. poen. 288.; C. G. poen. 378.

1540. Note: There are several and grave theologians who probably defend that it is not mortal to reveal a grave matter committed under secret to one or another upright person under the same secret, provided it is not disclosed to whom especially he who committed the secret wished it concealed; since the matter can still be called secret in those circumstances. Yet this is not so easily to be permitted in practice. For so great is the talkativeness of men that a secret can scarcely stop with one. By an oath furnished, officials of the Roman curia are held to keeping secret; administrators, consultors, cardinals of the Sacred Congregations of the Holy Office, of the Index, of the Consistory; synodal examiners and pastor-consultors; examiners of books and writings of the Servants of God; and administrators of any order in the Roman curia. Ord. serv. in R. C. after Const. Sapienti Consilio. Secret is to be kept in designating those who are proposed for Episcopal Sees in the United States of North America. S. C. Consistor. 2 July 1910. The secret to be kept in designating persons for episcopal sees is extended to all dioceses and provinces in which the same or a similar form of designation obtains as in the United States of North America. S. C. Cons. 28 Apr. 1911.

Deputies for discipline and deputies for economy of the new major Roman Seminary at the Lateran, and of the minor Seminary at the Vatican, according to C. In praecipuis of Pius X, 28 June 1913, are obliged under grave sin to keep secret from office concerning business discussed and concluded in the deputation. S. C. Cons. 30 Oct. 1913. Public agents before the Sacred Congregations are held to keeping secret from office. C. Sapienti consilio, Reg. Gener. after C. cap. 9. Those who violate the secret which is called of the Holy Office cannot be absolved except by the Supreme Pontiff, the Cardinal Penitentiary himself excluded, from the reserved excommunication to the same Supreme Pontiff which they incur. Ord. serv. in R. C. Norm. pecul. c. 7, a. 2, n. 4.

The print's appendix has more on this paragraph: [Power of the Sacred College](/manuals/bucceroni/power-of-the-sacred-college). (ed.)

1541. Whether from violation of a secret an obligation of restitution arises? He who by revealing another's secret sinned mortally is held from justice and under grave obligation to repair the grave damage of another. The reason is that it is unjust damaging. Cf. 1358.

1542. Whether it is ever licit to explore and reveal a secret? - It is licit to explore and reveal a natural, promised, and committed secret: 1. From the rightly presumed consent of him whose interest it is that the secret be concealed; for then there is no injury of anyone's right. 2. If the matter has already been spread abroad from another source; for then it ceases to be secret. 3. If damage to the republic is going to follow from the secret. The reason is that private good ought to yield to the common good, and therefore there can be no obligation of procuring a private good against common damage. And for the same reason, if common damage would follow from revelation of a secret, one is held rather to undergo death and any torments whatever than to reveal the secret. 4. Regularly, if from the observation of the secret grave damage would come to you or to him to whom the secret pertains, or

to another innocent person. The reason is that naturally no obligation can be given against the order of charity; nor is anyone by his promise and contract presumed to have obliged himself to such a burden, that he keep a secret even with his own grave damage, unless from the circumstances this certainly appears and the thing itself requires it. 5. If there is question especially of a committed secret concerning a truly grave matter, a committed secret does not cease in the private damage of someone, even if very grave; but it does cease in the grave damage of him to whom the secret has been committed; in grave spiritual damage of the very one committing it, e.g., if he wishes to marry his spurious daughter; in damage of another which threatens him from the very one committing the secret, as if a girl attempts to procure abortion and kill the fetus. The reason of the first assertion is that it still more concerns the public good that this secret be kept than that the private damage of another, even very grave, be impeded.

The reason of the second assertion is that otherwise, in the 1st case, you will scarcely find anyone who would wish to give counsel or help in straits of this kind, which likewise would be pernicious to the public good; in the 2nd and 3rd, the promise of secrecy would be illicit. 6. Finally, someone can use knowledge of a secret for his own advantage as if his own thing, although he extorted the secret not without injury to another, if nevertheless this is done without another's unjust damage, and he does that which otherwise by his own right he could have done. L. 570, 971.; l. 4, n. 49.; l. 6, n. 698.; St. Thomas, 2. 2, q. 70, a. 1 ad 1, 2.; Laym. l. 3, tr. 3, p. 2, c. 5, n. 2.; Lugo de Iust. et Iur. d. 14, n. 142.; d. 38, n. 37 seqq.; Ithur. l. c. n. 8-10, 11, 28, 29, 30-34, 37, 38.; Appendix n. 4, 19, 22, 23.; La Croix l. 2, p. 2, n. 1231.

1543. Whether someone is held to manifest a secret to a judge legitimately questioning? - Resp. Affirmatively, if there is question of a merely natural secret; because the obligation of obedience to be furnished to a judge legitimately questioning on account of the common good is stronger than that of impeding damage to a private person by observation of a secret; and in any case, since it is legitimately inflicted by a judge, there will be no injury of another's right. - Resp. Affirmatively also if there is question of a secret simply promised; because by the promise you obliged yourself only to that which you could licitly furnish.

But you could not promise against obedience owed to a judge or superior; because, when you knew the crime, you had already contracted a natural obligation of manifesting it, if the judge or superior required this. Therefore the subsequent promise of secrecy could not destroy the prior obligation. Resp. Negatively of itself, if there is question of a secret promised by pact and onerous promise.

The reason is that, as St. Thomas says, 2. 2, q. 70, a. 1 ad 2, "to keep faith is of natural right: but nothing can be commanded to a man against that which is of natural right." - Indeed, when an onerous contract intervenes, it is altogether of natural right to keep the faith given. - Resp. Likewise negatively, of itself, if there is question of a committed secret. The reason is that the common good itself demands that, from fear of such revelation, men not be deprived of the advantage of seeking necessary counsel or help, which certainly they would never require unless they were certain of the secret to be kept. Therefore the common good itself demands that, as long as the one committing the secret can licitly keep his secret, he retains the right that the other not betray it. Hence one can answer a judge questioning: I do not know, understanding internally, in such a way that I ought to manifest it; although, with an oath interposed, he is compelled to give testimony. S. Poenit. 21 Aug. 1830. Of itself; for otherwise it is if the case is one in which someone can and is held to reveal the

secret, as for instance if heresies, conspiracies, robberies are to be restrained. - L. 970.; Ithur. l. c. n. 13, 25.; Append. n. 10, 11, 12.; St. Thomas, Quodl. 1, a. 15, 16.; Lugo d. 14, n. 135, 141.; Gur. 437.

1544. Whether you can reveal a secret if you promised to keep it even with loss of life? Resp. Affirmatively, if the common good requires it, because a promise made against the common good is null. Resp. Negatively, if there is question of your own damage simply grave, and the other is placed in the same peril; because it is better to keep this secret promised by a special contract. - Resp. Likewise negatively, more probably, if there is question of your extreme damage, and the other would be cast into the same danger, or at least a very grave one, because you have expressly renounced your right, nor is it illicit in the case to omit the preservation of life in order to keep a promise. But it is altogether necessary that the business to be kept secret be of very grave moment. Otherwise the promise would be prodigal, which we are not held to keep. Yet St. Liguori 971 says the opposite is sufficiently probable, because it is licit for no one to squander his own life and postpone it to another's.

Ithur. l. c. n. 30.

1545. Whether he sins gravely who opens or reads another's letters? Resp. Affirmatively, of itself, or from its genus. The reason is that by natural right and the right of nations there is an obligation of leaving the secrets of letters uninjured; otherwise human commerce would be ruined. - Except the following cases: 1. If there is tacit or presumed consent of him who writes, or of him to whom the letters are sent. 2. If it is known or presumed that the letters contain matters of light moment. 3. If it is done from a just cause, e.g., for averting public or private damage, provided one has the right of opening the letters for warding off that evil, and does not read more than is necessary for this end. 4. If the letters are opened from levity or from some inadvertence. L. 1. 5, n. 70.; H. A. 5.; Lugo Resp. Mor. l. 5, d. 10.

1546. Note: Until the letter is delivered to him to whom it has been sent, it still pertains to the sender, who will be able to recall it to himself. That the secret be preserved, writings to be transmitted to the Holy See which contain secrets ought to be closed. S. C. Consist. 25 Nov. 1908. From C. L. 575, letters sent cannot be published without the permission of the author or of him who represents him, except in the case that they are to be added to some process. Violation of the secret of letters is prohibited by grave penalties in Civil Law. C. I. Poen. 159-164.

1547. Resolutions: To gather letters torn into small pieces, to join the various parts together, and to read them, is not licit with justice saved. For someone tore the letter apart in this way so that it could not be read. L. 1. 5, n. 70. "Thus a Prince can open letters not only of enemies, but also of others, which in time of war come from places bordering enemies. Likewise public ministers, as often as they judge it necessary for the public good.... And this proceeds not only for a Prince and ministers, but also for private persons....

A religious Superior licitly opens and reads the letters of his subjects, provided they are not sent to a higher superior, or to one whom the statutes exempt, nor come from him, either from the statute or custom of the religion, or from probable suspicion that they contain something evil." L. 1. 5, n. 70. Thus also in colleges and seminaries the superior, by reason of a more special vigilance to be observed, can open the letters of students, unless they are sent to other higher superiors or received from them, or unless there is question of a secret of conscience or of a family secret; for then it

suffices that the superior know that the letters are truly directed to the higher superior, to the spiritual director, or to the parents, or received from them.

Gousset 1090. - Struggl 56. III.; Ithur. l. c. n. 26 seqq.; Ferraris v. Litterae n. 9, 10. In the Norms of the S. C. EE. and RR. for Religious Institutes, art. 179, 180, it is said: Letters to be sent by Sisters, and those sent to them, are to be handed to the local superioresses, who will be able to read them at their discretion. Let them use this faculty with the moderation of prudence and charity, the secret being kept. From any inspection of superioresses are excepted letters to be sent to the moderator general, or provincial, and their councilors or assistants, to the Bishop and to the S. C. EE. and RR., or those given by these to the Sisters.

On the First and Second Precepts of the Church

1548. What are the precepts of the Church; what of tithes? There are indeed very many precepts of the Church which concern particular states of men. But the precepts of the Church which regard all states of men are commonly numbered as six. We will speak of the former in the treatise on Particular States; of the latter it will be necessary to speak here. Struggl init.

But here we omit the precept concerning tithes to be paid; since in very many places, by a convention entered into with the Church, or by legitimate prescription, they have been extinguished. Yet the obligation always remains, confirmed by natural law through positive divine law, that the faithful supply what is necessary for the sustenance of clerics exercising the care of souls. But in the aforesaid places provision has already been made otherwise for this necessity. But where neither the aforesaid convention nor legitimate prescription was present, they are still owed and are to be paid to the pastor. Praedial tithes, which are received from lands, are owed to the pastor in whose territory the estates are situated. Personal tithes, which are received from things which someone acquires by his own industry, are owed to the pastor from whom the sacraments are received. - Tithes are owed both from religion as a sign of the universal dominion of God, whence not to pay them is a graver sin of irreligion; and from justice, for those who serve the altar ought to live from the altar; hence under obligation of restitution "tithes are required from debt, and those who are unwilling to give them invade another's goods." St. Thomas, 2. 2, q. 87.; Quodl. 2, a. 8.; Quodl. 6, a. 10.; L. 1. 3, n. 42.; H. A. tr. 20, n. 85.; tit. de Decim.; Trid. s. 25, C. 12 de R.; Conc. Plen. Amer. Lat. n. 832, 833.; E. M. In the Catechism published by order of the Holy Father Pius X on 18 Oct. 1912 and edited in 1913, the precept of paying tithes is not had. But in its place the fourth precept is put: To assist the necessities of the Church by contributing according to the laws or customs. Here likewise we omit the prohibition of the solemnity of nuptials. For it is treated in the treatise on Matrimony. In the aforesaid Catechism of the Holy Father Pius X, the fifth precept of the Church is: "Not to celebrate weddings solemnly in prohibited times."

1549. What is the first and second precept of the Church? The first is that the faithful honor feasts instituted by the authority of the Church, especially by abstaining from servile works, C. 1 seqq. de Consecr. D. 3.; tit. de Feriis. The other is that at least on Sundays and feasts the faithful be present at sacred worship, C. Missas de Consecr. D. I. Hence these two precepts are intimately connected with each other. Struggl l. c.; Gousset 1091. In the praised Catechism of Pius X five precepts of the Church are numbered, of which the first is: "To hear Mass on Sunday and the other commanded feasts."

1550. What is the power of the Church to institute feast days? The Church enjoys the power of instituting feasts and of commanding their sanctification under grave obligation to all the faithful, as one which has received from Christ all power in order to the spiritual good of the faithful. The Pope alone can proclaim feasts for the universal Church, because he alone enjoys jurisdiction over the universal Church. Bishops also can institute feast days in their own diocese; for they have the faculty of making laws in their own diocese. Yet from C. Conquestus ult. de Fer. Bishops are forbidden to establish new feasts without consulting the clergy and faithful. But whether at present Bishops can still institute new feasts, the first opinion affirms, provided they are instituted in honor of Saints, not

of Blesseds, with the counsel of some clerics employed; yet they are admonished that they should strive to abstain. Urban VIII, C. Universa, 13 Sept. 1642.; Bonac. tom. 2, d. 6, q. un., p. 1, n. 3 seqq. The second opinion denies it from the Response of the S. R. C. 23 June 1703, n. 2113. And a Bishop certainly could not institute new feasts in those places in which, with Governments or the Bishops themselves requesting, the Holy See willed, by determining the number of feasts, to establish a uniform manner for all of sanctifying feast days. Bouix de Iur. Liturg. p. 4, c. 4.; E. M. Cf. following number.

1551. Which are the feast days to be observed? - Many feasts were formerly instituted, which in the course of times went into desuetude, or were abolished by ecclesiastical authority itself. Urban VIII, C. Universa, 13 Sept. 1642, suppressed many feasts and established a new list of feast days for the universal Church. To this catalogue must be added the feast of the Immaculate Conception of the B. V. M., Clem. XI, C. Commissi nobis, 6 Dec.

1708. But from these some less solemn ones, such as feasts of the Apostles, were later diminished, namely by the prohibition of servile works being removed; and these thereafter in some places were entirely abrogated. But some also from the more solemn ones were in some places transferred to Sunday. But, both as regards those abrogated and those transferred, nothing at all was changed as regards the office and Mass, ecclesiastical functions and choir, all of which therefore must be observed as before the abrogation or transfer. S. R. C. 18 Oct. 1818, 23 May 1835. Understand a perpetual transfer: for if a transfer is sometimes made on account of some impediment, only the office, not the observance of the feast, is transferred. Likewise nothing was changed as regards the obligation imposed on pastors of celebrating Mass for the people, and therefore one must still stand by the catalogue of Urban VIII. Pius IX, C. Amantissimi, 3 May 1858. - L. 267. Pius VI, on account of the calamity of the times, condoned for the Roman faithful the obligation of celebrating certain feasts. But these following are: namely feasts of the Holy Apostles, besides the solemnity of Saints Peter and Paul; the two weekdays which follow Easter and Pentecost; the Finding of the Holy Cross; the feasts of St. Anne, St. Lawrence, St. Stephen, the Holy Innocents, St. Sylvester, the Nativity of St. John the Baptist, the feasts of St. Michael and St. Joseph; yet the last three were afterward restored. In France, after the Indult of Cardinal Caprara, 9 Apr. 1802, from the concession of the Supreme Pontiff Pius VII, only four feasts besides Sundays remain of precept for the faithful, namely 1. the Feast of the Nativity of the Lord; 2. of his Ascension; 3. of the Assumption of the B. Virgin Mary; 4. the Feast of All Saints. From the same Indult the feasts of the Epiphany of the Lord, of the Most Holy Body of Christ, of the Holy Apostles Peter and Paul, and of the Holy Patrons of each diocese and parish are to be transferred to the Sunday next occurring. The remaining feasts, formerly commanded, are now celebrated on the same days as before, but without any obligation for the faithful. In the United States of America, from the concession of Leo XIII, 25 Nov. 1885, only six feast days are to be observed: 1. of the Immaculate Conception of the B. V. M.; 2. of the Nativity of Our Lord Jesus Christ; 3. of the Circumcision of Our Lord Jesus Christ; 4. of the Ascension of Our Lord Jesus Christ; 5. of the Assumption of the B. V. M.; 6. of All Saints. The solemnity of the feast of the Most Holy Body of Christ and of the Holy Apostles Peter and Paul is transferred to the Sunday next following.

For Spain, Pius IX conceded by Decree 2 May 1867: 1. that there be derogation from the precept of hearing Mass on feast days of the second order, commonly called Mass days; 2. that there be derogation from the same precept and moreover from the precept of abstaining from servile works on Monday after Easter and after Pentecost, on the day immediately following the feast of the Nativity of Our Lord Jesus Christ, and on the day of the Nativity of the B. Virgin Mary and of St. John the Baptist; 3. that in each diocese only one principal Patron be venerated, who must be designated by the Holy See. Wherefore besides Sundays the feasts still in force are those of the Nativity of Our Lord Jesus Christ, Circumcision, Epiphany; Immaculate Conception, Purification, Annunciation, Assumption of the B. Virgin Mary; Ascension of Our Lord Jesus Christ; Corpus Christi; Saints Peter and Paul, St. James the Greater; the feast of All Saints and of the Principal Patron of each diocese. But by Decree 12 Dec. 1867 the feast day of the Nativity of the B. Virgin Mary was restored. Finally, by Decree 28 Jan. 1890, in Spain and in regions subject to it, as also previously in several regions of Italy, the feast of St. Joseph is again to be observed as of precept. A. S. S. v. 24, p. 192.

To the feasts which the Church celebrates it was moreover licit to add the feast of the Patron, not Titular, or of one of the principal Patrons: 1. of a kingdom or diocese; and 2. of a place, where they happened to be had or venerated. Urban VIII, C. Universa; Pius VI, B. Ex quo divina, 7 June 1780. And where each feast has been introduced, each must be observed. S. R. C. 22 Mar. 1817. But it is not licit to choose Patrons except with the consent of the people and clergy and Bishop, and these Saints, not Blesseds, with the cause of the election known and approved by the S. R. C. Thus the same S. R. C. 23 Mar. 1630. - Ferrar. v. Festa n. 2 seqq.; L. 266.; E. M. But to the feasts which the Church celebrates it is no longer licit to add the feast of the Patron. At present, from the Motu Proprio of Pius X, Supremi disciplinae, 2 July 1911, concerning feast days, the feast days of Patrons are not subject to the ecclesiastical precept of hearing Mass and abstaining from servile works. Local Ordinaries can transfer the external solemnity to the Sunday next following. From S. C. C. 3 Apr. 1909, feast days recently suppressed are: In the Latin Patriarchate of Jerusalem there have been suppressed the feasts of the Holy Apostles Philip and James, St. John the Evangelist, and the Finding of the Holy Cross outside the city of Jerusalem, and also the second weekdays after Easter of the Resurrection and the second weekdays after Pentecost. - In the Apostolic Vicariate of Egypt the obligation of hearing Mass on the feast of St. Mark the Evangelist, 25 Apr., has been suppressed. In the Archdiocese of Munich and Freising the feast of St. Benno, 16 June, has been suppressed, transferred perpetually to the Sunday next following, with the obligation also of applying Mass for the people removed. In the Archdiocese of Bologna there have been suppressed the second weekday after Easter and Pentecost, the day immediately following the Nativity of the Lord, and the feasts of St. Anne, 26 July, St. Sylvester, 31 Dec. By common law now, from the Motu Proprio of Pius X, Supremi Disciplinae, 2 July 1911, the feast days besides Sundays are eight: the Nativity, Circumcision, Epiphany, and Ascension of Our Lord Jesus Christ, the Immaculate Conception and Assumption of the B. V. M., the Blessed Apostles Peter and Paul, All Saints. If any feast from those enumerated has legitimately been abolished or transferred, let nothing be changed without consulting the Apostolic See. But if Bishops judge that some feast from those abrogated should be preserved, let them refer the matter to the Holy See. If on any of these feasts a day of abstinence or fast falls, dispensation is given from each; and the same dispensation from abstinence and fast exists on feasts of Patrons, if those fall on these feasts, and they are celebrated with a great concourse of people.

Feast days to be observed in Missions must thereafter be observed in places separated from the former Mission. On feasts suppressed by the very recent Motu Proprio Supremi disciplinae, of the Most Holy Body of Christ, - of the Purification, Annunciation, and Nativity of the B. V. M., - of St. Joseph, spouse of the B. V. M., of St. John the Baptist, and of the Patron of each place or diocese, the obligation of making the Sacred Offering for the people remains. S. C. C. 8 Aug. 1911. In cathedral and collegiate churches, as regards the solemnity of Masses and Vespers in the choral office, the same things are to be observed as before the suppression. S. C. C. 8 Aug. 1911. By force of the very recent law, feasts from vow or statute, sanctioned even by ecclesiastical authority, are declared to be excluded from the number of feasts to which the obligation of hearing Mass adheres. S. C. C. 8 Aug. 1911. The law concerning feast days to be observed has been declared to be immediately in force. Namely, once it has been promulgated, the obligation concerning the observance of feasts on suppressed feast days now ceases altogether. S. C. C. 8 Aug. 1911. Faculty is granted to the Ruthenians, in the Canadian region and in the United States of North America, of observing feast days and fasts according to the custom of the places in which they live. Yet on Sundays and feasts falling in each rite on the same day, the Ruthenians are held to be present at the sacred liturgy in the church of their own rite, if it exists in the place. S. C. de P. F. 8 Aug. 1913, art. 33.; Pius X, XVIII Kal. Jul. 1907, art. 26. Whenever the feast of the Annunciation of the B. V. M. is impeded either on Friday in Parasceve or on Holy Saturday, as often as this occurs it is to be celebrated on Monday after Low Sunday with solemnity and cessation from work. S. R. C. 23 Apr. 1895, n. 3850. If on Friday in Parasceve another feast of precept falls, e.g., of the Patron, the precept of hearing Mass is not had, while the precept of abstaining from servile works remains. S. R. C. 20 Mar. 1706, n. 2164.; 10 Dec. 1773, n. 2305. If another feast falls on Holy Saturday, the transfer of the office and the obligation of hearing Mass to another unimpeded day is remitted to the judgment of the Bishop, S. R. C. 7 Aug. 1694, n. 1911.; or the obligation of hearing Mass ceases, while the obligation of abstaining from servile works remains, S. R. C. 2 Sept. 1903.

On the Third and Fourth Precepts of the Church

1552. What is the third and fourth precept of the Church? - The third precept of the Church is that the faithful confess their sins at least once each year to their own priest, namely to the Pope, Bishop, pastor, or any priest approved by the Bishop. Innocent III in Lateran Council IV, a. 1218, can. 21, Omnis utriusque sexus; Benedict XIV, de Syn. l. 11, c. 14, n. 2-6. - The fourth precept is that the faithful, each year, at least at Easter time, approach the Most Holy Sacrament of the Eucharist. Innocent III, l. c.; Trid. s. 13, c. 9.; E. M.

1553. When are children judged to have attained the years of discretion, so that they are bound by the precept of Confession? - When they are capable of mortal sin; that is around the seventh year, which is to be judged not from age alone, but chiefly from the degree of understanding or discretion of good and evil. But the spirit of discretion is judged to be present in those who now apprehend that lying or disobedience is evil, or who are ashamed of certain impure actions, etc. Hence pastors of souls are held gradually to prepare these little children for Confession, and to absolve those in whom they observe mortal sin, even doubtful, at least within the year, by force of the Lateran Council. In doubt concerning discretion, let them be absolved conditionally. Therefore Confessors who never wish to absolve children committed to them gravely err and cannot be excused. But from the same age of discretion, that is around the seventh year, the obligation also of Communion begins. S. C. de Sacram. 8 Aug. 1910.; L. 1. 3, n. 370.; l. 6, n. 432-666.

1554. Whether he who is not burdened with mortal sins is held to confess by reason of the precept of annual Confession? Resp. Negatively. The reason is that the Church, by commanding annual Confession, determines the precept of Confession imposed by Christ. But Christ imposed no other precept of Confession than that of mortal sins, as is clear from Trent s. 14, C. 1, 5.; c. 1, 2, 6, 7. - Therefore. C. De Lugo calls this opinion common and truer, Resp. Mor. l. 1, d. 15, n. 2.; L. l. 6, n. 663, 667.; Schmalz. de Poenit. et Rem. n. 16.

1555. Note: "Notwithstanding these things, certain regular, or even synodal, statutes are given, by which religious, and in certain dioceses clerics, are obliged to receive the sacrament of penance more often within the year, even if they are conscious to themselves only of venial sins.... Meanwhile, however, similar statutes ordinarily, and speaking of themselves, do not oblige under grave sin." Struggl 18. From the Norms of the S. C. EE. and RR., art. 138, Religious are held ordinarily to make sacramental confession once a week.

1556. Resolutions: "If someone within the year and at the beginning of Easter time confessed only venial sins, and then within Easter time fell into mortal sin, he would be held to confess it: because he would not yet have satisfied the precept of the Church, which obliges only to confessing mortal sins. Meanwhile, however, it is also probable that he is not held to confess before the year has elapsed from the sin committed." Struggl 12. Indeed, since doctors are not lacking who hold that annual Confession from obligation, in defect of mortal sins, is extended to venial sins; and the faithful think that by annual Confession they have now satisfied the obligation; certainly they ought

not to be obliged, in the case, to a repeated Confession of mortal sins committed afterward. Cf. St. Thomas, 4 d. 17, q. 3, a. 1.; d. 16, q. 2, a. 2.; s. q. 6, a. 3.; q. 8, a. 5 ad 4.; Benedict XIV, Inst. 18, n. 24.

1557. Whether this precept is attached to Easter time? - This precept is not per se, but only per accidens, attached to Easter time. The reason is that the Church nowhere commanded annual Confession determinately for Easter time, as it did Easter Communion. It is not per se, but only per accidens attached, etc.; for one having mortal sin is obliged to Confession at Easter time per accidens, and by reason of Communion to be received at Easter time; because for receiving this worthily in a sinner, contrition does not suffice, but sacramental Confession is required. Trent s. 13, C. 17, c. 11.; Struggl 10.

1558. From what time is the year of Confession to be computed? - It can probably be computed from the first day of January to the last of December, or from the last Confession, or from one Easter time to another Easter time. Struggl 11.; L. 662. "But Lugo with the common opinion says that there is no obligation of confessing on account of the sole danger of forgetting sins." L. 665, 671.

1559. Whether the precept of the Church is satisfied by an invalid Confession? Resp. Negatively, whether the Confession is voluntarily or involuntarily invalid. The first part is openly clear from proposition 14 condemned by Alexander VII. The second part is clear from the fact that the Church commands a Confession through which the sinner is reconciled with God. Hence, if a priest had invalidly absolved a penitent from defect of due intention or jurisdiction, and the latter found this out, he would have to confess again, if he knew himself to be guilty of mortal sin. Struggl 13. - Likewise he by no means satisfies the precept of Communion who communicates sacrilegiously. E. M.

1560. Whether annual Confession which is not made to the pastor, or to another with the pastor's permission, is sufficient for satisfying the precept of the Church concerning annual Confession to be made to one's own priest? Resp. Affirmatively. The reason is that he who confesses to a priest having jurisdiction and approved now confesses to him by the permission of his own pastor, namely either of the Supreme Pontiff or of the Bishop, who deputed him so that he might hear the Confessions of all coming to him. Lugo Resp. Mor. l. 1, d. 15, n. 2.

1561. Whether he who has not confessed for a whole year is held to confess as soon as possible? - Resp. Affirmatively. Because the precept imposed by the determination of the Church urges; for the term of the year was not placed by the Church to end the obligation, but only to urge it, as is sufficiently gathered from the words of the precept: at least once in the year. Yet another opinion is present which denies it. Moreover, he who confesses in the following year satisfies by one confession the precept of each year; and there is no one in practice who obliges him to another confession. For the precept is only concerning confession to be made once in the year. Therefore in this same year he is not held to another. L. l. 6, n. 668, 669. Cf. 1568 and Lugo de Poenit. d. 15, n. 180.

1562. What is the nature of the precept of Easter Communion? - The precept of Easter Communion, not otherwise than the precept of annual Confession, is divine as regards substance, but ecclesiastical as regards the determination of time. But Communion is commanded in one's own parish, as is clear from the general practice of the Church and various Constitutions of the Supreme Pontiffs. Benedict XIV, C. Cum magno, a. 1751. Each is grave: not to communicate in one's own parish, and not to communicate at Easter time, although one or another day after Easter time has elapsed. There is no

precept of the Church of receiving Communion determinately on the day of Easter, or on the Supper of the Lord, even for clerics. But priests satisfy this precept by celebrating anywhere; otherwise they are held to communicate in the parish, as other laymen. L. 300.; Lugo d. 17, n. 31.; E. M. In the often cited Catechism, promulgated in 1913 and edited by order of the Holy Father Pius X, 18 Oct. 1912, the third precept of the Church is expressed thus: "To confess at least once a year, and to communicate at least at Easter." In one's own parish is omitted.

1563. What is Easter time; and who can grant delay? Easter time by common law begins from Palm Sunday and ends on Low Sunday. But it can be prolonged by dispensation of the Bishop or pastor. Thus judged S. C. C. 19 Nov. 1616. Ferraris v. Eucharistia n. 10. But pastors, only in individual cases. L. l. 6, n. 294, 296. Since the Confessor is judge not only of the disposition required for Communion, but of the greater opportuneness for receiving the Most Holy Sacrament, he can permit or impose some delay, if he judges that the greater good of the penitent requires this, at least if the latter is not unwilling. L. l. 6, n. 297, third part at the end. For this was expressly provided in C. Omnis de Poenit. et remiss.

Yet the penitent would indeed sin if the Confessor had to defer Easter Communion for him on account of defect of due disposition for receiving sacred absolution. For he who is held to the end is also held to the means. But due disposition for absolution is a means altogether necessary for receiving the sacred Eucharist at the prescribed time. Therefore. In Latin America all the faithful can satisfy the precept of annual confession and communion from Septuagesima Sunday up to and including the eighth day of the solemnity of Corpus Christi. Leo XIII, C. Trans oceanum § VIII. At present in Rome the aforesaid time for Easter Communion is prolonged up to the feast of the Most Holy Trinity.

1564. Who can dispense from Communion in the parish? From the precept of communicating in one's own parish the Bishop, the vicar general, and the pastor himself can dispense. But interpretative or presumed consent suffices, provided there is moral certainty concerning their will. Thus St. Alphonsus l. c. n. 300.; Gousset 224, 226.

1565. Whether in the Cathedral all who are of the diocese can fulfill the precept by communicating there? Tamburini responds "that they can, because there resides the Bishop, who is the common head and pastor of the whole diocese. Thus Diana.... Thus also Bonacina." De 3 Eccl. pr. c. 4, n. 4. And concerning this same matter, "there are many of the ancients," says C. De Lugo Resp. Mor. l. 1, d. 15, "who recognize in the archpriest of the Cathedral Church the power of administering sacraments to all subjects of that diocese, and therefore they seem to suppose the Cathedral Church to be common to the whole diocese; Thomas Sanchez reports and gathers these, l. 3 de Matrim. d. 27, n. 1. Wherefore he who receives Communion in the cathedral church seems to receive it in the common parish of the whole diocese. Hence just as, if he received it from the hand of the Bishop, he would without doubt satisfy the precept of the Church, since the Bishop is pastor of the whole diocese, so if he receives it in the episcopal Church, he seems to satisfy the same precept," n. 3. "Yet I," C. De Lugo continues, "rather believed that in strictness satisfaction is not made except in the proper parish of each one, or unless the Bishop expressly or tacitly consents," n. 4. St. Alphonsus, l. 6, n. 300, adheres to this opinion of Lugo, and says of the opposite opinion: "I do not know whether it is probable, unless in some place there is a common usage which causes the consent of the Bishop to be presumed; for sheep ought to be known by their own shepherd." And the same opinion is clear from

S. C. EE. and RR. 21 Jan. 1848. Yet S. R. C. 6 Sept. 1636, 1 Apr. 1662, n. 1230, favors the contrary opinion.

1566. Where can travelers, vagi, soldiers, and servants satisfy the precept of Easter Communion? - Travelers and vagi can communicate in any church, nor are they held to approach the parish of the place where they are staying; because they do not have their own pastor who ought to know them. - Soldiers in station, or having domicile in a city, ought to communicate in the parish in which they dwell; otherwise they can fulfill the precept in any church. Servants and all others having quasi-domicile are bound by the same law as inhabitants. L. l. 6, n. 300.

1567. Whether he who communicated sacrilegiously in the parish is held to communicate again in the parish? - Resp. Negatively, because he fulfilled the end of the precept as regards the circumstance of place: therefore it suffices that he communicate in any place whatever to satisfy the precept of Easter Communion, which he did not fulfill through sacrilegious Communion. Nor is he held to making Easter Communion in the parish who at Easter time received sacred Viaticum, for the end of the law was sufficiently fulfilled. But cf., as regards this question and the preceding 1564-1566, n. 1562 at the end. La-Croix 630.

1568. Whether he who omitted Communion at Easter is afterward held, once Easter time has passed, to receive Communion as soon as possible? The first opinion, more common, and which St. Alphonsus holds, l. 6, n. 297, affirms; and according to this opinion, as one is held to Communion after Easter time has passed, so also he is held to receiving Communion in his own parish.

The reason is that Easter time was not assigned by the Church to end the obligation, but to urge it; hence when the obligation already contracted has not yet been fulfilled, it must be fulfilled as soon as possible. Indeed, from the Lateran Council, one is not held simply to receiving Communion at Easter, but at least at Easter. The other opinion denies it. The reason is that the precept of Communion is affixed to Easter time. For as in the precept of hearing Mass on Sunday, and in similar precepts, the obligation ceases with the predefined time, so also it must be said in this precept of Communion at Easter time. Indeed, if Communion were not truly affixed to Easter time, but had to be made each year at least after that time had elapsed, it would be licit also to make it before Easter time, with just cause standing. Several and grave theologians hold this opinion, among whom is St. Antoninus; Busembaum, Palaus, Bonacina, and others think it probable, and St. Alphonsus himself, l. c., thinks it not to be contemned. But according to this second opinion, as one is not any longer held in that year to Communion when Easter time has now passed, so consequently neither is he obliged to Communion in his own parish. "Which," notes the holy Doctor, 688, "proceeds pari passu with the precept of annual Confession." But the precept of the Church here is determinative of the divine precept of communicating sometime in life.

Hence, when Easter time has passed, just as certainly the divine precept does not cease, so the ecclesiastical precept always urges, namely for that year; for it is said that the faithful ought to communicate each year, at least at Easter. Trent s. 13, c. 9. Therefore, if not at Easter, certainly not as soon as possible; but within the year one ought to communicate. Within the year, i.e., from Easter to Easter; otherwise the year cannot here be verified, since, in the time from January to Easter, the precept cannot be anticipated.

1569. Whether one who cannot communicate at Easter time is held to anticipate? Resp. Negatively, because "such communion would not fulfill the precept; for at the time at which it would be made, the time of obligation would not yet have begun, since the time of annual communion had not yet begun. Conversely it is certain that, when Easter time has begun, if someone foresees that he is to be impeded from Communion, he is held to receive it immediately, as they commonly teach." L. 298.

1570. Whether an excommunicated person is held to obtain absolution so that he can fulfill the precept? - They commonly affirm it; "because Communion greatly contributes to the salvation of the soul, whence its precept strictly obliges to removing spiritual evils which stand in the way." L. 299. Indeed he who is held to the end is held to the necessary means ordered per se to it. Wherefore just as he who is in mortal sin is held to confess, so that he can fulfill the precept of Communion, so also he who is excommunicated is held to obtain absolution from excommunication, so that he can receive Communion. And this is confirmed from the fact that, if someone wishes, he can most easily obtain the aforesaid absolution.

1570 bis. Decree concerning the first Communion of children. "...With all these things maturely weighed, this Sacred Order concerning the discipline of the Sacraments, in the general Congregation held on the fifteenth day of the month of July, in the year 1910, so that the mentioned abuses may be entirely removed and children even from tender years may adhere to Jesus Christ, live His life, and find protection against the dangers of corruption, judged it opportune to establish the following norm concerning the first Communion of children, to be observed everywhere. I. The age of discretion both for Confession and for Holy Communion is that in which the child begins to reason, that is around the seventh year, whether above or even below. From this time begins the obligation of satisfying each precept of Confession and Communion. II. For first Confession and first Communion a full and perfect knowledge of Christian doctrine is not necessary. Yet afterward the child will have to learn the whole catechism gradually according to the measure of his understanding. III. The knowledge of religion which is required in the child, so that he may suitably prepare himself for first Communion, is that by which he perceives according to his capacity the mysteries of faith necessary by necessity of means, and distinguishes Eucharistic bread from common and bodily bread, so that he may approach the Most Holy Eucharist with that devotion which his age bears. IV. The obligation of the precept of Confession and Communion, which burdens the child, falls chiefly upon those who ought to have care of him, that is, upon the parents, the confessor, the teachers, and the pastor. But it pertains to the father, or to those who take his place, and to the confessor, according to the Roman Catechism, to admit the child to first Communion. V. Once or several times in the year let pastors take care to announce and hold a general Communion of children, and to admit to it not only the newly admitted, but also others who, with the consent of parents or confessor, as was said above, have already previously for the first time tasted holy things from the altar. For each group let some days of instruction and preparation be put before.

VI. Those having care of children must take care with every zeal that after first Communion the same children approach the sacred table more often, and, if it can be done, even daily, as Christ Jesus and mother Church desire, and that they do this with that devotion of soul which such an age bears. Let those to whom this care belongs remember moreover the very grave office by which they are held of providing that the children themselves continue to be present at public catechetical instruction, or if not, that they supply for the religious instruction of the same in another way. VII. The custom of not

admitting children to confession, or of never absolving them, when they have arrived at the use of reason, is altogether to be disapproved. Wherefore local Ordinaries, with remedies of law also employed, will take care that it be thoroughly removed from the midst. VIII. Altogether detestable is the abuse of not ministering Viaticum and Extreme Unction to children after the use of reason, and of burying them with the rite of little children. Let local Ordinaries proceed severely against those who do not depart from a custom of this kind. These things sanctioned by the Fathers Cardinals of this Sacred Congregation, Our Most Holy Lord Pope Pius X, in the audience of the seventh day of the current month, approved all, and ordered the present decree to be issued and promulgated. Moreover he commanded individual Ordinaries that they signify the same decree not only to pastors and clergy, but also to the people, to whom he wished it to be read every year at the time of the Easter precept, in the vernacular language. But the Ordinaries themselves will have to report to the Holy See, after every five years has passed, together with the other affairs of the diocese, also concerning the observance of this decree. - Notwithstanding anything whatever to the contrary." Decr. Quam singulari, S. C. de Sacr. 8 Aug. 1910. - E. M. n. 500.

On the Fifth and Sixth Precepts of the Church

I. On Abstinence from Flesh Outside Fast

1571. What is the fifth and sixth precept of the Church? - The fifth precept of the Church is that the faithful abstain from flesh on certain days, as is clear from various Constitutions of the Supreme Pontiffs, Catechisms, and the universal custom of the Church. - But the sixth precept of the Church is that the faithful observe fasts at the established times, as likewise is clear from various Constitutions of the Supreme Pontiffs, Catechisms, and the universal custom of the Church. C. Quadragesima 16 seqq. de Consecr. D. 5. - Each precept obliges of itself under grave sin, since its matter is grave. Proposition 23 condemned by Alexander VII. Of itself; for in each, according to the common opinion of theologians, smallness of matter is given. Trent s. 25 de Delectu cibor. etc.; L. 1030.; E. M.

1572. Flesh of which animals is prohibited on a day of abstinence? - The flesh of animals born and breathing on land is prohibited. The reason is that these bring the greatest delight in eating, and chiefly provoke man to venereal things. St. Thomas, 2. 2, q. 147, a. 8. - "To discern which animals are to be reputed flesh, although it is not a slight judgment to attend to whether they are accustomed to live for a long time outside water; nevertheless the common estimation of the faithful and the judgment of physicians is more to be attended to, if they repute them flesh or fish." L. 1011. Hence for discerning prohibited flesh a twofold criterion is present: a physical natural criterion, namely that they are animals born and living on land; and a moral criterion, namely that from common estimation and the judgment of physicians they are terrestrial animals and not fish. But each criterion fails, and does not furnish a determined and fixed universal rule. The physical criterion fails because amphibious animals are given; and it is licit to eat snails, turtles, frogs, crabs, oysters, locusts, shells, and according to some, beavers or castors, otters, sea ducks, coots, and certain others add sea crows. The moral criterion fails because it is valid only for ordinary and common things, as is clear. Hence in doubt there is a threefold rule: 1. The structure of the animal, whether it is similar or dissimilar to terrestrial animals. 2. Nutritive power. 3. Custom, which in these matters is the best rule. With doubt still remaining, it is licit to eat, because the law concerning abstinence is negative; wherefore, unless the prohibition is certain, it is licit to eat. St. Thomas, 2. 2, q. 147, a. 8.; Benedict XIV, de Syn. l. 11, c. 5.; Antonelli vol. 2, de Praeceptis Ecclesiae. But both flesh and other things which are derived from flesh, or are in any way constitutive parts of animals, are prohibited; namely fat, blood, marrow, bacon, grease or lard, juice expressed from flesh, and peptones, which are extracted from beef and contain the more principal substance of flesh. Tambur. Decal. l. 4, c. 5, n. 19.; L. 1010. From an Indult now common almost everywhere, seasonings from animal fat are permitted; and then it is licit to use the fat of the flesh of any animal, and not only swine fat, and also butter and margarine; and where there is usage, also broth of cooked meat is tolerated. E. M.

1572 bis. Seasonings which are permitted on days of abstinence and fast can be used in the meal and in the evening collation, S. Poenit. 16 Jan. 1834. When abstinence is not of stricter right, the permitted seasonings are seasonings from the fat of any animal, from butter, from margarine, and similar seasonings. When these seasonings are permitted, one can use the same fat for seasoning

foods and eat those small pieces which remain of fat or bacon from the same melted down, provided they continue to be part of the seasoning. Nor are they to be troubled who on days of abstinence and even of stricter abstinence use oil in which flesh has been fried. But seasonings from eggs are not permitted. The juice of swine bacon, or broth from pork, is not comprehended under the terms: condimenti di grasso. S. C. C., 29 Apr. 1911. Peptone is an extract of flesh, united to pepsin; and consequently it is by no means permitted on days of abstinence. The case is altogether different for margarine, which although it is made from the fat of oxen, oil, and milk mixed together, nevertheless is positively permitted when the use of butter is licit. S. O. 6 Sept. 1899.

1573. When, outside fast, does the precept of abstinence from flesh urge? This precept, besides the time of fast, urges 1. on Friday of any week in the whole Christian world, C. Explicari 3 de Observ. ieiunior., unless a special Indult is had; - 2. on Saturday, unless legitimate custom has prescribed otherwise somewhere, or something else has been established by the Holy See, or a privilege is had, C. Quia 31 de Consecrat. D. 5. Cf. Benedict XIV, de Syn. l. 11, c. 5, n. 5. Hence the Holy Office declared on 10 Jan. 1855 that those traveling outside Belgium cannot eat flesh on Saturday in places in which the said Law is in force. But not only in Belgium, but also in the United States of America, in Italy, and in most other places, abstinence is no longer observed on Saturday. - 3. In Lent the precept of abstinence also urges on Sundays; again unless an Indult or another particular law is now had. From this law of abstinence the Nativity of the Lord is excepted by privilege of Honorius III for those who are bound neither by vow nor by regular observance, if it falls on the 6th weekday or on Saturday, C. Explicari 3 de Observ. ieiunior. In most dioceses of France, from particular custom, the obligation of abstinence is in force on the three Rogation days and on the vigil of St. Mark. Therefore attend to the special custom of places. Besides the time of fast. On days of fast, those also who are exempted or excused from fast are held to observing abstinence, as is clearly drawn from the Indults themselves, by which those even who are not held to fast are permitted to feed on flesh and milk foods, unless something else has been established by the Holy See for some place. Tamburini tr. 4 de Quarto Eccl. praec. c. 9.; La Croix l. 4, n. 1291.; l. 3, p. 2, n. 1660 seqq.; E. M. 1573 bis. In the Catechism of the Holy Father Pius X the second precept of the Church is expressed thus: "Not to eat flesh on Friday and on the other prohibited days, and to fast on the prescribed days." Indeed in very many places both the law of abstinence and of fast has been reformed at present. Italy: "1. In all and individual regions of Italy, with also the dioceses of Malta and Gozo comprehended, which are accustomed to use the dispositions laid down in this matter for Italy, fast, or the law of one meal per day, will have to be observed: During the whole time of Lent, Sundays only excepted; on Fridays and Saturdays of Advent; on Wednesdays, Fridays, and Saturdays of the Four Times of the year; on the Vigils: of Pentecost, of the Holy Apostles Peter and Paul, of the B. V. M. assumed into heaven, of All Saints, and of the Nativity of Our Lord Jesus Christ. But on the days on which fast is prescribed, the mixing of flesh and fish in the same eating is at the same time always and absolutely forbidden, not even Sundays in Lent excepted. 2. Besides fast in all regions of Italy, as above, the law of abstinence from flesh and from all those things which draw origin from flesh, namely milk, butter, cheese, eggs, and seasonings from the fat of any animal, must also be observed: on Friday of the Four Times in Lent; on Friday in Parasceve; on the Vigils of the Assumption of the B. V. M. and of the Nativity of Our Lord Jesus Christ. 3. But on the first day of the Lenten fast; on Fridays and Saturdays of Lent; on Fridays and Saturdays of Advent; on Wednesdays, Fridays, and Saturdays of the Four Times; on the Vigils: of St. Joseph, Spouse of the B. V. M.; of the Annunciation of the same B. V. M., where these

feasts are recalled under precept, and, as regards the vigil of the Annunciation, provided it falls within Lent; of Pentecost; of the Holy Apostles Peter and Paul and of All Saints, abstinence from flesh only and from juice in any way expressed from flesh will have to be observed: so that it is licit at will in the principal meal to eat eggs and milk foods, and both in the same principal meal and in the little meal to use seasonings from any fat, butter, margarine, as they call it, and similar things. 4. This same abstinence from flesh only and from meat broth will likewise have to be observed on all and individual other Fridays through the year, yet without obligation of fast and, consequently, with no distinction of meals made as regards the free use of eggs, milk foods, and seasonings. 5. But as often as, on any of the above-mentioned days consecrated to fast or abstinence or to each, there falls either some feast from the more solemn ones in the Church, or the feast of the Titular or principal Patron of some place or diocese, or some extraordinary religious solemnity, such as centenaries, pious pilgrimages, and similar things, or public annual fairs which are celebrated with an unusual concourse of people, it is conceded to local Ordinaries, except in the time of Lent and Advent, that they can either anticipate both fast and abstinence, either for the whole diocese or, according to diverse cases, for certain determined places, to another free day pleasing to them, or even, yet from very grave causes, dispense concerning these. 6. This decree does not regard fasts and abstinences to be observed in some places from a particular vow. But as regards Regular Families of each sex, not bound by a special vow of abstinence or fast, it is decreed that they can use the same law as the simple faithful. 7. By the present decree whatever local indults, concessions, privileges, customs even immemorial, to the contrary, not even the Bull of the Crusade excepted, where and under whatever form it is now in force in Italy, are revoked, abrogated, and thoroughly abolished. But let the Ordinaries vehemently exhort the faithful subject to them that they strive to compensate the Apostolic indulgence by other good works.... Our Most Holy Lord Pope Pius X deigned by His Supreme authority to approve and confirm all and individual these things, commanding those whom it concerns that the same, having been opportunely brought to the knowledge of the faithful, from the First Sunday of Advent of the current year 1906, be observed exactly and that they strive that they be observed by all. - Anything whatever to the contrary notwithstanding." S. O. Decr. Frequenter pluribus, 7 Sept. 1906. Therefore in their own force remain fasts and abstinences to be observed from the particular vow formerly made by some place. And therefore at Rome the vow of strict fast on the vigil of the feast of the Purification of the B. V. M. obliges; and in Sicily the vow of fast on the vigil of the feast of the Immaculate Conception, confirmed by Pius VII, C. Frequentes pluribus, 10 Apr. 1818.

After the Motu Proprio Supremi disciplinae, 2 July 1911, concerning suppressed feasts, the vigils of suppressed feasts hitherto observed from precept or from vow must still be observed. S. C. C. 18 Sept. 1911. But by this decision the Decree of the Holy Office Frequenter pluribus, 7 Sept. 1906, was not derogated. S. O. 25 Feb. 1912. "Whether by article 6 of the Decree of Wednesday, 7 September 1906, On reforming the law of fast and abstinence in Italy, anything was derogated from the fasts and abstinences prescribed for Religious Families of each sex by their own Rules and Constitutions? - Resp. Negatively; and therefore, as regards fasts and abstinences to be observed from the general precept of the Church, Religious Families of each sex, not bound by a particular vow of fast or abstinence, can use the same law as the simple faithful; but as regards fasts and abstinences proper to them, one must stand by the Rules and Constitutions of each of them." S. O. 24 Apr. 1907. The great concourse of peoples in the Decree of the Holy Office, as regards dispensation from abstinence and fast to be conceded or anticipation to be made by the Bishop, can be understood also of the

concourse of a city or place, and not necessarily of extraneous peoples. S. O. 18 Mar. 1896. Dalmatia: It was established: "1. That fast be observed by strict abstinence from flesh and from all those things which draw origin from flesh, namely milk, butter, cheese, eggs, and seasonings from the fat of any animal, each year on these four days only: Friday of the Four Times in Lent; Friday in Parasceve; the vigil of the Assumption of the B. Virgin Mary; the vigil of the Nativity of the Lord. 2. That fast be observed by non-strict abstinence, that is, from flesh only and from broth in any way expressed from flesh, so that it is licit at will in the principal meal to eat eggs and milk foods, and both in the same principal meal and in the little meal to use seasoning from any fat, butter, margarine, and similar things, each year on these following days: Ash Wednesday; Fridays and Saturdays of Lent; Wednesdays and Fridays of Advent; Wednesdays, Fridays, and Saturdays of the Four Times; the vigil of the Holy Apostles Peter and Paul; the vigil of the Annunciation of the B. Virgin Mary, if it falls in Lent; finally the Vigil of All Saints. 3. But since for several citizens of Dalmatia, on account of weakness of stomach, the drinking of coffee in the morning breakfast without milk becomes very burdensome and troublesome, we indulge that on the days inscribed above under n. 2, with Wednesdays, Fridays, and Saturdays of the Four Times always excluded, it is licit in the morning breakfast either to mix milk with coffee, or to use simple milk. 4. We further declare that abstinence of this kind from flesh only and from broth expressed from flesh is to be observed in all Dalmatia, also on all and individual other Fridays through the year, yet without the obligation of fast, and consequently with no distinction of meals made as regards the free use of eggs, milk foods, and seasonings. 5. Finally we command that in all the Dioceses of Dalmatia fast be observed during the whole time of Lent, besides the days already enumerated above, so that it is licit to eat flesh in the principal meal only, but in the little meal to employ seasoning of fat, butter, and similar things. But as regards the mixing of flesh and fish in the same eating, we altogether forbid it on the days on which fast is prescribed, and during Lent, even on Sundays; and therefore we will that all who are dispensed from abstinence from flesh cannot use such mixing during the whole time of Lent, on Wednesdays and Fridays of Advent, for in Austria in the Advent of the Lord on Wednesdays and Fridays and not Saturdays fast is prescribed; finally on the Four Times of the year and on the vigils mentioned above. 6. Moreover, complying with favorable will to the vows of the Bishops of Dalmatia, we concede to them the faculty that, except in the time of Advent and Lent, they can anticipate both fast and abstinence, either for the whole Diocese or, according to diverse cases, for determined places, to another free day; or even, with very grave causes nevertheless pressing, whether of solemnity or of concourse of people, they can altogether dispense the faithful similarly from the obligation both of fast and of abstinence.

7. Finally, assenting to the desires of the same Prelates, we grant that regular families of each sex existing in Dalmatia, which are not bound by a special vow of abstinence or fast, can and may licitly use and enjoy, from Apostolic benignity, the same dispensation as the simple faithful." Pius X, C. Romani Pontifices, 10 June 1911. Spain and Portugal use the Bull of the Crusade, to which various other Indults have been added, the Indult of flesh, the Indult of milk foods. Cf. E. M. ed. 4, p. 151 seqq. As regards Spain, the Bull which is called of the Crusade does not dispense for eating flesh on days of fast, even of Lent, unless necessity stands, from the counsel of both physicians; but it gives the faculty of eating eggs and milk foods at discretion. The law of fasting remains. Secular priests and regulars living outside cloisters cannot use this Indult unless one has reached the sixtieth year of age; but outside the Lenten time eggs and

milk foods are permitted to them. In Spain there is besides another Indult which is called of flesh, for eating wholesome flesh in the time of Lent and on other vigil and abstinence days within the year, except Ash Wednesday, the Fridays of Lent, Wednesday, Thursday, Friday, and Saturday of greater week, and the whole greater week besides Palm Sunday for priests, whether secular or regular outside cloisters, the vigil of the Nativity of Our Lord Jesus Christ, of Pentecost, of the Assumption of the B. Virgin Mary, and of the Holy Apostles Peter and Paul; and this for all. But that someone may be able to use this privilege he must besides have the Bull of the Holy Crusade; and priests, whether secular or regular outside cloisters, must have another Indult of milk foods, so that they can use that of flesh in the time of Lent, if they have not yet completed the sixtieth year. But regular priests within cloisters can, with the Bull of the Crusade alone, feed on eggs and milk foods, even in the time of Lent, greater week excepted. With the Bull of the Crusade and the Indult of flesh they can do the very same as secular priests having the Bull of the Crusade, the Indult of flesh, and the Indult of milk foods. Indult for sixty-year-old priests in Spain. "In Spain secular priests, sixty years old, by force of the Bull of the Crusade and the Indult for feeding on flesh, with abstraction made from their greater or lesser strength or infirmity, cannot use flesh on Monday and Tuesday of Greater Week, as the lay faithful. But Our Most Holy Lord deigned benignly to declare that sixty-year-old secular priests in Spain, by force of the Bull of the Crusade and the Indult for feeding on flesh, with abstraction made from their greater or lesser strength or infirmity, can use flesh on Monday and Tuesday of Greater Week, as the lay faithful." S. O. 31 Mar. 1906. Indult for the poor in Spain. "The poor in Spain, in order that they enjoy the Lenten Indult, are not held to give alms; but they are held if they wish to enjoy other privileges of the Bull of the Crusade." S. C. C. 23 Jan. 1910. "The poor in Spain, without the alms assigned for the Bull of the Crusade having been paid, can enjoy the Indult as regards eggs and milk foods which is contained in the mentioned Bull." S. C. C. 4 July 1910. "1. Whether the law of fast and abstinence on the day of the solemn Commemoration of St. Joseph, Spouse of the B. V. M., in Spain, where the feast has been restored, has been dispensed by force of the Motu Proprio Supremi disciplinae, or needs dispensation of the Ordinaries according to the tenor of the decree of S. C. C. 3 May 1912? - 2. Whether on days on which the law of fast and abstinence is dispensed, the prohibition also is removed of not mixing fish with flesh in the same meal? - Resp. To the 1st: Affirmatively to the first part, Negatively to the second. - To the 2nd: Negatively." S. C. C. 21 Nov. 1912. - Concerning this Response to the 2nd, observe: Through the Motu Proprio of the Supreme Pontiff, 2 July 1911, the precept of abstinence and fast is not simply removed, but dispensed, "we dispense," "we concede dispensation." Wherefore, if feast days preserved by the Motu Proprio fall on a day only of abstinence, the mixing of foods is not prohibited. But when they fall on a day of fast, the mixing of flesh and fish still remains prohibited. "Whether it is licit or not among Spaniards to season fasting foods, both in the meal and in the evening collation, with fat or bacon? Resp. Affirmatively, provided that by Apostolic Indult those seasonings are permitted on days of fast." S. C. C. 6 Aug. 1910. "Whether an Apostolic Indult for seasoning foods both in the meal and in the evening collation is had in Spain by force of the Bull of the Crusade, or at least by force of the Lenten Indult? - Resp. His Holiness benignly deigned to grant the favor, as regards all those not excepted in the Lenten Indult." S. C. C. 24 Jan. 1914.

Latin America and the Philippine Islands: With the Bull of the Crusade abrogated for all Latin America and the Philippine Islands, and likewise with Lenten Indults and Summaries abrogated, a new recent Indult for ten years, concerning abstinence and fast, has been conceded to all, without petition being necessary or any tax to be paid. And even Regulars can use this Indult, provided they are not bound by a special vow, and even as regards abstinences and fasts prescribed in their own Rules. By force of this Indult, Fast without abstinence is to be observed on Wednesdays of Advent and Lent. Fast with abstinence is to be observed on Ash Wednesday, Fridays of Lent, and Thursday of greater week. Eggs and milk foods are permitted in the evening collation; in the morning little meal, milk foods, eggs excluded. Abstinence from flesh without fast is to be observed on the four vigils of the Nativity of Our Lord Jesus Christ, Pentecost, Assumption of the B. V. M., and the Holy Apostles Peter and Paul. Secret. Stat. 1 Jan. 1910. In the Episcopate of Ancy, Frejus, and Toulouse, and in the Archdiocese of Mechlin and the suffragan Episcopates, abstinence and fast on the vigil of the Holy Apostles Peter and Paul, whose feast has been transferred to the Sunday next following, have been abolished.

Warsaw: In the Archdiocese of Warsaw, and in the whole ecclesiastical province, there is conceded 1. the use of milk foods on all days of strict fast through the year, except Friday in Parasceve; 2. swine fat, goose fat, etc., on Mondays, Tuesdays, Thursdays of Lent, as seasoning of foods; 3. the use of flesh on all Mondays, Tuesdays, Thursdays of Lent, only at dinner, except Thursday of greater week; on Rogation days as often as they occur; on all Saturday days through the year, insofar as they do not coincide with a strict fast obliging from another source. Scotland: The law of abstinence for the faithful of the kingdom of Scotland has been relaxed, so that it is licit for individual faithful of that Region to eat flesh, Lent excluded, on Saturdays of the Four Times of the year, and on vigils which either immediately precede or follow Friday or another day of abstinence. Apost. Lett. Benigna Mater, 27 Jan. 1911. Ruthenians: Cf. number 1551 at the end.

The print's appendix has more on this paragraph: [The Law of Fasting](/manuals/bucceroni/the-law-of-fasting). (ed.)

1574. Whether flesh can be given to little children on those days on which it is prohibited? - Resp. Affirmatively, if they have not attained the use of reason; otherwise, negatively. But if they are possessed of the use of reason before the seventh year, it is controverted; St. Liguori more probably denies it, de Leg. n. 155. Cf. 195.; L. 1012.

1575. What quantity of flesh is required for grave sin? It is controverted. All agree that matter is grave which notably nourishes; but this can scarcely be determined. According to several, grave matter ought to exceed half an ounce; but St. Liguori rejects this opinion, 1029, where he reports and seems to approve what the Salmanticenses say, that slight matter is only the eighth part of an ounce. Yet they say this concerning days on which fast must also be observed. Among more recent authors, some say grave matter is one ounce; others say grave matter in flesh, eggs, and milk foods is only two ounces. For the nature of this precept does not seem to require that severity of an eighth or half part of an ounce, or even of one ounce. Yet a distinction seems to have to be made among flesh, eggs, and milk foods. Grave matter in the latter is twice as much as grave matter of flesh; for they nourish less. One hen's egg equals almost two ounces.

1576. Whether it is a mortal sin to feed on a dumpling, greens, etc., seasoned with flesh or grease? - Resp. Affirmatively, of itself, if that food is notably juicy; otherwise it will be only venial. Hence it is mortal if the broth of the dumpling has been cooked with a great quantity of flesh, and so on for the

others. But the poor are more easily excused from grave, or even light, sin, when, because they are not able to buy butter, they use a small quantity of grease for seasoning a dumpling. But if seasonings from fat are permitted, and grease is employed only in the manner of seasoning, then there will be no sin for all. And where there is usage, also broth of cooked flesh is tolerated. If forbidden seasonings have been employed in good faith, and the error is detected with dinner imminent, when it is no longer easy to prepare other foods, and lest there be scandal and disturbance, the food already prepared can be taken. E. M.

1577. Who are judged to be excused from the law of abstinence? - 1. Begging poor; for they can eat whatever they receive as alms, as theologians commonly think. 2. Poor workers, who have nothing else except a little piece of grease or bacon for seasoning a dumpling or greens. 3. The sick, e.g., those laboring under fever, etc.; also those who are so weak in stomach that they cannot digest licit foods. 4. Those who daily give themselves to labors so arduous and fatiguing to the stomach that, like the sick, they do not experience hunger and reject foods; of this kind are those who spend life in mines or in glass and iron works. In the number of these seem also to be judged drivers who, for the space of several days, leading public carriages by day and night, can scarcely swallow one or another little piece of food; but not those who slowly lead carriages, horses, or mules and rest at inns at night. 5. Travelers who find nothing in inns besides forbidden foods, and cannot easily turn aside elsewhere. Yet they are held seriously and insistently to ask for licit foods. For the mere reason of journeying in no way exempts from the law of abstinence, even if on account of too great fatigue it perhaps dispenses from fast. Hence travelers cannot be excused on account of human fear, on account of fear of displeasing companions, on account of mockeries and other difficulties of this kind; otherwise nearly all those making a journey would be exempted from this law. 6. Those who are of a household, if the father of the household is unwilling or unable to prepare fasting foods; namely these are excused by reason of the necessity in which they are placed. 7. Soldiers living in camps or barracks, and nourished in common at the expense of the Government; and from toleration, in France, also their officers and families, Gousset 313, or from an indult, as others affirm, La France militaire et religieuse n. 3, p. 40, Mar. 1889. An Indult is given each year in Belgium. "Pius IX, at the prayers of the Bishop of Buffalo, conceded that American soldiers and sailors be exempted universally from the law of abstinence, six days excepted, namely Ash Wednesday, the three last days of holy week, and on the vigil of the Assumption of the B. V. M. and of the Nativity of the Lord. This is to be understood of those who are actually serving in camps, ships, garrisons, but not those who are absent by leave. Families using common food with them enjoy that privilege; not likewise those who live far away." Kenrick tr. 4, c. 4, n. 37. Cf. here 1626. 8.

Those who from a just cause have obtained dispensation, which besides the Supreme Pontiff, in individual cases Bishops, regular prelates, and pastors can give to their subjects. If sometimes dispensation is given to the whole household, it seems to comprehend, from the intention of the giver, also those who, in occurring cases, are guests in the same household. C. Consilium 2 de Observat. ieiunior.; L. 1008.; E. M.

II. On Ecclesiastical Fast

1578. What is ecclesiastical fast; when; whom does it oblige? Ecclesiastical fast is situated, properly and strictly speaking, in one meal per day; but when it is joined with abstinence, then it is situated in

abstinence from foods and from a certain quality of foods, which is to be observed according to the form prescribed by the Church. - Ecclesiastical fast joined with abstinence consists as of three parts, namely 1. one eating during the 24 hours of the day, with an evening little meal added; 2. abstinence from flesh or even from milk foods, as will be declared below; 3. the time determined for taking the meal, also to be declared below. Yet note that the custom of places and times contributes very much to modifying the nature and obligation of fast. The time of fast, as in other similar obligations, is from midnight to midnight, and can be computed according to true, mean, central astronomical time.

Fast obliges especially in the time of Lent, Advent, the Four Times, and certain vigils. The principal ones are: of the Nativity of the Lord, Pentecost, Assumption, All Saints, and the Holy Apostles Peter and Paul. There were many fasts in antiquity, also in the time of Advent, of Rogations, and on several other vigils; but all these in many places have become obsolete. The fasts of the vigils themselves have been reduced almost everywhere. Cf. 1573 bis. But when a vigil occurs on Sunday, fast must be kept on Saturday, C. Ex parte 1, C. Consilium 2 de Observatione ieiunior.; Urban VIII, Br. Cum evenire, 13 Oct. 1638. Cf. n. 1573 bis. All the faithful, from the twenty-first completed year of age, are held under grave obligation to observing fast on established days, unless they are legitimately excused or dispensed by superiors. It is a most ancient obligation, which is said to have been handed down by the Apostles themselves. From the twenty-first completed year, because the Church, a pious mother, does not wish to impose on children and adolescents a law surpassing their strength. This is clear from universal custom and from all Catechisms. L. 1004.; St. Thomas, 2. 2, q. 147, a. 3-5.; Benedict XIV, Notif. 11.; de Syn. l. 13, c. 4, n. 6, 7.; Tamburini tr. 4 de Quarto Eccl. praec. c. 9.; La Croix l. 3, p. 2, n. 1260 seqq., 1273.; Ferraris v. Ieiunium Append.; E. M.

1579. Note: The vigils of feasts suppressed by the Motu Proprio Supremi disciplinae, 2 July 1911, are still to be observed. Cf. 1573 bis. On 23 Dec., when it falls on Saturday, fast and abstinence are to be observed. E. M. "Since the feast of the Annunciation of the B. M. V., occurring next year on Friday in Parasceve, is transferred also with cessation from work to Monday after Low Sunday as to its proper place, it is asked whether in the following year 1910 the law of abstinence from flesh is to be observed on the vigil of the Annunciation of the B. M. occurring on Thursday in the Supper of the Lord, or ought to be transferred?

Resp. Affirmatively to the first part, negatively to the second." S. C. Conc. 9 June 1909. "The fast on the vigil of the festivity of the Holy Apostles Peter and Paul is to be observed in France on the Saturday before the Sunday of the festivity of the said Apostles. But if the day of 29 June occurs on Saturday, the fast of the vigil in question is to be observed on the fourth day before the Kalends of July." S. O. 22 Nov. 1879. For the whole kingdom of Spain it was conceded that "as often as the feast of the Immaculate Conception happens to fall on Friday or Saturday, the fast of that day be transferred to the Thursday immediately preceding." S. O. 9 Nov. 1870. The fast on the vigil of St. John the Baptist, when it falls on the day of the solemnity of Corpus Christi, is to be anticipated on the preceding day, or Wednesday. Urban VIII, Br. Cum evenire, 15 Oct. 1638.

1580. What is one meal? - One meal is the primary condition of fast: for its essence is principally situated in this, and when this is removed no one is ever said to fast, while on the contrary fast without abstinence from flesh and milk foods is conceived. But with one full meal or dinner in the morning, a little supper in the evening is permitted at present to all.

But small eatings which are made besides this will be venial sins taken separately, and when repeated more often on the same day can coalesce into grave matter, as is clear from proposition 29 condemned by Alexander VII. Fast is not broken by a draught of water, wine, and other drinks which of themselves are ordered and commonly employed for quenching thirst, although, according to the first discipline of the Church, Christians abstained entirely from wine and similar liquors. Hence the axiom: Liquid does not break fast. But by liquid is understood only that which, from common use, is taken in the manner of drink, not in the manner of food, as milk, etc. L. 1021, 1022.; St. Thomas, 2. 2, q. 147, a. 6.

1581. Whether wine drunk for calming hunger breaks fast? - Resp. More probably negatively. The reason is that the law of fast commands only abstinence from food, but not from drink; and, according to St. Thomas, 4 dist. 15, q. 3, a. 4, c. 1, "The statute of positive law does not attend to the intention of the one observing, but to the act itself, because the mode of virtue does not fall under precept, but is the end of the precept." L. 1022.; St. Thomas, 2. 2, q. 147, a. 6 ad 2.

1582. Whether the drinking of coffee and tea breaks fast? Resp. More probably negatively, unless too great a quantity of sugar is mixed in; because these do not have the nature of food, but of drink or medicine. St. Liguori 1019 says: "indeed they are permitted altogether at will."

1583. Whether the drinking of water mixed with sugar and juices of oranges or lemons breaks fast? Resp. Negatively, of itself, that is, unless you mix in a great quantity of their substance which is judged to have the nature of food. The reason is that all these from common estimation are held as drinks. Nor does it prevent this if they are served frozen; for freezing does not change the nature. L. 1022.

1584. Resolutions: Therefore it would be otherwise concerning the taking of milk, broth, juice of melons, commonly melloni, and of other fruits, likewise of preserved grapes, or those then pressed by the teeth, although afterward they are spat out. For all these are judged to have the nature of food; and they are referred rather to nutrition than to a vehicle of food. Indeed as regards drinks mixed with milk there is an express prohibition of Clement XIII, Enc. Appetente sacro, 20 Dec. 1759. - Whey properly so called is held as a simple drink, or rather as medicine. Yet as regards tea and coffee to which milk is mixed, Billuart says, tr. de Temper. diss. 2, art. 5, par. V: "Tea and coffee... seem to me to have the nature of drink and not to dissolve the fast, unless perhaps much milk and sugar is mixed in, and they are taken in great quantity." Indeed in milk there is a great part of water, almost 85 parts in one hundred. - L. 1019, 1021, 1022.

1585. Whether a drink of chocolate breaks fast? - Resp. Affirmatively, if it furnishes rich nutrition, as is the custom outside the time of fast. But negatively if a modest quantity of chocolate is taken, and it is done only once in the day, in the morning morsel. The reason is drawn from general custom. L. 1023. What quantity can be taken? The holy Doctor says that not less than an ounce and a half of chocolate is usually put into ordinary cups; for thus it is commonly done from the custom tolerated by the Church and observed by pious faithful. But not a few, with the aforesaid quantity of chocolate diminished, substitute bread pro rata. But truly the total quantity of that food ought not exceed the weight of two ounces, water prescinded. An ounce equals around 30 grams. Cf. 1593. - Benedict XIV, Notif. 15.; E. M.

1586. Whether it is licit on a day of fast to taste some food before drink, lest the latter harm? - This indeed is not licit as often as one likes, as they say; for then the law of fast would be ridiculous. And so it can be permitted only once or again in the day; especially lest strength fail, if dinner, e.g., happens to be delayed much beyond the customary time, as happens to religious serving at table, readers, and servants. Indeed an obligation of taking something will urge, if this is necessary for observing the fast. - L. 1018, 1019.; E. M.

1587. Whether electuaries break fast? Electuaries are said to be those things which are made from chosen things, e.g., from sugar and juniper, etc. But they are not judged illicit on days of fast, if they are taken in the manner of medicine and in modest quantity. But any reasonable cause suffices for excusing from all fault, e.g., for the digestion of foods, strengthening the stomach, removing bad odor of the mouth, preserving the voice, and similar things. St. Thomas, 2. 2, q. 147, a. 6.

1588. What quantity of food is judged grave matter if it is taken outside the meal and little supper? It is controverted. Matter which, added to the evening little supper, would make another meal is undoubtedly to be judged grave. But certainly a quantity of two ounces is to be held as light matter. Not a few judge the quantity equivalent to half a little supper, or four ounces, to be grave matter. Outside the meal; in the meal no quantity of foods is taxed; otherwise it is in the little supper. Cf. 1593. Outside the meal and little supper; therefore to these four ounces are to be computed those two ounces of the morning morsel, and therefore even outside that, the matter is grave beyond only two ounces. But, with the morning morsel now permitted from present custom, the illicit light and grave matter of two and four ounces seems now to be computed outside all permitted little meals. L. 1020, 1025.; St. Thomas, 2. 2, q. 147, a. 6.; 4 d. 15, a. 4, q. 3.

1589. Whether he who culpably took two meals sins gravely if he adds a third? Resp. Negatively, at least more probably.

The reason is that the precept of fast urges in an indivisible mode during the day of precept; therefore he who once violated it does not sin again and again by eating. Therefore, once mortal sin has been committed through violation of fast, the whole law urging on such a day has been violated. Therefore. Yet he who breaks fast by eating forbidden flesh or milk foods several times sins as often as he eats. L. 1030.; H. A. 20.

1590. Whether he who inculpably took two meals in a day, when the error has been detected or the excusing cause removed, is held under grave obligation to abstain from a third? Some affirm. The reason is that he injured fast only materially, not formally; wherefore as soon as he adverts to the law of fast, or sees the excusing cause cease, he is subject to the same law and is held to observe it as the rest; otherwise he would violate it formally. Thus probably Reuter de Leg. 176. Yet others more probably deny it, because since the essence of fast is situated in one eating, after two meals fast becomes impossible. L. 1030.; H. A. 20.

1591. What if on a day of fast you inadvertently breakfasted? - If you have taken a little something, e.g., two, three, or almost four ounces of food, you ought indeed according to custom to fast, without leaving the meal and little supper at the customary hours; for the fast was not substantially injured. If you have taken a quantity equivalent to a little supper, you ought to transfer dinner to the evening time, or abstain from the little supper itself, or take a morsel in place of the little supper, unless this yields to you into grave inconvenience. But if a quantity of this kind were nearly equal either to a

double little supper or to the customary meal, you ought, with dinner omitted, to take only the evening little supper, yet earlier if you cannot wait without grave difficulty. Moreover, you could increase this little supper according to the reason of necessity; or even take a morsel late, with the little supper anticipated at evening time. But there are not lacking those who think that one is no longer held to fast in this inverted order, not the usual order, since it is an extraordinary mode and as it were a privilege, which no one is held to use, and it is not without grave inconvenience. E. M.

1592. Whether an evening collation is permitted? - Besides the customary meal, it is licit, from universal custom introduced for many centuries and tolerated by the Church, indeed tacitly also approved, to take toward evening a little meal from lighter foods. The evening little collation began in some way from monks, who in fasts introduced by their own rule, before or after sacred conversations, called collations or conferences, took some draughts of water, or of another drink, for refreshing strength. Afterward a morsel either of bread or of another food was added, lest the drink harm. But the faithful embraced this custom in the fasts of the Church; this custom came to this, that a small supper is had; that this custom is altogether legitimate at present is proved by custom received everywhere, and indeed indiscriminately as regards all, even if someone did not need it. Elbel 473.; L. 1024.

1593. What quantity of food can be taken in the little supper? From present and common custom, at least speaking ordinarily, around eight ounces of food, or around 250 grams, can be taken. For a common ounce is equivalent to around 31 grams, and a Roman ounce around 29 grams. A pound of 16 ounces equals 500 grams. L. 1025. But others say that the fourth part of supper or dinner is to be permitted. But this doctrine is too vague or liable to scruples. - The quantity of eight ounces seems to be denied to no one, but a greater one is to be conceded to those for whom this would not suffice. Indeed no rule altogether fixed can be established, since attention also must be paid to constitution, duties to be performed, duration of fast, etc. It is licit in general to take as much as one judges necessary for avoiding an indisposition which impedes him from suitably performing his duties. Regard also must be had to one's own region, if somewhere a greater quantity of food is necessary. - L. 1024.

1594. What excess is judged grave in the little supper? - All agree that an excess of two ounces is light matter. The stricter authors with Concina teach that an excess surpassing two ounces is grave; but others with Billuart hold that an excess is required which, taken separately, is equivalent to an entire little supper. Yet commonly the doctors require above the little supper an excess equivalent to another half little supper, or four ounces. In various places, from introduced custom, on the vigil of the Nativity, even on Saturday if the Nativity falls on Monday, likewise on the Supper of the Lord, it is licit to take a quantity twice as great; but this custom is not in force everywhere. - L. 1024, 1025.

1595. What quality of foods can be employed in the little supper? - Lighter foods are permitted: bread, any fruits, also any vegetables, sweets of various kinds. But especially the custom of places is to be observed.

Several things are permitted in various dioceses or provinces which elsewhere are forbidden. L. 1024-1026.

1596. Whether it is licit to eat eggs, cheese, butter in the evening little supper? - Resp. Negatively, generally; although a dispensation for milk foods is had, as is clear from the Decree of Benedict XIV

and C. Appetente of Clement XIII, 20 Dec. 1759. Yet in certain places, from custom, it is licit to take some butter, or cheese, or milk; but eggs are by no means permitted, because they are of greatest substance, and therefore are rejected by custom, says St. Liguori 1027. Thus in Belgium milk and cheese are usually employed; in France and elsewhere generally it is licit from custom to feed on cheese. The privilege of cheese likewise in the diocese of Novara for the whole Vicariate of Intra was conceded by Innocent XII, through the organ of the Holy Office, 30 Jan. 1694. "Cheese or butter in the little supper is not conceded," says Kenrick tr. 4, c. 4, n. 46, "according to the general custom of the Church: but a contrary usage has obtained in these provinces. Milk also from a certain necessity is taken somewhere among us." They also assert that eggs are permitted from custom in Germany and in many regions of North America. In Latin America it is licit for all to use milk foods and also eggs. S. E. Neg. Extr. 6 July 1899. Cf. here n. 1573 bis.

1597. Whether fish are permitted in the little supper? Resp. Affirmatively, if there is question of little fish, especially dried, and probably also of fresh and larger fish, with today's almost general practice considered. Yet St. Liguori thinks, 1208, that from these the weight of two or three ounces is not to be exceeded. In Spain, however, by force of custom, fish and little fish generally are not permitted. E. M.

1598. Whether it is licit in the little supper to use broth from herbs cooked with water, vinegar, oil, or boiled wine? Resp. Affirmatively, probably, unless custom is certainly opposed: but then neither water nor wine is to be computed in the weight; but, according to Viva, that is to be computed which does not have the nature of drink, e.g., oil. L. 1209.

1599. Whether it is licit in the little supper to take bread boiled with water and oil, or soupy bread? Resp. Affirmatively, from present custom, which even the timorous follow, and recent theologians commonly approve; yet with a quantity of solid food of bread less than eight ounces. Boiled: for it can be conceded that during the meal itself someone dip bread in water or wine, and thus also take eight ounces of bread moistened with wine: since here almost the same substance of bread remains: and the liquid, since it serves only as a vehicle, is not computed. L. 1029.

1600. What quantity of boiled bread of this kind can be permitted, water prescinded? Theologians disagree. There are those who deny that it is licit absolutely to exceed eight ounces. But if an ounce of bread boiled in ten ounces of water with another ounce of oil were taken, what scruple would there be in permitting these twelve ounces? But others concede eight ounces of boiled bread, water prescinded. Yet on account of this boiling you have one food, which, although it does not constitute a greater quantity of nutritive substance, nevertheless from the greater volume generates greater satiety. Hence it seems that one cannot at least altogether prescind from the water. Therefore a middle opinion seems to be chosen, namely that five, or at least four, ounces of boiled bread can be permitted, with water and oil not computed. The same likewise will have to be said of other boiled preparations which likewise are usually placed in the little supper, e.g., from spelt, rice, legumes, etc. L. 1029.

1601. What abstinence is prescribed in fast? - To all the faithful using reason, by the precept of the Church the use of flesh is now forbidden on many, but not all, days of fast. Hence by the law of fast a twofold precept is then imposed, namely of abstaining from several meals and of abstaining from flesh. On certain days eggs and milk foods also are prohibited under grave obligation, namely all those things which draw origin from flesh. - Moreover, although the use of eggs and milk foods could

not be excused from grave sin of itself, according to the common opinion, nevertheless smallness of matter seems more easily to be admitted in these than in the use of flesh. But when by Indult it is licit to use bacon, fat, butter, margarine as seasonings, one can use them also in the little supper, although he fasts. Cf. 1572, 1572 bis.; L. 1005, 1006, 1007.; St. Thomas, 2. 2, q. 147, a. 3, 8.; Benedict XIV, Notif. 16.; E. M.

1602. When must abstinence from milk foods be observed? - Resp. In Lenten time eggs and milk foods also were formerly prohibited under grave obligation, namely all those things which draw origin from flesh. But outside Lenten time this prohibition was not had. Yet somewhere, e.g., at Rome, a custom having the force of law prevailed, that even on certain other days, e.g., the Four Times, abstinence of this kind be observed. But at present one must stand by particular laws, privileges, indults. Cf. 1573 bis. In many places still, Bishops, by a faculty delegated by the Roman Pontiff, concede dispensation, even as regards flesh, for the principal part of Lent. - L. 1009.; St. Thomas, 2. 2, q. 147, a. 8 ad 3.; Struggl tr. 8, q. 2, n. 18.

1603. Whether abstinence from eggs and milk foods also obliged on Sundays of Lent? - Resp. Affirmatively. The reason is that in Canon Law, C. Denique 6 d. 4, abstinence from milk foods is universally commanded on Lenten days. But it is certain that Sundays also are days of Lent. L. 1007.; St. Thomas, 2. 2, q. 147, a. 8.

1604. Whether, when abstinence of stricter right is to be observed, it is licit in the meal to eat breads made with eggs? Resp. Negatively, unless eggs have been permitted; the reason is that their substance is not lost from the fact that it is mixed with flour. L. 1009.

1605. Whether those dispensed for milk foods are by that very fact also judged dispensed for eggs? - Resp. Affirmatively, because these are equated by custom, unless a distinction is clearly expressed in the dispensation. Gury 504. Indeed, when on a day of simple abstinence, e.g., Friday, milk foods are permitted, eggs also are conceded. But those dispensed for flesh are judged also dispensed for eggs and milk foods; and those dispensed for eggs are judged dispensed for milk foods too; because to whom the greater is conceded, the lesser also is conceded. But to whom it is licit to eat milk foods, it is not therefore also licit to eat bacon and grease, because they participate in the substance of flesh and are judged as flesh. L. 1015. Cf. here 1573 bis.

1606. Whether those dispensed for flesh are still held to fast? Resp. Affirmatively. This is proved from the prescription of Benedict XIV, B. In Suprema, 22 Aug. 1741, and more clearly B. Libentissime, 10 July 1745, Inst. 15, n. 20 seqq., de Syn. l. 7, c. 3, n. 1.; L. 1013, 1014, 1015. - Those dispensed; those who cannot abstain from flesh on account of grave inconvenience are more truly still held to one meal; although another thing seems to others. Benedict XIV, Not. 15, n. 19 seqq. But those who likewise on account of grave inconvenience cannot be nourished by one meal, are held to abstinence from flesh, which is the truer and certain opinion. Indeed this precept is divisible by reason of its matter, and the obligation can well remain for one part, the obligation ceasing for another, as is clear from particular laws for some places, and for others from the dispensation itself, which is usually given in Lent, and from the fact that those not yet having attained the twenty-first year of age, although they are not held to fast, are nevertheless held by the law of abstinence. Cf. n. 1573 bis, 1626.; Benedict XIV, cited Constitutions.; Collect. S. C. de P. F. n. 2057.; E. M.

1607. Whether those dispensed for flesh can eat flesh and fish at the same time? - Those dispensed for flesh cannot on days of fast in the time of Lent and through the year, nor on Sundays of Lent, eat flesh and fish together, namely in the same eating. This is clear from three Constitutions of Benedict XIV: Non ambigimus, In Suprema, Libentissime. Those dispensed; for he who by reason of infirmity eats flesh, even several times, on a day of fast can eat both flesh and fish at the same time. S. Poenit. 9 Jan. 1899. For the forbidden mixing is a condition placed on those who eat flesh by force of an indult, although from a reasonable cause they are immune from the law of one eating. And these then can eat flesh as often as they eat, unless a restriction is placed in the indult, that those who also do not fast can eat flesh only once; this restriction is not added at Rome.

On days of fast; for on Fridays and Saturdays, he to whom it is licit to eat flesh from dispensation can eat fish at the same time. Days of fast; nevertheless the precept concerning not mixing each kind of food obliges also on Sundays of Lent. Flesh, not broth seasoned with flesh. Fish also comprehends marine shellfish, oysters, crabs, etc. Cf. here 1626.; L. 1013, 1014, 1015.; E. M. In Italy specifically, on the days on which fast is now prescribed, and also on Sundays of Lent, mixing is always and absolutely prohibited. The same prohibition is altogether had for Dalmatia. Cf. 1573 bis. An Indult has been conceded for Chile of mixing flesh and fish on those days on which dispensation from fast and abstinence had already been made. E. M.

1608. Whether those dispensed for flesh can, without injury to the fast, eat flesh not wholesome, namely pork and similar things? "The doctors very commonly and indeed probably affirm; both because license for flesh generally imparted is not to be restricted to wholesome flesh alone, and because otherwise those dispensed would be subjected to many scruples, not rarely doubting which flesh harms or profits.... But, speaking in particular of pork, it does not seem that it can be called absolutely unwholesome." L. 1015. Those dispensed, namely individuals, not all universally; for then only wholesome flesh is permitted. Benedict XIV, C. Libentissime § 1. But this restriction, which previously was placed in the Indult at Rome, has now been omitted from the year 1897, as is to be seen in the Lenten Indult; and everywhere it has now become obsolete. E. M. 1626.

1609. At what hour is the meal to be made? - In these our times, from universal custom, the meal is licitly taken almost at midday. L. 1016.; H. A. 9.; St. Thomas, 2. 2, q. 147, a. 7. "The one meal which is permitted on a day of fast was formerly taken after sunset in Lent, and at the ninth hour, or around three hours after noon, at the other times of the year; from the fourteenth century it has been taken around midday." Kenrick tr. 4, c. 4, n. 42.

1610. Whether the hour of the meal pertains to the essence of fast, so that he sins gravely who notably anticipates it without just cause? The first probable opinion affirms. The reason is that just as the Church instituted fast, so also it instituted a certain time of eating for those fasting. Therefore he who notably anticipates dissolves the fast. The second opinion, also probable, denies it. The reason is that from present custom the hour no longer pertains to the substance of fast. Some say notable anticipation exists if the meal is anticipated by more than an hour; others if by only an hour. Anticipates; for someone would not sin by delaying, since he would more approach the ancient custom, which indeed conduces better to the end of fast. Without just cause; for as a just cause can excuse from the fast itself, so also it can excuse from the hour of the meal. "Moreover," says St. Alphonsus 1016, "it is licit to anticipate within an hour, even without cause." - L. H. A. tr. 12, n. 21.; St. Thomas, 2. 2, q. 147, a. 7. Cf. here 1611.

1611. Whether fast is broken if the little supper is taken at midday, but the meal in the evening? It is not broken essentially, and therefore, if it is done without cause, it does not exceed venial sin. But even from this venial sin a reasonable cause excuses, and the custom of place or condition. Indeed in many places from present custom the little supper can be made at the tenth hour in the morning, and the meal in the evening. But with a reasonable cause standing, someone could also take the little supper in the morning, dinner at midday, and a morsel in the evening. L. 1020, 1024.; E. M.

1612. How long can dinner be prolonged? Nothing can be determined absolutely concerning this; but it does not seem that it can be prolonged beyond two hours without some fault. L. 1020.; H. A. 10.

1613. Whether he breaks fast who interrupts the meal and, after an interval has elapsed, approaches it again? - If the interruption is slight, e.g., of one quarter-hour, it lacks all fault, even if it is done without reason. L. ib. - If the interruption is of almost one hour without reason, it does not lack some fault, as it seems. If the interruption is very notable, e.g., of two hours, it cannot be excused from grave sin, because it cannot be called one meal, unless a just cause excuses. - But if the interruption is had from a grave cause, there is no sin in returning to the table, even with a notable delay interposed, when the preceding meal was not sufficient; because the Church never intended to oblige one to pass a day without sufficient meal. L. 1017, 1020.

1614. Whether he who rose from the table with the intention of eating no more can sit down at the table again? Resp. Affirmatively, probably, if the guests are still eating, or if a new dish is placed on the table which he did not know was to be placed. The reason is that it is still judged morally the same dinner. By the same reason it is licit to take something before dinner for sustaining strength, e.g., for ministers and readers at table among religious; for there still remains morally one meal, and sufficient cause is present for acting thus. - L. 1020.

1615. What are the causes which excuse from fast? Causes excusing from fast are usually reduced chiefly to three, namely: 1. to impossibility, whether physical or moral; 2. to piety or charity; 3. to dispensation, as was said concerning other precepts. As regards piety and charity, any work of piety and charity indeed excuses, provided nevertheless that it is better than fast and a grave cause is present; because what the law commands is regularly to be furnished. If the cause is doubtful, someone ought to use the counsel of both physicians, or of the Confessor alone, or of the physician alone, or of another prudent man, or even his own, if he can prudently judge the case. L. l. 3, n. 325.; n. 1031 seqq.; l. 4, n. 154.; St. Thomas, 2. 2, q. 147, a. 4.

1616. Resolutions: All poor are excused from fast who neither have, nor can provide in such a way, that from which they may procure a fair meal for the whole day. But bread and fruits do not suffice for this, nor a dumpling with bread and fruits, nor bread and wine only. For they cannot suitably sustain themselves with such foods unless they take them several times in the day. The sick, convalescents, the weak, and those who, unless they are refreshed twice, suffer a notable headache or dizziness from emptiness of stomach, or cannot sleep at night, are excused. Nor are these held to breakfast in the morning and dine in the evening, which is extraordinary and brings grave inconvenience. Pregnant women and nurses are also excused, and likewise wives to whom fast is forbidden by husbands, and who by fasting would suffer grave indignation of husbands.

Those are excused who exercise very laborious works, such as plowing, digging, cutting stones, carrying heavy burdens, and other things of this kind. Soldiers are excused, whether in camps or in lodgings, even in time of peace, both because they do not have food suitable for fast, and on account of the labors of military service, and on account of custom.

Servants and maidservants and others of this kind are excused when they are occupied with so many and such great labors that fast cannot be joined with them without great difficulty or inconvenience; likewise those making a journey on foot for a notable time with great fatigue. But of themselves and ordinarily servants, lackeys, barbers, tailors, painters, scribes, printers who do not turn the press but only arrange type, and those giving work to other similar things, are not excused. C. Consilium 2 de Observ. ieiun.; L. 1008, 1031 seqq.; H. A. 23.; St. Thomas, 2. 2, q. 147, a. 4.; E. M.

1617. Whether sixty-year-old elderly persons are excused from fast? - They are indeed excused if they are weak in strength, as is clear. Indeed they are excused also, according to the common opinion, in doubt concerning the validity of their strength; because then the presumption stands for their weakness. L. 1036. If they are strong in strength, it is controverted. The first opinion denies that they are exempted by the law of fast, because those who at that age have strong powers are not reputed as elderly. This opinion indeed is probable, says St. Alphonsus ib., but the opposite opinion is no less probable. The reason is both because universal custom bears this, as the doctors more commonly testify, and because otherwise it would be a matter liable to many scruples to examine whether some sixty-year-old is or is not sufficiently robust for sustaining fast. But the stronger reason is that old persons of this kind, both on account of weakness of strength and on account of defect of heat, cannot take sufficient nourishment at one time, and need more frequent food; and although some at such an age seem robust, nevertheless their robustness is easily illusory and inconstant, since it cannot be denied that in elderly persons of this kind strength fails and slips toward destruction. Hence the common adage: old age itself is a disease.

1618. Note: What is said concerning ecclesiastical fasts, the same can be established concerning fasts which Religious observe from Rule; for sixty-year-old persons will be able to be excused also from these, unless perhaps, as St. Alphonsus notes, l. 3, n. 139, they expressly promised observance of fast even unto death. This norm can be extended also to those who have vowed some weekly or monthly fasts for the whole of life. But likewise except if someone, thinking of old age, expressly wished to bind himself up to the end of life. L. 1038 seqq.

1619. Whether the weaker sex, as being one which ages sooner, is also excused sooner from fast? The doctors almost move the controversy concerning the fiftieth year. Those who deny that they are excused, some say it is false that women already grow old at the fiftieth year; but others are moved by the fact that although a woman ages sooner, nevertheless she is less worn down by fast and needs less nourishment. Those who affirm it say that women at the fiftieth year already grow old, so that they cease to generate. But if women need less nourishment, or rather if, because of weakness, they are unequal to bearing more abundant nourishment, this rather proves that they are excused from a law which concedes one eating, since one scanty eating cannot be equal to sustaining strength. - L. 1037.

1620. Whether smiths, artisans, etc., are excused from fast if they are so robust that they can fast quite easily? Resp. Affirmatively, probably, because custom exempts generally all who exercise arts of this kind; but laws do not regard that which happens rarely and per accidens, but what happens

commonly and per se. But Concina, Bonacina, etc., also probably deny it. This second opinion, says St. Liguori 1043, speaking speculatively, seems more probable, but in practice scarcely one will be found who is not gravely relaxed from work of this kind.

1621. Whether workers are excused from fast on those days on which they abstain from work? Resp. Affirmatively, if they interrupt labors only for one or another day. For they are sufficiently excused by reason of repairing exhaustion and of preserving strength for sustaining the next labors. L. 1044.

1622. Whether rich artisans, who can cease from work on days of fast, are excused? - Resp. More probably affirmatively. The reason is that it concerns the republic that on account of fast workers not interrupt the exercise of arts to which they are devoted from their office. This seems also to be clear from the declaration of Eugenius IV apud St. Liguori 1042. Nor is the mind of the Church that the faithful be impeded from ordinary occupations. St. Thomas, 2. 2, q. 117, a. 4 ad 3, speaking of those journeying, has these words: "It does not seem to have been the intention of the Church establishing fasts, that through this it would impede other pious and more necessary causes."

1623. Whether they sin who without just cause undertake unusual labor and labor incompatible with fast? - Resp. Affirmatively, of itself, even if they do not act in fraud of the law: for the law which commands fast consequently commands that, without reason, causes not be placed which are opposed to satisfaction of it. - Without reason; because, with a just cause intervening, it is licit to undertake labor incompatible with fast, although that labor is unusual, e.g., for receiving extraordinary gain, etc. But the mere reason of pleasure alone never suffices, unless another honest cause accedes. Yet ancient and more recent authors are not lacking who affirm that even delight alone suffices, provided it is rarely done. For natural equity itself seems to persuade this. Indeed, if it is done rarely, there is had a certain necessity of honest and licit delight, which it does not seem the intention of the legislator itself to impede. - L. 1045, 1046, 1048, 1049.

1624. What journey undertaken on foot from a just cause exempts from fast? They commonly say that a journey of almost 5 leagues is required and suffices, that is, fifteen thousand paces, or four or five hours, or 20-22 kilometers; but if either the way were very arduous, or the weather harsh, or the traveler weak and unaccustomed to journeying, he could be excused by a journey of two leagues, or 9, 10 kilometers. L. 1047.; E. M.

1625. Whether or how are preachers, teachers of sciences, and Confessors excused? Preachers who have a sermon daily or almost daily are commonly excused from fast by reason of piety and office. By even stronger right missionaries, who are exercised in missions with graver fatigue, are excused. Generally speaking, preachers who preach only three or four times in the week are not excused; but in this one must stand by the judgment of prudent persons. - Teachers of sciences are excused, although they teach for only one hour each day, if they need study and labor for preparing lessons; but not those who only deliver from writing lessons already previously ordered and often repeated. The same must be said of advocates and judges if they need great study, and also of physicians if they are fatigued by great labor in the visitation of the sick. - Likewise students are excused who otherwise cannot devote themselves to their office. But Sanchez and Azor deservedly judge, against the Salmanticenses and others, that teachers of grammar are excused if they teach for 4 or 5 hours. Confessors are not excused of themselves, but only when they undergo extraordinary labor, e.g., when for several succeeding days they must hear confessions, as is usually done in missions, or when

they are so weak that they cannot satisfy the frequency of penitents without grave inconvenience. L. 1047, 1049.; H. A. 34.

1626. Who can dispense in the law of fast? These can dispense: 1. The Supreme Pontiff, in the universal Church, and his dispensation, even without cause, is valid. A just cause is required for lawfulness at least under light obligation.

2. Bishops with individuals, in particular cases, from a legitimate cause; but not with a whole community, unless from very grave and urgent necessity, and only for individual occasions. Benedict XIV, B. Prodiit iam dudum, B. Non ambigimus, B. In suprema, § 2. Benedict XIV, for dispensing as regards abstinence with private persons, requires the counsel of each physician, bodily and spiritual. Yet usage has prevailed that the faithful are content either with the counsel of the pastor alone, or confessor, or of the physician alone, or even of some prudent man, nor therefore are they to be troubled. From the Decree of the Holy Office, 5 Dec. 1894, Bishops have the faculty of anticipating or even from a very grave cause of dispensing concerning the law of fast and abstinence, when some feast to be celebrated with great concourse of people falls on Friday or Saturday, except in the time of Lent, Advent, the days of the Four Times, and vigils consecrated through the year to fast. And they can do the same for days on which extraordinary fairs with great concourse of people are held, or centenaries, pilgrimages, and similar things are celebrated, provided there is a great concourse of peoples. A very grave cause is the general danger of transgression of the law. 3. Regular superiors, by force of privileges, with their own subjects, in particular cases and from a legitimate cause. 4. Pastors, by force of custom, with individuals, and only for individual occasions, and from a just cause. But the law of one eating and of forbidden mixing is always and by all to be observed, whether dispensation as regards abstinence is given to the whole community or is given to private persons, provided no certain and dangerous reason of affected health intervenes and necessarily demands that it be done otherwise. Benedict XIV, C. In suprema § 2.; Non ambigimus, 30 May 1741.; C. Si fraternitas, 8 July 1744. The first limitation of one eating does not touch those who by age, grave labor, or weak health are not held to fast. The other limitation of mixing does not regard those who are not bound by the law of abstinence on account of illness, and consequently do not need to be dispensed. Nor indeed does it regard those who use the Bull of the Crusade; for Benedict XIV himself affirms that his Constitutions do not regard that Diploma of the Crusade. Moreover, those who use that Bull do not eat flesh merely by force of Indult, but with necessity and weakness of health intervening, as is declared there. Finally those who use that Bull do not eat flesh by force of dispensation, but by force of Privilege, which is quite different, since those consequently are exempt, not merely dispensed. 5. A physician and confessor cannot dispense, but they can by their office declare someone to be excused from fast or abstinence, when the excusing cause is manifest or doubtful. Sanch. Cons. l. 5, c. 1, d. 5, n. 3, 28.

But a superior can dispense not only when the cause is manifest, but also when it is doubtful, and then he will be able to mix with the dispensation a commutation into other pious works, prayers, alms, etc. Sanch. l. 5, c. 1, d. 5, n. 26. - Cf. n. 1601.; L. l. 6, n. 1031, 1032.; H. A. tr. 12, n. 22.; St. Thomas, 2. 2, q. 147, a. 4.; E. M. A broad Indult was conceded for Spain to common soldiers, by which, without any exception of time, they are dispensed from fast, from abstinence, and from the

law of mixing. Edict. Patr. Ind. 28 Jan. 1877. - But the Brief of Pius VII, Cum in Regis, 16 Dec. 1803, has these things: "Of declaring all common soldiers and decurions, commonly corporals and sergeants, and also drummers and moreover royal guards, making some journey by reason of their office, free from the law of fast, no account of days being had, not even of Friday and Saturday of Lent and of greater week, as often as the Vicar General himself shall judge this expedient in the Lord." An Indult was conceded to the Bishops of Austria for seven years of dispensing from the law of abstinence "soldiers who actually serve in camps or garrisons, two days only excepted, namely the vigil of the Nativity of Our Lord Jesus Christ and Friday in Parasceve. But as regards dispensation from the law of fast... let them follow the doctrines of approved authors concerning the exemption of soldiers from that law by reason of labor." S. O. 7 Sept.; A. S. S. v. 37, p. 236 seq. Bishops, dispensing from abstinence by Apostolic Indult in the time of Lent, prescribe a visit to some church, prayers, alms. Under grave obligation? - There are those who affirm, because Bishops dispensing by delegation are judged to make a certain commutation, and therefore the substituted work represents the grave obligation of abstinence; and the Bishop of Montpellier declared thus in the year 1861. But others generally do not recognize this rigorous commutation. Rather, it must more probably be said that Bishops principally intend to dispense, and accessorily to impose some pious work as a certain light satisfaction; and thus among others the Bishop of Mondovi declared in the year 1844 and the Bishop of Wurzburg in 1879. S. O. 5 Feb. 1890, to the Apostolic Vicar of Southern Japan declared "that this is remitted to the prudent judgment and conscience of the Reverend Apostolic Vicar." - E. M.

Appendix

On Moral Theology and on Liberty

To n. 1, 665, 671, 675, 693, 695, 701, 703, 704, 705. ON MORAL THEOLOGY AND ON LIBERTY

All good and honorable men at present direct their mind to the reformation of human society. The necessity of this reformation appears too plainly from so many and such great evils of errors and iniquities by which any civil community is at once oppressed and depressed. Many remedies are brought forward by many persons. No other remedy can be efficaciously applied to them except the right knowledge and observance of the precepts of Our Lord Jesus Christ to be persuaded. Indeed the Word was made flesh, that He might be the true light which enlightens every man coming into this world, John 1:9, 14, and might save His people, Ps. 27:9. And therefore Christ sent the Apostles into the world for this end, that going they might teach all nations, teach them to observe all things whatever He Himself commanded, Matt. 28:19, 20. Moral Theology narrates, explains, and demonstrates these precepts to be observed. And the study and discipline of them also tends to this, that we who devote labor to it may be able to continue the mission of the Apostles, with the Church as guide and teacher, also we going into the whole world by our own person, voice, writings, and example of our life. The mission of the Apostles has not ended, but is always continued and will be continued even unto the end. Sending the Apostles, Christ added: And behold I am with you all days, even to the consummation of the age. Matt. 28:20.

Therefore we are held to study Moral Theology with all diligence, with every effort, so that in the midst of the night of the age we may be able to show to those erring the way of justice, through

which all men may pass from the power of darkness into the light and kingdom of God, and all societies may be established in stable peace and proceed prosperously to true happiness. Indeed, without virtue, without honesty, without morality, to renew old things, to restore those fallen apart, is an impossible matter, and true happiness cannot be had on this earth; neither individual men, nor peoples and civil communities, can attain it. Blessed are the undefiled in the way, who walk in the law of the Lord, Ps. 118:1. Blessed is the nation whose Lord is its God, Ps. 32:12.

Fittingly St. Alphonsus, most versed equally in moral doctrine and in the care of souls, in the Dedicatory Letter directed to Benedict XIV, which is found at the beginning of the Moral Work, gives to the Supreme Pontiff this reason for his Work. "For since," he says, "I had been called by the benefit of God to the ministry of Missions, for helping the people scattered through the countryside, and especially those who are more destitute of spiritual helps, there seemed to me necessary for this a knowledge, more than mediocre, of moral matters, which would be suited both to instructing and to governing souls."

If to the holy Doctor a knowledge, more than mediocre, of moral matters seemed so necessary for peoples scattered through the countryside, how much more necessary will be not common knowledge, but exquisite, for the peoples of great cities? And if that knowledge, more than mediocre, of moral matters was necessary at that time, how much more will an excellent knowledge be necessary in this our time, in which Modernists and Americanists, with the name of science usurped, try to overturn the very nature of vices and virtues.

Well instructed in this moral doctrine, we will fight the good fight, and trusting in the assisting grace of God, we will open our mouth in the midst of the Church, to show and reprove that false and condemned liberty by which almost the whole world is disturbed up and down, and from which every error, every iniquity draws its origin. For from this condemned and condemnable liberty flows that liberty of opining, whence, as occasion arises, every error of rationalism and naturalism arises; that liberty of speaking, writing, acting, whence every iniquity, every delict and crime sprouts against persons, against civil society, against the society of the Church. What nation indeed exists which, notwithstanding the powerful apparatus of arms and soldiers, stands quietly in peace, without daily fearing social commotion and revolution? Dark freemasons and sectaries, socialist and communist agitators, and all others who, having the modern soul, as they say, by proclaiming themselves defenders of liberty, especially attack the Church of Jesus Christ, as the enemy of all liberty, and proclaim the separation of the civil state from the Church, plotting the ruin of Church and civil state together, continually prepare it by employing all wicked means. But all these vanished in their thoughts; and their foolish heart was darkened; for saying that they were wise they were made fools. Rom. 1:21, 22.

History itself refutes them. For the Church of Jesus Christ has always proceeded together with liberty, and has always advanced pari passu from its beginning.

For indeed, as the Apostle says, Gal. 4:26: That Jerusalem which is above, namely the Church, is free, and she is our mother. If liberty is truly liberty from dejection, from chains and bonds, the Church is the one that protects the dignity of man by proclaiming him destined for the adoption of sons of God, heir of God, coheir of Christ. The Church is the one that most constantly defends the dignity of woman by most firmly preaching the indissolubility and sanctity of matrimony, by invincibly proscribing adulterous divorce. The Church is the one that vindicates for each one dominion of his

own conscience and of his own things. The Church is the one that, from the doctrine of Jesus Christ, commands one to love all, even enemies, and prohibits anyone private from taking vengeance for delicts, this right being reserved to public authority. Consequently the Church has always labored to abolish the monstrous servitude of men, always to reconcile peace among peoples, also to proscribe errors against the liberty of man by which man was being reduced to the condition of beasts.

We, having an ancient soul, not haters of liberty, will on the contrary preach to all that true liberty, repeating to all the words of the Apostle Paul to the Galatians, 5:13: For you have been called unto liberty, brethren; 4:31, Brethren, we are not children of the bondwoman, but of the free: by the liberty by which Christ has freed us; and by which, even from the beginning of His birth, peace was announced to men of good will, Luke 2:13.

Which liberty consequently brought by Christ is not confusion between true and false, is not a mixing of good and evil, is not contempt of any superior power, is not violation of any right and obligation, is not transgression of any divine and human law, is not destruction of any order. This is not liberty, not liberty, but unbridled license, most shameful lust. If it is called liberty, it is that liberty which, according to the Apostle Peter, is the cloak of every iniquity. For so is the will of God, he says, that by doing good you may silence the ignorance of imprudent men: as free, and not as having liberty as a cloak of malice. 1 Pet. 2:15, 16.

Is that liberty by which, because men are equal by nature and by natural faculties, it denies every subjection to any power, of wife toward husband, of children toward parents, of subjects toward public powers? By nature and by natural faculties men are certainly equal among themselves; but they are not equal among themselves, nor can they be, in the evolution of the same faculties, in this order of things. And this is from nature itself and from God, the author and ordainer of nature. Hence the Apostle Paul, writing to the Romans, 13:1 seqq., concludes: Let every soul, therefore no soul is excluded, let every soul be subject to higher powers. And behold the reason and foundation of this subjection: For there is no power except from God; and those that are, are ordained by God.... Therefore he who resists the power resists the ordinance of God.... Therefore be subject of necessity, not only on account of wrath, but also on account of conscience. On account of conscience, not on account of the person of a man. On account of conscience, because if there is no power except from God, wherever that power is found, it itself is from God, and is the minister of God. On account of conscience, because it is from the ordination of God. Therefore if anything is commanded against the ordination of God, then certainly one must obey God rather than men, Acts 5:29, and rather die than be defiled.

Liberty is a gift of God, and therefore cannot be against the ordination of God Himself, and true and perfect liberty can exist only in good. Wherefore against God Himself, against religion, against the Church of God Himself, there can be no true liberty. Moreover liberty is the most noble dowry and perfection of human nature. Wherefore again against the right reason of man, against human nature itself, against the order and good of man and of human society, true liberty cannot be had. Liberty against the right order of things is something absurd.

For which reason the Apostle Paul, whom we have heard preaching liberty, addresses all Christians, saying: Render to all their dues: tribute to whom tribute is due; custom to whom custom; fear to whom fear; honor to whom honor. Rom. 13:7.

Kings and Princes of all the earth, therefore render to all their dues. Hear King David: Render justice to all, equity, and judge right things, Ps. 57:2. Hear King Solomon: Love justice, you who judge the earth, Wis. 1:1.

And you who are subjects, render to all their dues. Hear the Prince of the Apostles: Be subject to every human creature, on account of God, whether to the king, as excelling; or to governors, as sent by him.... Fear God, honor the king. 1 Pet. 2:13 seqq.

And you who are masters, render to all their dues. Hear the Apostle:

Masters, furnish to servants what is just and equal, knowing that you also have a Lord in heaven. Col. 4:1.

And you who are servants, render to all their dues. Hear also the Apostle: Servants, obey carnal masters with fear and trembling, ... serving with a good will, as to the Lord and not to men. Eph. 6:5†.

And all you men, render to all their dues. Hear the Apostle: Husbands, love your wives, and do not be bitter toward them. Col. 3:19.

And you wives, render to all their dues. Hear likewise the Apostle: Women, be subject to your husbands, as it is fitting, in the Lord. Col. 3:18.

And you children, render to all their dues. Hear the Apostle: Children, obey your parents in all things. Col. 3:20†.

And you fathers, render to all their dues. Hear also the Apostle: Fathers, do not provoke your children to indignation; but educate them in the discipline and correction of the Lord. Col. 3:21.

And all you men, all you Christians, all you Catholics, laymen, clerics, religious, render to all their dues. Render dues to God, render dues to neighbor, render dues to yourselves.

Hear Christ Our Lord Himself: You shall love the Lord your God from your whole heart, and from your whole soul, and from all your strength, and from all your mind; and your neighbor as yourself.... Do this and you shall live. Luke 10:27, 28.

Hear the Apostle to the Romans, 13:8. Owe nothing to anyone, except that you love one another: for he who loves neighbor has fulfilled the law.

But especially you Priests, clerics, and religious, render to all their dues. Hear the Apostle: You must be blameless, sober, prudent, modest, hospitable, not following shameful gain. Be an example of the faithful in word, in conversation, in charity, in faith, in chastity. 1 Tim. 3, 4. Render dues especially to the Vicar of Christ on earth, the Supreme Pontiff, our most loving and most beloved Father. Render to him love, honor, reverence, obedience to his most wise commands.

Hear my great Father, St. Ignatius of Loyola: "Let us be altogether of one mind and conformable with the Catholic Church itself," he says, "if something which appears white to our eyes she shall have defined to be black, we ought likewise to pronounce that it is black. For it is undoubtedly to be believed that the Spirit of Our Lord Jesus Christ and of the orthodox Church, His Spouse, is the same, through whom we are governed and directed to salvation; nor is there one God who once handed down the precepts of the Decalogue and another who at this time instructs and rules the

Hierarchical Church." And He instructs and rules her through the Supreme Pontiff, the Vicar of Christ.

And hear the Supreme Pontiff himself, the Vicar of Christ, Pius X. In an Address, in the Italian language, given to Priests in the year 1912, "Love," he says, "Love the Supreme Pontiff, because the Supreme Pontiff is.... Love, not in word, nor in tongue, but in work and truth. When someone loves another he is conformed to him in thought and will, searching out his desires. And if Our Lord Jesus Christ said of Himself, if anyone loves me, he will keep my word, so the Supreme Pontiff is to be loved by furnishing due obedience to him. And therefore, when the Supreme Pontiff is truly loved, questions are not raised about that which He decrees and prescribes, how far obedience is owed, and in what things obedience is to be given; when the Supreme Pontiff is truly loved, it is not said, in order to elude obedience, that he spoke somewhat obscurely; nor are his Decrees and Ordinances called into doubt...; nor is his authority restrained within arbitrary limits; when the Supreme Pontiff is truly loved, the authority of other persons, however learned they may be, who dissent from the Supreme Pontiff, is not preferred to the authority of the Pontiff. If they are learned, they are certainly not holy, because he who is holy cannot dissent from the Supreme Pontiff." Behold the Italian words: "To love the Pope, it is enough to reflect who the Pope is.... How must he be loved? Not in word, nor in tongue, but in work and truth. When one loves a person, one seeks to conform oneself in everything to his thoughts, to execute his wishes, to interpret his desires. And if Our Lord Jesus Christ said of Himself: If anyone loves me, he will keep my word, so to show our love for the Pope it is necessary to obey him. Therefore when one loves the Pope, one does not make discussions about what He disposes or requires, or how far obedience must reach, and in what things one ought to obey; when one loves the Pope, one does not say that he did not speak clearly enough... one does not put his orders in doubt... one does not limit the field in which He can and ought to exercise his authority... one does not prefer to the authority of the Pope that of other persons, however learned, who dissent from the Pope; these, if they are learned, are not holy, because one who is holy cannot dissent from the Pope." He is not holy, sanctus non est. What then is he? He is a modern soul.

Therefore all render to all their dues, and the whole of society will be reformed; all observe the commands of Christ concerning charity and justice, and all things will be renewed in Christ. As the physical order consists in this, that each thing be placed in the place due to it, so the moral order consists in this, that rational and free creatures observe their own due obligations. From order observed there is had peace, which is the tranquility of order; and with the peace of one's own soul, and the peace of men among themselves, there is had that happiness and blessedness which can be had in this life, both of individual men and of individual societies of men. And truly then there will be new heavens and a new earth. Indeed true and perfect blessedness can be possessed only in the other life, by the possession of God. Hence happiness and blessedness in the present life can be had as no other than that which disposes us to attaining that eternal and perfect blessedness, and which is contained in justice, namely that justice which renders dues to all, and thus makes the will of man right, through due order to the end. Indeed, as is said in Prov. 14:34: Justice raises up a nation; but sin makes peoples miserable. Concerning this justice, which renders dues to all, which consequently establishes peace in the world, and which already makes us sharers of true happiness, we can well say with Aristotle: "Neither Hesperus nor Lucifer is worthy of such admiration"; και ουθ' εσπερος, ουθ' εωος, ουθω θαυμαυτος. Eth. Nicom. l. 5, c. 1, toward the end.

On Epicheia

To n. 179, 834. - ON EPICHEIA

Epicheia or Equity, properly and strictly such, is a virtue, is one special virtue, and it is a subjective part of justice, commonly so called, corresponding to legal justice, in a certain way contained under it, and in a certain way exceeding it, and more noble than it and with it a most excellent virtue.

1. Epicheia or equity can be taken in multiple ways, by common and proper signification. Hence equity first is justice itself, whose office it is to establish equality or equity of things in human acts and contracts. And thus in L. 14 de Condictione indebiti it is said: "This is naturally equitable, that no one be made richer with another's detriment." And Reiffenstuel: Restitution in integrum is "an extraordinary remedy of law by which one gravely injured, from natural equity through the office of a judge, is reduced into that state or right in which he had been before the injury." L. 1, tit. 41, n. 3. Equity of this kind is called and is natural equity.

2. But equity proceeds further, namely by establishing a certain suitable measure generally in all laws, tempering the rigor and subtlety of laws according to various circumstances. Equity taken thus, by which it extends broadly, is commonly accustomed to be called epicheia; and it is treated in the treatise on laws when the question is raised concerning interpretation of law. But if it is taken restrictively, namely insofar as it determines a suitable measure in justice by moderating the rigor and subtlety of law, civil equity is had. And thus L. 22 de Donationibus, Modestinus moderates the rigor of law, defining: "that he who for the sake of donation promised money or something else does not owe interest from delay of payment of the money is of the highest equity." Ulpian tempers the subtlety of law in L. 29 § 6 Mandati vel contra, establishing: "If a surety, although freed by time alone, nevertheless paid the creditor, he will rightly have the action of mandate against the accused; for although, now freed, he paid, nevertheless he fulfilled faith and freed the debtor: therefore if he is prepared to defend the accused against the creditor, it is most equitable that by the judgment of mandate he recover what he paid." Equity of this kind, tempering law, is opposed to strict law, to which namely equity is neither mixed nor applied.

3. This civil equity, from its object, concerning the good and equitable, is said in the Law, as can be seen, e.g., L. 17 de Iniusto, rupto, irrito facto testamento. Indeed Ulpian defines Civil Law itself from the good and equitable, L. 1 de Iustitia et Iure, saying: "One about to devote work to law ought first to know whence the name of law descends. But it is named from justice: for, as Celsus elegantly defines, law is the art of the good and the equitable. On account of this someone deservedly calls us priests: for we cultivate justice and profess knowledge of the good and equitable, separating the equitable from the inequitable, discerning the licit from the illicit." Therefore, since law is the art of the good and equitable, the Rule of Law is easily understood, L. 90 de Diversis Regulis Iuris antiqui: "In all things indeed, but especially in Law, equity is to be considered." And this is civil equity.

4. Moreover epicheia or equity seems also to be called modesty. For where the Apostle says to Phil. 4:5: Let your modesty be known to all men, in the Greek there is epieikeia. For in the Greek text is read to epieikes hymon. - Likewise equity is contained either under epicheia or

under friendship, insofar as, as some say, by it someone is rightly ordered to equals, as obedience to superiors, discipline to inferiors. St. Thomas, 2. 2, q. 80, single article ad 3.

5. Finally equity properly and strictly is had when in a particular case the observance of the law is omitted, following the intention of the legislator with the words of the law omitted. The law, e.g., is that no one climb the walls of the city. Yet, when the case occurs that otherwise the city would be lost, someone can climb the walls to save it.

6. Therefore equity imports equality or moderation in its concept and common acceptance. - Wherefore 1. insofar as it bears equality before itself, it is then used for justice itself, and is called natural equity. - Insofar as it bears moderation before itself, 2. it is also taken for modesty, but rarely; and more frequently 3. for benign interpretation of laws, and 4. for moderation in exacting and exercising one's own rights, and it is civil equity; and properly and strictly 5. for correction of law that is deficient on account of the universal, and it is epicheia simply such.

7. With the notion of equity declared, considered generally, let us now inquire step by step whether it is a virtue, and what sort of virtue it is. Epicheia or equity, insofar as it is justice itself, is a virtue, as is clear of itself, and is not a virtue distinct from justice itself. -

This is the equity of which Leo XIII speaks in the Encyclical Letter Rerum novarum, 15 May 1891, on the Condition of Workers, when he says: "Those things touch the proletarian and worker: that what has been freely and equitably agreed concerning work, he render integrally and faithfully. -

It is equitable to revere in them the dignity of person.... But among the greatest duties of masters that one stands forth: to furnish just things to each. Indeed, that the measure of wages be established from equity, several causes are to be considered. Equity commands that care be taken of the proletarian publicly, so that from that which he brings to the common utility he himself may receive something, so that, housed, clothed, safe, he may be able to endure life less painfully. - It is certain that neither the citizen nor the family is to be absorbed by the republic. It is equitable to permit each its own faculty of acting." And Cicero in 2 Offic. 22 at the end: "But what equity does it have, that he who had no field should have one; but he who had one should lose it?"

8. Epicheia, insofar as it establishes due measure according to the various circumstances of cases in the observance of laws, is also a virtue, and is the companion of all virtues. "The companions of virtue," says Aristotle, "are probity, equity, candor, good hope." Ethic. De virtutib. et vitiis c. 8, § 3. As regards direction, it pertains to prudence. And for various cases it is either Synesis or Gnome, which are two potential parts of prudence. Synesis is a virtue judging well about particular things to be done, according to common rules. Gnome is a virtue judging well concerning things to be done beyond common principles, and consequently imports a certain perspicacity of judgment. Hence it is also called eugnomosyne, as if good gnome. St. Thomas, 1. 2, q. 51, a. 4.; 2. 2, q. 80. But as regards execution, that virtue pertains to legal justice. "Those two," says St. Thomas, 2. 2, q. 80 ad 4, "are attributed to prudence according to direction, but to justice according to execution" ... "It must be said that epikeia is not joined to particular justice, but to legal justice, and seems to be the same as that which was called eugnomosyne." Wherefore it cannot simply be admitted what La-Croix says, l. 1, n. 829, namely that epicheia is an act of prudence.

9. Epicheia taken for civil equity in the exercise of one's own right, insofar as namely one exacts it not with the whole rigor of law, but with suitable moderation, by making some remission of right, is also a virtue; and as regards execution, it seems to be either generally charity, which is mixed with justice, or friendship or affability or humanity, from the fact that someone is called humane, as is said by Isidore, because he has love and the affection of pity concerning man, St. Thomas, 2. 2, q. 80 ad 2. Benignity also could not unfittingly be called it, since the same Isidore says that a benign man is one spontaneously prepared for doing good and sweet in speech. St. Thomas, l. c. ad 4. Mercy and truth have met each other: Justice and peace have kissed. Ps. 84:11. Yet, as from St. Thomas, so from Aristotle, it is justice, and not another virtue. Ethic. l. 5, c. 10, § 8.

10. Epicheia taken for modesty is likewise a virtue, which is part of temperance. "It must be said," says St. Thomas, 2. 2, q. 120, a. 2 ad 3, "that it pertains to epicheia to moderate something, namely the observance of the words of the law. But modesty, which is placed as part of temperance, moderates the exterior life of man, for instance in walking or clothing or other things of this kind." And thus the name of epicheia can be transferred by a certain similitude to all moderations.

11. Epicheia, in the last place properly and strictly such, which follows the intention of the legislator in those things in which it is not fitting to follow the words of the law, because this would be vicious, is likewise a virtue, and this is agreed among all. The Angelic Doctor, treating this question expressly in 2. 2, q. 120, raises the question concerning epicheia or equity, and in the first article treats the question: Whether epicheia is a virtue. And he responds: "It must be said that because human acts, concerning which laws are given, consist in singular contingents which can be varied in infinite ways, it was not possible for some rule of law to be instituted which would fail in no case; but legislators attend to that which happens in the greater number, making law according to this; yet to observe it in some cases is against the equality of justice and against the common good which the law intends.... Therefore in these and similar cases it is evil to follow the law; but it is good, with the words of the law omitted, to follow that which the reason of justice and common utility demands. And to this epicheia is ordered, which among us is called equity. Hence it is clear that epicheia is a virtue." Indeed, if that is a virtue which pursues the reason of justice and the common utility according to the words of the law, that is also necessarily a virtue which pursues the same equality of justice and the same common good according to the intention of the legislator. Hence it is said in L. 5 de Legibus et Constitutionibus Principum et Edictis in the Code: "There is no doubt that he commits against the law who, having embraced the words of the law, strives against the will of the law."

12. Given that equity, properly and strictly such, is a virtue, it is asked whether it is a general or some particular virtue. The most learned Lessius, in book 2, chapter 47, doubt 9, n. 65, of the work De Iustitia et Iure, says: "It is very probable that it is not one virtue distinct from the rest, or at least that such a virtue is not necessary. The reason is that equity has place in every genus of laws and in every matter of virtues, and does not regard one formal reason; but it looks to diverse reasons of the honorable in diverse matters, indeed in diverse cases concerning the same law."

13. This opinion of Lessius can be confirmed from the words of St. Thomas in 3 Dist. 33, q. 3, art. 4, qc. 6, sol. 5 ad 5, where he says that epicheia is somehow the same for every virtue, as also legal justice is. But the clear opinion of St. Thomas is to be taken from 2. 2, q. 80 and 120, where again he treats expressly of epicheia or equity. And thus Cajetan himself, on q. 80 at the end, says: "Note how much the Author, that is St. Thomas, advanced from the time when he wrote the last article of q. 3, dist. 33 in 3 Sent. For these differ from those as clear light from somewhat obscure. Wherefore, follow these." And indeed in fact the opinion of the holy Doctor in 2. 2 is so clear that the same Lessius, after asserting and proving his own opinion, then concedes that one virtue can be established, as St. Thomas establishes it l. c. And one virtue really must be established, 1 because although it has place in every genus of laws and in every matter, nevertheless in all cases and in all matters it always pursues one and the same reason of the honorable; which we have already heard from the Angelic Doctor, namely the equality of justice, lest one be overburdened before another, and the common good, not according to the words of the law and in cases commonly occurring, which pertains to legal justice, but in extraordinary cases and according to the intention of the legislator. Hence it is that equity corresponds to legal justice.

14. Wherefore, as legal justice, by reason of its own formal object, is one virtue, and at the same time a certain general virtue by reason of matter or material object, so likewise equity is a certain general virtue, because, as we have heard from Lessius, equity has place in every genus of laws and in every matter of virtues; and it is at the same time one special virtue, because, according to the Angelic Doctor, there is only one equity directive of laws, according as the reason of justice and common utility demand. Namely epicheia or equity has a special object, which of itself bears a peculiar difficulty, and therefore it is a virtue distinct from others.

15. And this is Aristotle's opinion; he says in V of the Ethics: "Equity is the direction of law, where it fails because of the universal." Equity is direction, because its act consists in this, that it makes a right work. But it is direction of positive law. Whether it is also direction of natural law is a matter controverted among the doctors. Cajetan affirms with others after St. Thomas in 2. 2, q. 120, a. 1. Several on the contrary deny it, adducing Suarez in chapter 16, l. 2, De Legibus. But, with the explanation applied which Suarez truly applies, there can be no controversy about this matter. For equity is the direction of law, yet of universal law and one deficient in some cases. But natural law can be regarded in two ways, as the same excellent doctor notes, n. 5 and 16. For it can be regarded according to itself, and insofar as it happens to be brought by some positive law. Natural law according to itself is nothing other than the dictate of right reason, which is to be brought concerning human actions, all their conditions having been weighed. But this dictate is not brought universally insofar as it can fail, but insofar as it is affected with those circumstances with which it never fails; otherwise it would not be a true dictate, and consequently neither necessary, nor right, nor containing a natural precept. And thus in the example brought by St. Thomas and Cajetan of epicheia, in not returning a deposit if someone asks it back for the attack on the fatherland, there truly is no epicheia in natural law considered according to itself. For that natural precept, as such, is nothing other than right reason, and right reason does not absolutely dictate that a deposit must be returned, but with the conditions understood which the reason of justice and charity

requires. Suarez l. c. n. 7, 9. But if natural precepts are regarded as they have been constituted by positive law, then certainly epicheia has place, namely by reason of the universality by which the law is expressed, if nevertheless by reason of this universality the law fails in some case. And thus in the aforesaid example of St. Thomas, "the law established that deposits be returned." Yet if a madman deposited a sword and asks it back while he is in madness, "it would be evil to follow the law placed." But if, as Cajetan says l. c., "some things are so universally true that in no case do they fail, such as that one must not lie, that adultery must not be perpetrated, and things of this kind, in these, because they cannot fail, equity has no place."

16. Moreover equity is the direction of law where it fails because of the universal. Therefore direction of law does not pertain to equity unless it fails because of the universal. Therefore if law fails in some case because of a privilege, commanding something other than the common law, direction of the acts of the privilege does not pertain to equity. And it is similar if from any other cause whatever the law fails, e.g., if because of obscurity or ambiguity the sense fails, or whether it fails is doubted. For it is not the office of equity to derogate from law or to interpret law, but to direct law where it fails for the reason that it was placed universally. Cajetan l. c. Nor in Aristotle's definition is there question of any defect whatever of law because of the universal. For law can fail because of the universal in two ways, negatively or contrariwise. It fails negatively when a case occurs in which the reason of the law is not verified. Yet if the law is observed, nothing evil, nothing disordered, is committed; indeed a good and very laudable act is placed, as is clear concerning Our Lord Jesus Christ, who observed the law of circumcision in Himself, and likewise concerning Our Lady, the Blessed Virgin Mary, who observed the law of presentation in the temple. Therefore equity is not the direction of a law which because of the universal fails negatively. But the law fails contrariwise because of the universal when in a particular case it would lead to crooked things if it were observed, namely it would be acted inequitably, as in the case of returning a deposit for attacking the fatherland, and in other similar cases, in which to observe the law would be to deviate from the right. And this properly constitutes the matter of equity; and it is clear ostensively, as Cajetan says, from the reason of the virtue itself which is called equity. "For since it is a certain justice," as the Philosopher says, dikaiosyne tis, Eth. l. 5, c. 10, § 8, "and justice is necessary to man for this, that he be virtuous, it follows that its matter, as also of the other species of justice, is that operation which without its direction would not be right. But we see that exchanges would not be made rightly without commutative justice, nor distributions without distributive. Therefore those operations which would bend away from right by observing the universal law are the proper matter of equity, and on account of them alone direction is necessary. And on account of this it was deservedly called by the prince of Philosophers the direction of law. For law does not need direction except where it falls from rectitude, where it would lead away from the right." Cajetan l. c.

17. From this doctrine it is easily clear that interpretation of law and proper epicheia or equity must be altogether distinguished. For every epicheia is an interpretation of law, but not conversely is every interpretation of law epicheia. Often or always, as Suarez and Cajetan note, laws need interpretation because of ambiguity of words and because of obscurity of sense, or

another similar cause. Interpretation of this kind is not epicheia. For that alone is epicheia by which we interpret a law in some particular case, because in it it fails because of the universal, so that it cannot justly be observed in that case. And in this sense Aristotle says epicheia is the amendment of legal justice, because it interprets the law as not to be observed in the case in which it would be a practical error to observe it, and against justice or natural equity.

But truly there can be other interpretations of law which do not regard amendment of the laws themselves, but only the explanation of their ambiguous or obscure sense; as e.g., when the law prohibits some contract, and a doubt arises whether the law merely prohibits that contract, or also invalidates it. Thus Suarez de Legib. l. 2, C. 16, n. 4. But from St. Thomas it would rather have to be said that epicheia simply is not interpretation of law. For, according to the Angelic Doctor, 2. 2, q. 120, a. 1 ad 3, interpretation has place in doubts, by consulting the prince; epicheia on the contrary has place in manifest things, by acting immediately in them. And again in 1. 2, q. 96, a. 6 ad 2, he says: "It must be said that he who follows the intention of the legislator does not interpret the law simply, but in the case in which it is manifest by the evidence of harm that the legislator intended something else. For if there is doubt, he ought either to act according to the words of the law or to consult the superior."

18. But must epicheia properly such be taken so restrictively that it has place only in the case in which it would be a sin to follow the law? Thus at first sight it would seem it must be said from St. Thomas, 2. 2, q. 120, a. 2, who seems to explain epicheia from cases in which it would be evil, as he says, to follow the law placed. And this is confirmed from the examples brought by the holy Doctor himself: restitution of a deposit which would be harmful if it were made to a madman, or if it were made for attacking the fatherland; and likewise if the gates of the city, which ought to remain closed, were not opened to citizens through whom the city would be preserved.

19. But St. Alphonsus, de legibus n. 201, extends epicheia also to the case in which the law is rendered too burdensome or too hard. "That place be given to epicheia," he says, "the law ought not only to cease in the particular case negatively, because namely the end of the law would then fail; but it ought to cease contrariwise, namely because the law is rendered damaging or too burdensome. Wherefore a deposited sword can be denied to the owner if he is going to abuse it. But it suffices if otherwise the law would be rendered too hard. Hence he is excused from hearing the sacred liturgy who fears a notable loss of goods. And he also is excused from the observance of a feast who otherwise is compelled to lose great gain."

20. Moral Theologians and Canonists commonly admit epicheia thus enlarged by St. Alphonsus. And it is truly not only not rejected by St. Thomas, but altogether admitted. For from St. Thomas its foundation is in this, that the reason of justice and common utility require it. Moreover the reason of justice demands this, that one not be overburdened before another, that one before another in the civil community or community not suffer damage. 2. 2, q. 120, a. 1. - Wherefore Scherer, who against the common opinion attacks epicheia, is rightly and deservedly reprehended. Wernz Ius Decretalium ed. 2, tom. 1, n. 48, note 19.

21. But to know more and more the intrinsic nature of epicheia, this question is moved here: Whether, in an occurring case of epicheia, someone can act freely, or ought first to recur to the

Superior? And one must answer altogether negatively. Fittingly St. Thomas, 1. 2, q. 96, a. 6: "If there is sudden danger not allowing so much delay that one can recur to the Superior, necessity itself has dispensation annexed, because necessity is not subject to law." And in 2. 2, q. 120, a. 1 ad 3, he says it must be said "that interpretation has place in doubts, in which it is not licit without the determination of the prince to depart from the words of the law; but in manifest things there is no need of interpretation, but of execution."

22. Now it must be inspected what sort of virtue equity of this kind is. According to Aristotle, equity is not charity, nor is it a certain charity; but it is a certain justice, as is expressly said in V of the Ethics. And, according to St. Thomas, who altogether follows Aristotle, "epicheia is part of justice commonly so called, as existing as a certain justice." But how epicheia is a part of justice commonly so called, and what that justice commonly so called is, the same Angelic Doctor thus declares: "it must be said that epicheia properly corresponds to legal justice, and in a certain way is contained in it, and in a certain way exceeds it. For if legal justice is called that which obeys the law either as regards the words of the law, or as regards the intention of the legislator, which is stronger, thus epicheia is the stronger part of legal justice. But if legal justice is called only that which obeys the law according to the words of the law, thus epicheia is not part of legal justice, but is a part of justice commonly so called, divided against legal justice, as exceeding it." Therefore epicheia is nothing other than a certain justice, part of justice taken generally, not a potential part of justice, but a subjective part. For epicheia corresponds to legal justice, which is not a potential part of justice, but a subjective part. Hence the Angelic Doctor concludes, saying, Hence it is clear that epicheia is a subjective part of justice.

23. Wherefore the doctrine of Lessius does not seem true, or certainly that doctrine does not correspond to the doctrine of St. Thomas. For Lessius numbers epicheia or equity among the potential parts of justice, de Iust. et Iure l. 2, § 7. Others also number Epicheia among the potential parts of justice. They perhaps did this because the Angelic Doctor treats of epicheia at the end of the virtues annexed to justice. But the Angelic Doctor himself openly excludes it from the other virtues annexed to justice. For first, in question 80, single article, the holy Doctor gives the reason of the virtues annexed to justice and of the potential parts of justice and numbers them. Moreover, in the number of potential parts of justice the holy Doctor does not number epicheia also. But in the reason which he assigns of the potential parts of justice, or of those deficient from the perfect reason of justice, the holy Doctor altogether excludes epicheia. The reason of justice consists in this, that what is owed to another be rendered to him to equality. Therefore in two ways some virtue existing toward another falls short of the reason of justice. In one way indeed, insofar as it falls short of the reason of equality, and thus religion, piety, observance fall short, which cannot render debt to equality. In another way, there can be a defect from the reason of justice by reason of debt. But debt is twofold, legal debt and moral debt. Moral debt is what someone owes from the honorableness of virtue, and thus truth, gratitude, liberality, affability or friendship fall short. But legal debt is that to the rendering of which someone is bound by law. "And such debt justice properly attends, which is the principal virtue." Moreover epicheia attends legal debt, not indeed according to the words of the law, but according to the intention of the legislator. Moreover, in question 120, where St.

Thomas expressly treats of epicheia, he expressly affirms: "Epicheia is a subjective part of justice," as we have already heard from the same Angelic Doctor.

24. Namely, it is evidently a subjective part of justice, of justice taken generally. But if epicheia is considered as part of legal justice, as St. Thomas says, it is its stronger part; for legal justice is directed according to epicheia. Hence epicheia is as it were a superior rule of human acts. By which reason it is also clear that epicheia is a more noble subjective part of justice taken generally, if it is considered as a co-distinguished part from legal justice. Epicheia, says the Philosopher, is better than a certain justice, namely legal justice. For since it itself is a certain justice, it is not better than every justice. St. Thomas, 2. 2, q. 120, a. 2.

25. It is the stronger part of legal justice, it is better than a certain justice; because legal justice inclines to the just according to common laws, but epicheia or equity inclines to the just beyond common laws. The former regards an inferior end, the latter a superior end. And thus in the law, lest foreigners climb the walls of the city, the proximate end is the security of the city from foreigners; but the end of equity, if a foreigner climbs to defend the city from enemies, is the safety of the city. But it is clear that the safety of the city is a higher end than security from foreigners, because that security is ordered to the safety of the city as to an end. And similarly in the law of deposits the proximate end is that to each one his own be returned; but the end of equity denying the deposit to a madman is useful, namely because in the aforesaid case that which is his own is not useful to him but harmful. Con-

But it is clear that the higher end is to give to someone his useful own, than his own; because something is given to someone as his own so that it may be useful, for it is given under the final reason of useful good. St. Thomas, 2. 2, q. 120, a. 2.; Cajetan in h. l.

26. Therefore epicheia or equity is related to legal justice as a superior rule of human acts, as St. Thomas expressly affirms, because it has a higher end, and to the intrinsic end of the law it adds another extrinsic end. And this is Aristotle's opinion, saying in V Ethics that the equitable is better than a certain just thing, and he speaks of the just according to common laws.

27. But as in laws, so also in acts and contracts epicheia or equity, for preserving equity itself or equality, is to be attended to, on account of the same reason, because namely it is morally impossible to foresee all things and to define all things in them. And therefore they need the interpretation, judgment, and sentence of a good and equitable judge. In Roman Law contracts were divided into contracts of good faith and of strict right. A contract of strict right is one in which only that is to be considered concerning which it was expressly agreed. A contract of good faith is one which is accepted not from the rigor of words, but from benign interpretation, from the good and equitable. Contracts of good faith are purchase, sale, lease, hire, deposit, partnership, and others which are numbered in the Institutes, title de Actionibus § 28, Actionum autem. They are called contracts of good faith, not because in them alone good faith must be observed, for this is required also in all other contracts of strict right, since it is not licit to celebrate them in bad faith; but because, since they are frequently accustomed to be made among citizens, many conditions are not usually placed in those contracts, which otherwise are placed in other contracts, but the contracting parties are remitted to the customs of the country and to other things which are usually understood in the said contracts. In

contracts of strict right, on the contrary, several conditions are usually placed, according to which the judge is held to judge strictly. Cf. Ferraris v. Contractus in genere n. 12-18.; Reiffenstuel lib. 1, tit. 35. By more recent law, all contracts are esteemed to be of good faith, and receive interpretation from the good and equitable. Italian Code 1124, 1131, 1134.; French Code 1135, 1156, 1159.

28. Finally it is worth the effort to report what Aristotle has concerning epicheia, or concerning equity, in book V of the Ethics, chapter 10. "

1. It follows that we speak concerning equity and concerning the equitable good, peri de epieikeias kai tou epieikous, what relation equity has to justice, what relation the equitable good has to right. For to those looking more closely it seems neither altogether the same nor other in genus. And sometimes we praise the equitable good, and the man who is equitable and good. Indeed we even transfer this name to other things in praising, using it for good, when we say to epieikesteron, signifying something better. Sometimes to those following reason it seems absurd that the equitable good, since it is something diverse from right, is praiseworthy. For either right is not good, or the equitable good is not just, if indeed this is something diverse from right, or if each is good they are the same.
2. Therefore the whole question concerning the equitable good arises almost from these things which we have said. But all these things have themselves well in a certain way, nor is there anything of them which fights with itself. For the equitable good is a right better than a certain right; nor is it so better than right that it is some other genus. Therefore right and the equitable good are the same; and since both are good, the equitable good is better.
3. But the doubt has arisen from this, that although the equitable good is right, nevertheless it is not right established by law or legal right, but a correction of legal right.
4. The cause of this matter is that every law is general, but concerning certain matters one cannot command rightly universally and generally. Therefore in those matters in which it is necessary that the voice of the law be universal and general, but this is where it cannot be done sufficiently rightly, in these the law takes that which usually happens in the greater number; although it sufficiently understands that which is mistaken in this. Nor nevertheless on that account is this done less rightly. For it is not the fault of the law, nor of him who made the law, but of the nature of things. For such plainly is the matter of those things which fall into action.
5. Therefore when the law has spoken generally and afterward something happens beyond that universal genus, then it is fitting that, where the bearer of the law omitted something and erred in that he spoke absolutely, that which is lacking and omitted be corrected: which even the bearer of the law, if he were present there, would say in this way and would have made law concerning it if he had foreknown it.
6. Therefore since right is the equitable good, it is then better than a certain right, not than what is absolutely right, but than that which, on account of general declaration, is not without fault. Finally this is the nature of the equitable good, that it is a correction of law where something is lacking to it, on account of the fact that it speaks generally. For this is the cause why not all

things are comprehended by law, because concerning some things law cannot be brought; so that therefore a decree of the people is needed.

7. For of an undefined thing the rule also is indefinite, as also the Lesbian rule of lead for construction; for it is bent to the figure of the stone, nor does the same rule remain; so also the decree of the people is adapted to matters.

8. Therefore what the equitable good, to epieikes, is, what right is, and finally by what right the equitable good is better, is clear from these things. From this it also appears who is an equitable and good man. For he who has taken counsel of this kind, so that he follows these things, since he is fit for doing those very things, and who does not press the highest right too much, nor toward the worse part, but rather concedes concerning his own right, even if he could rely on the help of law, he is equitable and good; and this habit is equity, epieikeia, which is a certain justice, not another habit." And in book 1, chapters 1 and 2 of the Magna Moralia: "After the things which we have handed down, it seems fitting that we discuss equity, hyper epieikeias, and what it is, and in what things, and concerning what sorts of things. But equity, and the equitable man, he epieikeia kai ho epieikes, is he who yields concerning his own right which belongs to him by laws: for he who in those things which the legislator cannot examine in particular and define exactly, for he speaks universally, yields concerning his own right and follows that which the legislator indeed would have willed to define even particularly but could not, he is an equitable man. Moreover he does not yield concerning every right simply; since he does not diminish those things which are just by nature and truly, but only those which the legislator left behind when he could not define. But right estimation of things, and the right estimator of things, He de eugnomosyne kai ho eugnomon, concerns the same things as equity, namely concerning just things which, omitted by the legislator, have not been sufficiently exactly defined, so that a judge may be found of those things which the legislator omits and certainly knows were passed over by the legislator, which nevertheless are just; he is the right estimator of things. Therefore right estimation of things is not without equity. Esti men oun ouk aneu epieikeias he eugnomosyne. For judging belongs to the right estimator, tou eugnomonos; but acting according to this judgment belongs to the equitable man, tou epieikous."

On Observance of Law

To n. 213. ON OBSERVANCE OF LAW As to substance and as to mode

1. Since among precepts of law some are affirmative, which command what is honorable, and others are negative, which prohibit evil, the question concerning observance of law, as to substance and as to the mode of virtue, indeed has place in affirmative precepts; but in negative ones it scarcely has place.

For positive precepts must be fulfilled by a positive act. But negative precepts, without any act, can of themselves be fulfilled, as far as is from the form of the precept, because through the mere negation of the prohibited act a man is conformed to the law. Yet they can further be positively fulfilled through the will of not doing what is prohibited. But in omission as such, the mode of virtue is not

found, although it can be in the positive will of abstaining from a depraved act. But of itself this positive will is not necessary for fulfilling a negative precept, or for not sinning against it. Decline from evil.

2. Therefore it is one thing to observe the law, another thing not to transgress the law. For he who does not transgress the law does not always observe the law, as is clear also in him who acts against an affirmative law from invincible ignorance, or from impeded use of reason.

3. Now the observance of law is distinguished in two ways, as to substance and as to mode. This mode generally is nothing other than the mode of virtue.

4. Any law, whether human or natural, is to be observed as to substance. For any law commanding an act obliges to the substance of the act. Yet law does not always oblige also to the mode of the act. For human laws regularly command only the substance of the act, not also the mode, unless the mode is intrinsic to the act commanded. And thus he who, on a day of fast and abstinence, fasts and observes abstinence not for mortification and penance, or for temperance and restraint of gluttony, but on the contrary from gluttony, so that on the following day he can eat more, and because fish please him more than flesh, observes the law, and certainly does not violate it. "It must be said," says Suarez de Leg. l. 3, C. 29, n. 6, "that human law is sufficiently fulfilled through the act commanded, according to its substance, even if it is not simply morally good, nor done with an honorable intention."

5. The added limitation is: unless the mode is intrinsic to the act commanded; for evidently, if it is intrinsic to that act, it enters its substance, and consequently the law is to be observed as to substance and mode; as is to be seen in the precept of prayer, in the precepts of annual Confession and Easter Communion. For in the former there enters intention and at least some attention implicit in it; in the latter true interior sorrow for sins is required as regards Confession, and the state of grace and right intention as regards Communion.

6. The restriction likewise was made as regards human laws. For evidently natural law commands an act simply good, and therefore its observance embraces substance and mode of the act. Wherefore natural law also embraces the mode of virtue to be observed, wherever it broadly extends; for from natural law, good is from an integral cause, evil from any defect whatever. Fittingly Suarez: "Natural right differs from human right; for human right can be observed through an evil act in such a way that it is violated in no part; because that malice which is joined to such an act often is not against any human precept, but against the natural: but truly natural right itself, which commands one to make an honorable act, also commands that it be done studiously, because this very thing is from natural reason... and therefore as often as a natural precept is fulfilled through an evil act, natural right itself is violated." De Leg. l. 2, C. 10, n. 13.

7. Nor does it avail to object that even human law commands only a good act and an act of virtue. -

For human law indeed commands an act good of itself, or one which of itself can be done well, yet it does not command all the modes necessary that it be done well. Wherefore he who does all that

human law commands, and with all the external circumstances which it commands, although he does it with a depraved intention, does not do otherwise than he ought to do by force of that human law, although he does otherwise than another divine law commands, and therefore he sins not against human law, but against divine and natural law. Likewise human law commanding an act determines the act in a certain species of virtues. But this does not import that that species of virtue ought to be intended by the one operating, or that that act be done without any admixture of malice; but it imports only that the law commands an act of some singular virtue, because laws intend to make men honorable in the genus of all virtues. But this motive of the precept of the law is not the precept itself or that which is commanded, and for observing the law it suffices to do what is commanded.

8. But although natural right commands each, substance and mode, good and well, yet this is not so to be understood that he who does not observe the mode also does not observe the substance of the law. For this is true only when an evil mode corrupts the whole substance of the act. And thus he who gives alms to a poor man impelled by vain glory, or with some interior displeasure, observes the precept of almsgiving as to substance, although he sins as to mode. But he who gives alms to a poor man moved only from the depraved end of attracting him to evil, e.g., to denying the Catholic faith and professing the false faith of Protestants, does not observe the natural precept of charity and almsgiving, neither as to mode nor as to the substance itself; on the contrary he sins gravely by that alms given against charity, by the sin of scandal and cooperation toward grave sin against faith. Although in this case he now does not transgress the precept of almsgiving, nevertheless he does not observe the precept of almsgiving. Cf. Salmant. de Leg. C. 2, n. 148.
9. From these things which precede it is clear what mode is in the observance of law. It is namely, as was said at the beginning, the mode of virtue. -

Let us now declare this mode of virtue, and see the various modes of virtue in the observance of law; whether at least some one of them is required for the observance of any law, and what sort.

10. Moreover the modes of virtue of which we speak are either the mode of some special virtue, or the modes of virtue in general. That special virtue here can be no other than either that virtue to which all other virtues are ordered, and which is the end of the whole law, which is charity, or that virtue which enters by its nature the precept of any virtue, and which is obedience.
11. As regards charity, the Angelic Doctor, 1. 2, q. 100, a. 10, raises the question: "whether the mode of charity falls under the precept of divine law"; and responds: "It must be said... Some have said absolutely that the mode of charity is under precept.... But others have said that the mode of charity altogether does not fall under precept. Each has said what is true in some respect. -

For an act of charity can be considered in two ways. In one way, according as it is a certain act per se. And in this way it falls under the precept of the law which is specially given concerning this: You shall love your Lord, and You shall love your neighbor. And as regards this the first have said what is true.... In another way the act of charity can be considered according as it is the mode of the acts of other virtues, that is, according as the acts of other virtues are ordered to charity, which is the end of the precept.... And in this way what the second have said is true, that the mode of charity does not

fall under precept: this is said, that in this precept: Honor your father, it is not included that the father be honored from charity, but only that the father be honored. Hence he who honors his father, although he does not have charity, is not made a transgressor of this precept, although he is a transgressor of the precept which concerns the act of charity, on account of which transgression he merits punishment."

12. But as the mode of charity is not required for the observance of law, so also the mode of obedience is not required, as will soon be explained more by declaring first the general mode of virtue.

13. And these things concerning the mode of special virtue. Let us now come to the mode of virtue in general. The Angelic Doctor, according to Aristotle, numbers only a threefold mode of virtue, namely 1. that someone operate knowingly; 2. that someone operate willingly or choosing, and choosing on account of this;

3. that he have and operate firmly and immovably, 1. 2, q. 100, a. 9, namely from a rooted habit. We can immediately omit this last mode of operating from habit. For no law, whether natural or positive, whether divine or human, commands this mode, and law obliges only to that which it commands. Besides, every law obliges from the beginning, namely before a habit is had. And thus the Angelic Doctor says: "as regards this, the mode of virtue does not fall under the precept either of divine law or of human law; for neither by man nor by God is he punished as a transgressor of the precept who furnishes the honor due to parents, although he does not have the habit of piety."

14. Hence it follows that it is not necessary for the observance of law to act delightfully, according as delight follows habit. For delight can regard the very observance of law, insofar as, e.g., notwithstanding the obliging law, someone would wish not to observe the law if he did not fear penalty or another harm; this mode includes intrinsic repugnance with the precept, and therefore is intrinsically evil and against natural law: for it excludes the will of observing the law, and on the contrary includes the will of not observing it. St. Thomas, 1. 2, q. 100, a. 9 ad 3.

15. But the two preceding modes of Aristotle and St. Thomas, for the sake of clarity, we distinguish into various conditions which they contain, required for the honesty of the act. Hence we say that the mode of virtue in the observance of law is only fourfold, namely that the law be observed: 1. from knowledge, will, liberty; 2. from intention of intrinsic honesty; 3. from intention of the end; 4. from all other circumstances. Another possible mode of virtue is not given. For the mode of virtue can be only on the part of the agent and on the part of the act; from these two heads no other assignable modes of virtue exist. The state of grace, which perhaps can be objected, pertains not to the observance of law, of which we are treating, but to merit and to supernatural merit. Likewise faith regards not the observance of law, but the supernaturality of the act.

16. Now as regards the first mode: to act from knowledge, will, liberty, that is, knowingly, willingly, freely to act, this pertains to the observance of both human and divine law. For this mode, that is, to act with knowledge of the work voluntarily and freely, pertains to the very

essence and substance of a human act; and therefore that mode regards the very substance of the precept of law to be fulfilled. "The reason is," says Busembaum and after him St. Alphonsus, l. 1, n. 165, "because since law is given to men, not to beasts, and therefore is to be fulfilled in a human mode, hence the fulfillment of every precept, whether human or divine, ought to be a human act joined with liberty and will of the one operating, that is, that he will or intend to do this which is commanded, e.g., to hear Mass, to fast, etc.... Hence he who heard Mass, fasted, etc., compelled altogether violently, did not satisfy; for it was not a human act by defect of the voluntary.... Nor does he satisfy who goes to Mass only to feed his eyes, to speak with another, or to wait for a friend." The opinion of the Angelic Doctor is the same; he says, 1. 2, q. 100, a. 9, that the first mode of virtue, namely that someone operate knowingly, according to the Philosopher, "is judged both by divine law and by human law." Hence the same Angelic Doctor concludes, "according to ignorance some things are judged toward punishment or toward pardon both according to human law and according to divine law." For ignorance removes the voluntary and sin.

17. That knowingly evidently also includes willingly, namely knowing and willing that which someone operates. Knowing and willing that, not only according to itself, but knowing and willing it as commanded. Otherwise there is not truly observance of law, which ought to be moral and an effect of law, but only material and per accidens conformity of the act with the law, as if someone knowingly and willingly gives alms, ignorant of the precept concerning it. This ignorance of the precept indeed suffices for not sinning directly against the precept, if it is invincible. Yet with it existing, there is not had moral and formal observance of the law. From the precept there arises an obligation of knowing it, because otherwise it cannot be morally observed. Hence the Angelic Doctor says that he who, ignorant, does an act which is ordered by law, does the commanded work by chance and per accidens. But the precept obliges that it be done per se and from intention, and therefore obliges one to have knowledge of it and to will its observance.

18. But there is need to will to do what is commanded; but not because it is commanded, namely from the motive of obedience. For this is not necessary for fulfilling the precept, because neither is this commanded in the law itself, nor is there any reason which obliges to this. - But it is objected that he who unwillingly does the commanded act is not held to do it again. And thus, after restitution has been made by a debtor altogether unwilling, the debtor is not held to restore again, which is a sign that he fulfilled the law. But in this example and in similar others, that natural precept of restitution is not observed; rather, he sins gravely against it; and the precept no longer obliges, not because it was observed, but because the matter was removed by the thing itself, with the debt extinguished.

19. A graver difficulty is in him who knowingly and willingly hears Mass and hears it attentively and devoutly, yet is ignorant of its precept. He indeed truly hears Mass, and thus sufficiently observes the precept, and is excused from hearing another Mass. It can indeed be said, and in fact is said by Suarez, that that pious will "virtually is the will of fulfilling the precept, which concerns the act itself commanded, and is judged to arise from the general will which each one has of satisfying his obligations: for morally any prudent man is judged to will this first in his honorable and religious actions. For this reason, one ignorant or not adverting that it is a feast

day, voluntarily hearing Mass as he is accustomed, fulfills the precept, so that he is not held to hear Mass again when he understands or remembers that it is a feast day." de Relig. t. 2, l. 4, C. 26, n. 6.

20. But another difficulty is far graver in him who on a feast day knowingly and willingly hears Mass devoutly, with the purpose of hearing it from devotion and not from precept. - There are several who hold that this one does not satisfy the precept, and ought to hear another Mass. For that will is not the will of fulfilling the precept, and therefore through that action the precept is not fulfilled. For fulfillment of the precept ought to be voluntary. Yet the common opinion holds altogether the contrary. The reason is that in reality he voluntarily did all that which was commanded in a human mode. And although the fulfillment itself of the precept, as it is a certain quasi-relation or adequation between the action and the precept, is not willed, but follows materially, nevertheless it cannot be impeded by the will of the one operating, even if he does not wish by that action to fulfill the precept.

But if in reality he does not hear another Mass, he is held to conform his will explicitly or implicitly with the precept, namely by willing to satisfy it by the prior hearing. For he is held not to resist the precept. Hence when afterward he wills not to hear another Mass, in order not to incur fault, it is necessary that he at least understand that he has satisfied the precept, so that he wills to be content with that satisfaction; because the natural law itself obliges one not to have affection contrary to the precept of a superior.

21. Wherefore it is necessary to distinguish the observance of a precept as to the substance of the exterior human act and as to the mode of interior affection, due by the nature of the thing to such action, with the precept supposed. As to the substance of the exterior act of the precept, it is true that someone fulfills a human precept by the very fact that, e.g., in a human mode and attentively he hears Mass, however much he then may not wish to fulfill the precept. But with that resistance of the will standing concerning the fulfillment of the precept, the precept is not completely fulfilled as regards the affection due by natural right to the precept, which at least requires that the subject not have affection contrary to the obligation of the precept. This mode indeed does not fall directly under the human precept, nor is it its matter, but follows from natural law and the general obligation of obedience. Hence, if afterward someone did not wish to hear Mass again, and at the same time persevered in the will of not fulfilling the precept through the prior hearing of Mass, he would sin by internal affection against that precept, but not by an exterior transgression of it. Hence he would not be held to hear another Mass, but only the obligation would be present that that prior hearing, as fulfilling the precept, not remain involuntary, but become voluntary, at least by judging now that he has satisfied the precept. And thus Busembaum and St. Alphonsus, l. 1, n. 164, say: "One hearing the sacred liturgy on a feast day which he knows to be the last, or, if it is not the last, intending to hear no other, although he intended not to satisfy, nevertheless truly satisfies the precept concerning hearing Mass; although he sinned against another precept, by which one is held to be subject to the legislator." - And in this sense observance of law, not only natural but also human, in order that it be complete, needs someone knowingly and willingly to operate that which is commanded.

22. As regards the second mode of observance of law, from intention of intrinsic honesty, St. Thomas, l. c., openly excludes this from observance of human law and says that it pertains only to divine law. Hence from the Angelic Doctor, only to divine law does it pertain to will to do evil and not do it, to do good but not on account of good. Behold the reason from which the Angelic Doctor proceeds to the said conclusion: "It must be said that a precept of law has coercive force. Therefore that falls directly under the precept of law to which the law coerces. But the coercion of law is through fear of penalty.... For that properly falls under the precept of law for which the penalty of the law is inflicted. But divine law and human law stand differently for establishing penalty. For the penalty of law is inflicted only for those things concerning which the legislator has to judge; because law punishes from judgment. But man, who is the legislator of human law, has to judge only concerning exterior acts, because men see those things which appear...; but it belongs to God alone, who is the bearer of divine law, to judge concerning the interior movements of wills, according to that saying: God searching hearts and reins." With this fundamental doctrine established, the holy Doctor, then speaking concerning the second mode of virtue in the observance of law, namely that, according to the Philosopher, someone operate willingly or choosing and choosing on account of this, that is, that someone will and choose good, and operate it on account of good, says that in this "a double interior movement is imported, namely of will and of intention," of will, WILLINGLY, of intention, CHOOSING. "And human law does not judge these two, but only divine law; for human law does not punish him who wills to kill and does not kill; but divine law punishes, according to that saying: He who is angry with his brother shall be liable to judgment." And consequently the same is true of the will which wills good and operates, but not on account of good, on account of its honesty. And thus a soldier who fights bravely in war, and kills the enemy only from hatred, indeed observes human law as to substance, but does not observe natural and divine law as to mode. Hence while he receives reward from the Prince, he is condemned by God to eternal fire.

23. Wherefore in this mode the precept is not truly fulfilled in the internal forum before God; but before men, and in the external forum, it is fulfilled for escaping penalty, provided the act commanded is done as to substance. If excommunication were present against one not fasting, he who fasts by force and compulsion alone, who is violently deprived of food, since he does not abstain from food voluntarily, does not fulfill the law; yet he would not incur excommunication, because this would not be incurred, in the case, unless the effect followed. But the law in the case as regards the external effect or substance is fulfilled, or at least is not violated. But it would be otherwise if the excommunication were against one not praying and not reciting the canonical hours, if someone read them only for learning the Latin language; for then he would not pray, and the precept concerns praying, and therefore in that case he would not fulfill the precept and would incur excommunication.

24. As regards the third mode: acting from intention of the end of the law, this mode likewise is not necessary as regards observance of human law. "Law," says Suarez de Leg. l. 3, C. 29, n. 7, "obliges only to that which it commands; but it commands only the matter into which it falls and not the end; therefore it obliges to the matter and not to the end. Therefore, if the matter is given to execution, the law is observed, whatever may be sinned from another source. The

last antecedent is proved, because only that is commanded which in the law is expressed in the mode of command; but human law does not command that this be done for that, but that this be done. But if sometimes the end of the law is expressed in the law, it is not in the mode of the object of the law, but only in the mode of reason or motive on account of which the mode is commanded, etc." Hence the saying: the end of the law does not fall under the law, the reason of the law is not law. And the law will still have to be observed, although that end in the particular case is not obtained, or its reason does not exist.

25. But as regards natural law, this obliges altogether to the end, to the ultimate end, since its foundation and reason is the end itself to which all human actions are to be directed, namely God. To the point, the Angelic Doctor: "The goodness of the will depends on the intention of the end: but the ultimate end of the human will is the highest good, which is God. Therefore it is required for the goodness of the human will that it be ordered to the highest good." 1. 2, q. 19, a. 9.

"The whole that man is, and that he can and has, is to be ordered to God." 1. 2, q. 22, a. 4 ad 3. But it is enough to direct those human actions to God virtually on the part of the work, or by the very act exercised, namely by acting on account of the end of some virtue, or what is honorable and consonant with rational nature; for such an act from its intrinsic nature tends to the glory of God. Fittingly again St. Thomas: "Whenever someone wills those things which are for the end, he wills the end by the same act; yet not conversely." 1. 2, q. 8, a. 3 ad 2. "He who, on the contrary, does an evil act not referable to God, does not preserve the honor of God which is owed to the ultimate end." 1. 2, q. 21, a. 4.

26. As regards the fourth mode of virtue, from all other circumstances of the act, the same must be said as concerning the end of the law: human law and generally positive law does not oblige to this mode of virtue, but natural law does oblige. And thus he satisfies the law who, while he hears Mass, consents to a thought of vain complacency, and he who, while confessing his sins, lies about something altogether impertinent to Confession. But natural law altogether obliges also to this mode of virtue. For natural law obliges to an act simply good, namely that it be good from its whole formal object, on account of an honorable motive. Moreover under the material object all circumstances of the object and act and also of the agent are comprehended. But no one operates intending toward honesty unless he operates with due circumstances. Wherefore the mode of virtue comprehends also all due circumstances. Therefore natural law not only obliges that someone simply, i.e., as regards all things, knowingly and willingly operate good, but also that he operate that good on account of honesty; in which mode of operating the mode of virtue is simply contained. And although even a natural precept can be observed through an act good from its genus and evil from some circumstance, nevertheless the whole natural right is not then observed; for this also prohibits that evil, whether it prohibits that evil circumstance by the same precept, as if someone prays attentively and devoutly but not with due exterior reverence; or whether it prohibits the aforesaid evil circumstance by another precept, as if someone fulfills the precept of almsgiving not without vain glory, which is not against charity and mercy, but against humility. Cf. Suarez de Legibus l. 2, C. 10.; l. 3, C. 29.

27. Therefore the general natural law, or as regards the whole natural right, is to be observed both as to substance and as to mode, because from natural law good is to be done and evil avoided. But the former is from an integral cause, the latter from any defect whatever, and therefore also from evil in any mode whatever. Human law, on the contrary, is regularly to be observed only as to the substance of the act commanded, not also as to mode, since it is not commanded; unless the mode is intrinsic to the act itself commanded. Moreover to observe the law as to substance is to fulfill by a human act the very thing commanded by the law, although without attending to any intrinsic honesty of the act, nor consequently by willing or intending it; but to observe the law as to mode is to do the good commanded by the law and to do this good well simply.

28. The common doctrine concerning the observance of law has been set forth, with the Angelic and Eximious doctors and also St. Alphonsus Maria de Liguori going before. But, as is not rare, in a moral matter contradictors are not lacking. Among others La-Croix openly denies, l. 1, n. 695, that it is universally true that the observance of law ought to proceed from knowledge, will, liberty. To prove his opinion he brings forward the example of a drunk man. "A drunk man," he says, "is held by the precept of fast.... Therefore by not eating in reality he fulfills it, since in reality he fasts." - The drunk man, although destitute of the use of reason and liberty, is indeed held by the precept of fast; because that law subjects to itself all habitually possessed of reason. Therefore by not eating in reality he fulfills it, since in reality he fasts; indeed he fulfills. But what does he fulfill? He indeed fulfills fast. But certainly he does not fulfill the law of fast, from which he is also excused through that state of perfect drunkenness, so that even by eating he does not sin. Wherefore just as by eating he does not properly and formally transgress the law, so also by not eating he does not properly and formally observe the law.

29. La-Croix adds another example of a thief, who even in drunkenness is held to restore. Therefore if he restores in drunkenness, he observes the law of justice. For justice commanded this. It is indeed most true that a thief even drunk is obliged to restitution. Yet one restoring in the state of perfect drunkenness indeed gives to another what he owes to him and what justice commanded, but he does not properly and formally fulfill the precept of the virtue of justice, just as he would not properly and formally transgress if, instead of giving what he owes, he himself took another's thing.

30. Then passing to reasons, La-Croix insists, saying: The virtue from whose motive the precept is placed does not oblige to an act proceeding from the motive of its own honesty. -

It is indeed so; it does not oblige to an act proceeding from the motive of its own honesty, but it does oblige to a human act. This is the object of virtue and of precept; without a human act, and consequently without knowledge, will, and liberty, neither can virtue be exercised, nor can the precept of virtue be observed.

31. Aptly Aristotle, Magna Moralia, l. 1, c. 34, § 23: "When, therefore, is a thing just, and when not? Namely, to put it briefly, when someone has performed it purposely and spontaneously, and when he has known both against whom, and to whom, and for what cause, then he does just things.

Likewise and similarly he also will be unjust, who has known both against whom, and to whom, and for what cause he has offended. But when, knowing none of these things, he nevertheless has committed something unjust, then he is not unjust, but unfortunate. For if he has killed his father, thinking himself to kill an enemy, he indeed committed something unjust, and although he has inflicted injury on no one, nevertheless he acted unhappily."

32. La-Croix still presses, saying: it is not necessary that the observance of law be a good act; therefore neither is it necessary, speaking per se, that it be a voluntary and free act. We concede that it is not necessary that the observance of law be a good act, i.e., simply good; but it is altogether necessary per se that the observance of law be a human act, and therefore from knowledge, from will, from liberty. Otherwise neither observance of law, nor the law itself, could exist; unless we wish to say not only that a drunken man, by not eating, observes the law of fasting, but also that a little ass, from which food is withdrawn, observes the law of fasting.

33. La-Croix evades this response, explicitly affirming that for the observance of law a human act is not indeed required, but that an act of a man, who is bound by such a law, is sufficient. But the contrary is true; for then it would certainly follow that a sick man observes the law of fasting, who, so long as compelled by sickness he does not eat, nevertheless with his whole will resists that law of fasting. But this, a little before, is affirmed by La-Croix himself altogether to remove observance of law from the middle. These are his words: "That a precept may be fulfilled, there ought not to be present a will positively contrary to the precept and coerced." Therefore it is not true to say: for observing a law "an act of a man, who is bound by such a law, is sufficient."

34. And La-Croix affirms this again and again, putting an end to the question by the repeated assertion: For the observance of law a free act is not required. Once that which is commanded has been posited, the observance of the precept is had. And he adds the reason: since a will of fulfilling or satisfying is not required; and he refers himself to the preceding number, saying: as was said in n. 692. But one thing is that a will of satisfying the law is not required; another thing is that a will of doing what the law commands is not required. And this is expressly affirmed in that same cited number 692, in which there is nothing except the doctrine of Busembaum, who says that law commands the free execution of the work. Free: therefore from knowledge, from will, from liberty.

35. With these points premised, it is easy to resolve the following case. Sabbas, Abbot of the monastery, on a certain day commands, in virtue of holy obedience, that from the ninth hour until midday rigorous silence be observed by all the monks, and that all remain in their own cell during that time, with permission afterward granted to go out freely from the cell, without any other leave, and to converse among themselves until night. Anastasius the monk was not present at the Abbot's precept, but out of laziness was sleeping, and he slept until midday. Anastasius did not transgress the Abbot's precept. But he did not observe the precept, because on account of ignorance of the precept he could not conform himself to it in a human mode, i.e., by a voluntary act. Nothing ought to be more voluntary than the observance of law, which is imposed on a free will. When the time of the precept of silence had passed, he could freely go out from the cell and converse with others. For the Abbot's precept concerned only the silence to be kept; once this had been kept, the aforesaid permission was given to all to go out

from the cell and converse. But Anastasius, while sleeping, did not speak, and certainly did not disturb the monastery in those three hours by his shouts and conversations. And this indeed was altogether sufficient in the case, not for escaping a penalty, which was not in question, but for enjoying the permission made by the Abbot to the monks.

On Cooperation

To number 446, at the end. ON COOPERATION

"Some Ordinaries of Italy having asked whether priests can undertake the office of councillor in administrative matters either of municipalities or of civil provinces, and to this end accept being proposed as candidates in elections, the S. C. Consist., ... judged that it should be answered that it is not lawful, unless by the previous consent both of the proper Ordinary of each priest and of the Ordinary of the place in which the administrative mandate is to be exercised; notwithstanding anything to the contrary." S. C. Consist., 8 June 1914. The same response was given for France by the S. Congr. NN. EE. EE., 2 Apr. 1906, S. C. Consistor., 19 May 1913. "From several dioceses of Italy, especially northern Italy, serious complaints have reached the Apostolic See concerning the harms which that institution or association, which is called syndicalism, inflicts even upon the class itself of workers and farmers, since, among other things, in act and in reality it defects into social conflict. Wherefore, to forestall, as far as is lawful, so great an evil, our Most Holy Lord, Pope Pius X, commanded this sacred Congregation to make known to the aforesaid Ordinaries of Italy his mind and firm judgment, that priests, with every exception of persons and places removed, cannot give their name to these syndicalist associations, or once given keep it in them, exercise any office in them, and give speeches or exhortations in their aid: from all of which all priests are to be prohibited, lest they themselves seem to be participants in the evils which often flow from that institution. "That I may carry out the commands of the Most Holy Lord, I communicate these things with the Ordinaries whom it concerns, that they may provide opportunely according to the variety of cases. Notwithstanding anything to the contrary. "Given at Rome, from the Secretariat of the sacred Consistorial Congregation, on the day 20 June 1914. -

C. Card. De Lai, Bishop of Sabina, Secretary.

I. Bapt. Rosa, Substitute."

On Devotion

To n. 451. -

"Devotion seems to be nothing other than a certain will of promptly handing oneself over to those things which pertain to the service of God." S. Th. 2. 2, q. 82, a. 1. "The extrinsic and principal cause of devotion is God.... But the intrinsic cause on our part must be meditation or contemplation ... of divine goodness and ... of our own defects." S. Th. l. c. a. 3. The effect of devotion per se and principally is spiritual joy; consequently, however, and accidentally, also sadness, which is according to God. S. Th. l. c. a. 4. Devotion is indeed a special act of the will. But it is also in some way a general act, insofar as "it is found in diverse genera of acts ... as the motion of the mover is found in the motions of mobile things." S. Th. l. c. a. 1 ad 2. Devotion likewise pertains to a special virtue, namely to the virtue of religion, and is its internal and first and most important act. S. Th. l. c. a. 2.

Therefore devotion is rightly distinguished from sensible sweetness and taste, which can be had in spiritual exercises and is very useful to the interior spiritual life. Wherefore the doctrine of the Pietists is to be rejected, and likewise several propositions of Michael de Molinos concerning sensible devotion already condemned by the Church are to be condemned.

1. Devotion, concerning which the whole thesis turns, is defined by the Angelic Doctor: a certain will of promptly handing oneself over to those things which pertain to the service of God.

2. 2, q. 82, a. 1. For devotion is said from devoting; whence those are called devout who in some way devote themselves to God, so that they subject themselves totally to Him. In Exod. 21, 21 it is said that the multitude of the children of Israel offered firstfruits to the Lord with a mind most prompt and devout. S. Th. id. Therefore devotion is the offering and handing over of oneself.

2. But this offering and handing over of oneself cannot be done except by that faculty which exercises command over the other faculties, and also over itself, namely so that it may move itself into the end or into God, and move the other powers of the soul, and direct their acts, into the end or God. But this faculty is not the intellect, but the will. Therefore devotion is a certain will.

3. To offer and hand oneself over to God can be done in two ways. Someone can be offered and handed over immediately to God, by adhering to Him through a certain union of spirit, according to that saying, 1 Cor. 6, 17: He who adheres to God is one spirit. And this offering and handing over of oneself pertains to charity. Likewise someone can be offered and handed over to God, not by this immediate union of the soul with God, but by offering and handing himself over to the works of divine worship. And this other offering and handing over of oneself pertains to devotion. But divine worship necessarily and essentially includes the service and servitude of God.

4. Aptly St. Thomas, 2. 2, q. 81, a. 3 ad 2: "It must be said that by the same act man serves God and worships Him; for worship regards the excellence of God, to whom reverence is owed; but service regards the subjection of man, who from his condition is obliged to show reverence to God. And to these two pertain all acts which are attributed to religion, because through all of them man testifies to divine excellence and his own subjection to God, either by offering something to Him, or also by assuming something divine."

5. Therefore devotion is a certain will of handing oneself over to those things which pertain to the service of God. But in this definition of devotion the adverb promptly is added: a certain will of promptly handing oneself over to those things which pertain to the service of God. Wherefore it signifies neither a simple will, nor only the mode of this will; but it signifies both at once, both the quality and the act, namely the quality in such an act, the act affected by such a quality. Promptness excludes delay; delay is accustomed to arise from difficulties, and can also arise from a more remiss will. Therefore the aforesaid promptness consists in a will that is absolute, efficacious, complete, namely actually conquering every obstacle, every fear, every hesitation. Hence by this promptness interior devotion is manifested. And without this promptness of will, true and perfect devotion cannot be had. Therefore devotion, as has already been said, does not signify just any will, but a will so affected that it is prompt. Those are

called devoted to some superior, to some friend, who are dedicated to him by a will so affected that they are prompt for him. "Hence in the usage of the Church devotion has been appropriated to those who are so affected toward God that they hold themselves prompt for God and for those things which are God's. And for this reason devotion has been led down to an act of this sort of will, by which man exhibits himself prompt for divine worship." Cajetan, in 2. 2, q. 82, a. 1.

6. Promptness of the will of this sort practically has as companion fervor of the will, which is nothing other than intensity and vehemence of affection.
7. Hence the word devotion has been transferred to signify several other things, which in reality are intimately connected with devotion. By devotion sometimes is signified the quality of a pious act, posited with promptness and fervor. In this sense prayer is called devout, meditation devout, namely one that is made with an attentive mind, a humble gesture of the body, in a place separated from all tumult.
8. Pious acts themselves, or exercises of piety, are not rarely called devout exercises, devotions, by denomination from devotion, because they are the matter about which devotion turns.
9. And the very manner of acting is accustomed to be called the devout life, namely when it is occupied especially with those pious exercises by which devotion is begotten and nourished; whence also such persons are called devout persons, or simply devout. And the Church generally calls women the devout feminine sex. Such persons indeed are called devout by Italians and by the French. The Spaniards also call them beatas.
10. This Spanish expression is not without its reason. For the effect of devotion is a certain spiritual joy, which is a certain heavenly gladness and a certain heavenly blessedness of the soul. And sometimes this spiritual joy also is accustomed to be called devotion.
11. There exists a twofold cause of devotion: one extrinsic, the other intrinsic. The extrinsic is the grace of God. The intrinsic is meditation, consideration, and study of divine things.
12. It is worthwhile to hear the Angelic Doctor: "It must be said that the extrinsic and principal cause of devotion is God, concerning whom Ambrose says ... 'God calls those whom He deigns; and whom He wills He makes religious

; and if He had willed, He would have made the Samaritans devout from being undevout.' But the intrinsic cause on our part must be meditation or contemplation. For it has been said that devotion is a certain act of the will for this, that man promptly hand himself over to divine service. But every act of the will proceeds from some consideration, because the understood good is the object of the will.... And therefore it is necessary that meditation be the cause of devotion, insofar as by meditation man conceives that he should hand himself over to divine service. To this indeed a twofold consideration induces him: one, indeed, which is on the part of divine goodness and His benefits, according to that saying, Ps. 72, 27: It is good for me to adhere to God, and to put my hope in the Lord God; and this consideration excites love, which is the proximate cause of devotion. But the other is on the part of man considering his own defects, from which he needs to lean upon God, according to that saying, Ps. 120, 1: I have lifted up my eyes to the mountains, whence help will come to me: my help is from

the Lord, who made heaven and earth; and this consideration excludes presumption, by which someone is impeded from subjecting himself to God, while he leans upon his own power."

13. Rightly and deservedly, therefore, very many propositions of Michael de Molinos have been condemned as erroneous, almost all of which are reduced to the first and second; by which it is asserted that, for the internal life, man must annihilate his powers; do nothing; bear himself merely passively. Those who neglect to think upon the Divinity, and who in the consideration and meditation of divine things are affected with tedium and are carried away by the thought of other things, just as they lack devotion, so they also lack the effect of devotion. Nor certainly can an argument of progress in the spiritual life be drawn from this, as the thing is in reality evident per se. Nevertheless it was very obscure to Molinos, who did not hesitate to assert in propositions 28 and 29: "Tedium concerning spiritual things is good.... When the internal soul is disgusted with discourses concerning God and the virtues, and remains cold, feeling no fervor in itself, it is a good sign."

14. Nor consequently can what the same Molinos asserts in proposition 64 be a wonder, since it is a natural consequence of the principle established. "The theologian," he says, "has less disposition than a rude man for the state of the contemplative; first, because he does not have faith so pure; second, because he is not so humble; third, because he does not so care for his own salvation; fourth, because he has his head stuffed with phantasms, species, opinions, and speculations, and the true light cannot enter into it."

15. But if those things which are of the Divinity are according to themselves most exciting to love, and consequently to devotion, because God is to be loved above all things, the science of the Divinity per se increases devotion; and therefore the theologian and the learned man and anyone who strives to penetrate divine goodness and divine benefits with intimate knowledge is also greatly helped by that science toward conceiving devotion. But if science is the occasion that man trust in himself, and does not perfectly subject that science to God, and therefore does not totally hand himself over to God, hence it is that it sometimes occasionally impedes devotion; and then "in simple persons and women devotion abounds, by repressing elation." S. Th. 2. 2, q. 82, a. 3 ad 2. Aptly Cajetan on this place: "That which removes an impediment is posited as the occasional cause of motion, as ... one who removes an obstacle from water is the cause of its flow; so simple persons and women have in themselves the cause of devotion, namely because they do not have the impediment to devotion, that is, swelling concerning themselves. And because God gives grace to those who do not place an obstacle, therefore the Church calls the feminine sex devout. Therefore the science of doctors is not at fault, nor is womanly imperfection in praise; but the abuse of science in magnifying oneself, and the right use of imperfection in not elevating oneself; than which the right use of perfection would be far better."

16. Now then, if contemplation truly is the cause of devotion, it must be that those things which are of higher contemplation excite devotion more. Yet frequently greater devotion is excited from the consideration of the Passion and Death and other mysteries of the life of Christ than from the consideration of the divine perfections and of His own infinite greatness. Therefore it does not seem true that contemplation is the per se and proper cause of devotion.

17. But this difficulty is easily solved. For those things which are of the Divinity are, according to themselves, most exciting to love, and consequently to devotion; but it is from the weakness of the human mind that, just as it needs to be led by the hand to the knowledge of divine things, so also to love, through certain sensible things known to us, among which the principal is the Humanity of Jesus Christ the Savior. In the Preface of the Mass for the Nativity of the Lord, which is one of those nine which Pope Pelagius II, in the Decrees de Consecr. dist. 1, cap. Invenimus, commends as consecrated by ancient usage, it is said: That while we know God visibly, through this we may be snatched up into the love of invisible things. And therefore those things which pertain to the Humanity of Christ, by way of a certain leading by the hand, most greatly excite devotion, although devotion consists principally about those things which are of the divinity. -

Therefore the consideration of all those things which are in some way known to excite the love of God causes devotion; but the consideration of any things whatever that do not pertain to this, but distract the mind from them, impedes devotion. S. Th. 2. 2, q. 82, a. 3 ad 1, ad 2. Moreover it follows from what has been said that for all religious and spiritual persons there should be daily meditations of this sort concerning divine goodness, charity, mercy, concerning our infirmity and misery, by which devotion and consequently other virtues are begotten. Cajetan, in loc. cit.

18. But from this it does not follow that devotion is only toward God and that there is no devotion toward the Most Blessed Virgin Mary, toward the Angels, toward the Saints. For devotion indeed per se and principally is toward God; but it is also toward others, though in order to God. "It must be said," says St. Thomas, 2. 2, q. 82, a. 2 ad 3, "that the devotion which is had toward the saints of God, dead or living, is not terminated at them, but passes over into God, insofar, namely, as in the ministers of God we venerate God."

19. From the cause of devotion let us now advance a step to the effect of devotion. -

The proper effect of devotion is a certain heavenly gladness, and a certain heavenly blessedness. Nevertheless this spiritual joy, in this life, is not separated from spiritual sadness: the former follows devotion first, principally, and per se; the latter follows devotion only secondarily and accidentally.

20. "For it has been said that devotion proceeds from a twofold consideration. Principally indeed from the consideration of divine goodness, because this consideration pertains as it were to the term of the motion of the will handing itself over to God; and from this consideration delight indeed follows per se, according to that saying, Ps. 76, 4: I remembered God and was delighted; but accidentally this consideration causes a certain sadness in those who do not yet fully enjoy God, according to that saying, Ps. 41, 3: My soul has thirsted for God, the living fountain; and afterward it follows: my tears have been my breads, etc. But secondarily devotion is caused, as has been said, from the consideration of one's own defects; for this consideration pertains to the term from which man recedes by the motion of the devout will, namely so that he may not exist in himself, but subject himself to God. But this consideration has itself conversely to the first: for per se indeed it is apt to cause sadness, by thinking again upon one's own defects; but accidentally joy, namely on account of the hope of divine assistance. And thus it is clear that

delight follows devotion first and per se; but secondarily and accidentally, sadness, which is according to God." S. Th. 2. 2, q. 82, a. 4.

21. Therefore the spirit, which on the one hand is troubled because of the defects of the present life, on the other hand is also delighted from the consideration of divine goodness, and from the hope of divine help. S. Th. l. c. ad 2. Nor indeed is this spiritual joy impeded by the fact that in devotion some break forth into tears. Tears come not only from sadness, but also from a certain tenderness of affection, especially when something delightful is considered, with an admixture of something sad: just as men are accustomed to weep from an affection of piety when they recover sons or dear friends whom they had thought themselves to have lost. Thus Gen. 45, 14, Joseph, embracing Benjamin his brother, wept amid the embraces; and also, Tob. 11, 14, after the return of the younger Tobias, his father and mother, kissing him, weep for joy. And in this way tears proceed from devotion. And this not rarely happens to pious and devout souls in the consideration of the Passion of Christ. In it there is something which saddens, namely human defect, for the removal of which Christ had to suffer; and there is something which gladdens, namely the kindness of God toward us, which provided for us concerning such liberation. S. Th. l. c. a. 4 ad 1, ad 2, ad 3. -

Hence Cajetan concludes on this article: "that those are not devout persons who, commonly sad and wild, do not know how to converse with others except by being disturbed or dissolved. For devout persons are cheerful, joyful in their own soul, not only from the principal cause, but also from the secondary cause, namely from the consideration of their own defects. For their sadness is according to God, and is accompanied by joy, according to that saying of Augustine: Let him grieve, and rejoice over his grief. On account of which we read concerning the Saints that they were joyful and cheerful; and deservedly so, as beginning on earth the heavenly conversation."

22. The aforesaid spiritual joy not only brings with itself facility in the exercise of spiritual things, but even proceeds further, all the way to a certain sensible sweetness, by which devout persons perform those things which regard the worship of God. Nevertheless devotion is in no way to be confused with this sensible sweetness and delight. Devotion is a human, virtuous, and meritorious act, and therefore is in our power. The aforesaid facility, sweetness, delight, do not depend on our will. They arise and remain in the special grace of the Holy Spirit, touching us, preventing us, exciting us; and then bodily disposition also helps us to conceive and perceive it. Hence it happens that man now operates without any difficulty and with interior taste, now operates with difficulty and with tedium. The absence of sweetness and facility of this sort does not diminish the merit of the will constantly persisting in its devotion, but rather increases it. Yet the same sweetness and facility and taste, which is perceived from devout exercises, is the occasion of greater merit. For acts, in the aforesaid exercises, are elicited more intensely, are continued for a longer time, and are repeated with greater frequency.

23. From this whole last observation it is clear what is to be thought concerning those Protestants who are called Pietists. Rejecting every discourse and understanding of the things of our faith, they give themselves wholly to a certain hidden and unknown sense of devotion, and they labor to excite that within themselves, without the foundation of true faith, without true knowledge of divine things. Vain piety is not true piety, because it is without a solid

foundation. A holy life, a spiritual life, a Christian life, cannot exist without true faith. But the just man lives by faith. Rom. 1, 17.

24. The falsity of the doctrine of Molinos in this matter is also clear. For Michael de Molinos rejected every sensible sweetness and taste in the spiritual life, from which consequently he removed every sensible means for procuring devotion. And thus proposition 27 of the following tenor was condemned: "He who desires and embraces sensible devotion does not desire nor seek God, but himself; and he acts badly, when he desires it and tries to have it, who walks by the internal way, both in sacred places and on solemn days." Likewise proposition 30 was condemned, which has itself thus: "Everything sensible which we experience in the spiritual life is abominable, filthy, and unclean." Likewise proposition 33 was condemned, sounding thus: "The soul which proceeds by this internal way acts badly if on solemn days it wishes by some particular effort to excite within itself some devout sense: since for internal souls all days are equal, all are festive. And the same is said concerning sacred places, because for souls of this sort all places are equal." But how fitting sensible means are for conciliating for us true and solid devotion is well clear from the Spiritual Exercises of St. Ignatius of Loyola; indeed it is a most shining thing from the whole liturgy of the Church.

25. Having explained the nature of devotion from its intrinsic nature, from its causes, from its effects, it remains that we examine whether it is truly a special act of the will, and of what virtue it is the act. It is indeed a special act of the will; for it has a special object, well distinct from any other, namely promptly to do those things which pertain to divine worship; and the will thus prompt and prepared for doing whatever things regard the service and servitude of God is properly devotion. Will, that is, an act, and simply an act of the will, that is, an act of the will of man offering himself to God both for worshiping Him and for serving Him; which act per se involves no oath, no promise, and no vow; and externally it is explained by words, when man says to God with heart and mouth: I hand myself wholly over to Your service, to Your divine service.

26. From this notion it becomes manifest that devotion, although formally it is a special act, nevertheless can also in some true sense be called a universal act, namely virtually or causally, because it moves to all acts of homage and service of God. It moreover imposes a mode of acting devoutly upon other acts. For the mover imposes the mode on the motion of the movable. But the will moves the other powers of the soul to their acts, and the will, insofar as it is of the end, moves itself to those things which are for the end. And therefore, since devotion is an act of the will of man offering himself to God for serving Him, who is the ultimate end, it follows that devotion imposes a mode on human acts, whether they are acts of the will itself concerning those things which are for the end, or also acts of the other powers which are moved by the will." S. Th. 2. 2, q. 82, a. 1 ad 1.

27. As devotion is a special act of the will, so it is a special act of the virtue of religion. There are not lacking those who regard devotion rather as an affection of religion than as a special act of religion. What that affection of religion is, which is not an act of religion, those who affirm this certainly are persuaded that they understand. But we confess that we do not understand. Wherefore, with the common doctrine, which is the doctrine of St. Thomas, 2. 2, q. 81, a. 7, q.

82, proemium and art. 2, which is thus concluded: "And thus it is clear that devotion is an act of religion," we also thus conclude.

28. And indeed to operate those things which pertain to divine worship or service properly pertains to religion. But to the same virtue pertains to operate something, to will to operate it, and to have a prompt will for doing it, because the object of both acts is the same. On account of which the Philosopher says, Eth. l. 5, cap. 1, around the beginning: Justice is that by which men will and work just things. Therefore to the same virtue of religion pertains having a prompt will for executing those things which regard divine worship or service, which is to be devout.

29. But that it is an internal act of religion is deduced from its own intrinsic nature, since it is the prompt will itself of devoting oneself wholly to divine service. But that it is the first and most important act of religion is clear from the very nature of religion. The office of the virtue of religion is to testify to man's subjection toward God, insofar as He is the first principle and lord of all. Whence, according to the diversity of those things which are subjected to God by man through religion, diverse are the acts of religion. Now the first and more excellent good of all man's goods is the spiritual good of the mind, and this is especially subjected to God through acts of devotion and prayer, which therefore are the most important. But devotion informs all acts of religion, furnishing them the mode of performing them devoutly. Therefore there can be no doubt that it is the first and most important of all acts of religion.

Unusual Titles of Worship

To n. 460. -

"Can a church be dedicated to the Most Holy Eucharistic Heart of Jesus, and can an image or statue of its title be placed on the high altar? R. The Bishop Ordinary of the place is to substitute a liturgical title both for the church and for the image or statue...." S. R. C. 28 Mar. 1914, A. A. S. v. 6, p. 146. "

I. The Decree of the S. R. C. of the day 28 March 1914 is to be confirmed again with the sentence: In what has been decided and more fully.

II. The title 'Eucharistic Heart of Jesus' can be permitted only in confraternities approved under that title; provided that it is accepted in the same sense in which the Most Sacred Heart of Jesus is understood, as it is present in the Most Holy Sacrament of the Eucharist.

III. But since a title of this sort is not canonical and liturgical, indeed smacks of novelty, it is never to be recognized and admitted in the sacred liturgy.

IV. Moreover confraternities which are called by that title can celebrate no other feast as proper except the feast of the Most Sacred Heart of Jesus with the universal Church, or the feast of the Most Holy Body of Christ." S. R. C. 15 July 1914, A. A. S. v. 6, p. 383.

On Saints or Blesseds Without a Certain Decree or Indult of the Holy See

To n. 463. ON SAINTS OR BLESSEDS WITHOUT A CERTAIN DECREE OR INDULT OF THE HOLY SEE

"In perpetual calendars and propers which, according to the newest Rubrics in accord with the norm of the Bull Divino afflatu and the Motu Proprio Abhinc duos annos of our Most Holy Lord Pope Pius X, and the decrees of the S. R. C. of 12 December 1912 and 28 October 1913, are subjected to the revision and approval of the same sacred Congregation, sometimes Saints or Blesseds are noted, who are neither described in the Roman Martyrology, nor enjoy public worship by a certain decree or confirmed by the Holy See, as is especially prescribed by the general Decree n. 3926 of the day 19 July 1890, at 1 and 2. Since, however, those who are called Saints or Blesseds of this sort are honored in particular places by immemorial custom with public and religious worship, with Office and Mass; and, for this reason, they are inscribed by the Most Reverend Ordinaries in the aforesaid calendars and propers, the sacred Congregation of Rites, by mandate of the same Most Holy Lord, declares that from this inscription it is in no way lawful to argue that those called Saints or Blesseds have obtained formal or equipollent beatification, and that their worship, as in a case excepted from the Decrees of Pope Urban VIII of holy memory and from the more recent decrees or declarations of the S. R. C. dated 11 November 1912 and 31 January 1913, has been recognized and confirmed; but it is lawful only to conclude that the worship of these Saints or Blesseds remains in the state of its possession, and therefore can neither be increased nor extended without consulting the Holy See. Finally the Most Reverend Ordinaries are exhorted that the aforesaid Saints or Blesseds be distinguished in their calendars and particular propers by some sign or asterisk from other Saints or Blesseds described in the Roman Martyrology or duly canonized or beatified, as is laudably done in some places. Notwithstanding anything to the contrary, even things worthy of special mention." S. R. C. 28 Apr. 1914.

On Feminism

To n. 680 bis. ON FEMINISM

1. The nobility of woman appears even from her first production. For in the first institution of things she was formed by God from man. Namely, this was done, as the Angelic Doctor says (1 p., q. 92, a. 2), "so that man would love woman more, and adhere to her more inseparably, when he knew her to have been produced from himself. Whence it is said in Gen. 2, 23 [printed: Gen. 9, 23]: She was taken from man. Wherefore a man shall leave father and mother, and shall adhere to his wife." The aforesaid nobility also appears from the end to which woman was ordered by God, namely as a help for man, as Scripture says, not indeed as a help for some other work, as certain men have said, since for any other work whatever man can more fittingly be helped by another man than by woman, but as a help for generation. S. Th. 1 p., q. 92, a. 1. Therefore the condition of woman is most noble when she furnishes help to man for completing human nature, and for constituting with him one principle of propagating and conserving the human race.
2. But woman, produced immediately by God, just as man was produced immediately by God, so that together they might be the principle of the human species, was in the direct intention of God, just as man himself was. Whence again appears the nobility and dignity of woman, destined from the intention of universal nature to the aforesaid propagation of the human race. "But the intention," says St. Thomas, "of universal nature depends on God, who is the universal

author of nature; and therefore, in instituting nature, He produced not only the male but also the female." S. Th., 1 p., q. 92, a. 1.

3. Adam moreover, as the same St. Thomas has it, 1 p., q. 102, a. 4, was made outside paradise, then by the grace of God was transferred into it, to be transferred thence, after animal life, into heaven. But woman was made in paradise, on account of the dignity of the principle from which her body was formed. For it was formed from the rib of man. The Lord God built the rib, which He had taken from Adam, into a woman. Gen. 2, 22.

4. "It must be said," says St. Thomas, 1 p., q. 92, a. 3, "that it was fitting for woman to be formed from the rib of man. First indeed to signify that between man and woman there ought to be a social conjunction; for neither ought woman to dominate over man, and therefore she was not formed from the head; nor ought she to be despised by man, as though servilely subject; and therefore she was not formed from the feet. Secondly, on account of the sacrament; because from the side of Christ sleeping on the cross flowed the sacraments, that is, blood and water, by which the Church was instituted.... But that rib was of the perfection of Adam, not insofar as he was a certain individual, but insofar as he was the principle of the species."

5. Therefore it is clear that woman is not the handmaid and servant of man by the ordination of nature, but his associate; and therefore she leads domestic life with him. Nor indeed is it a valid objection that subjection was afterward introduced from sin, and that after sin it was said to woman: "You shall be under the power of man." Gen. 3, 16. For "subjection is twofold. One is servile, according to which the one presiding uses the subject for his own utility; and such subjection was introduced after sin. But there is another subjection, economic or civil, according to which the one presiding uses the subjects for their utility and good; and this subjection would have existed even before sin. For the good of order in the human multitude would have been lacking, if some had not been governed through others wiser than themselves. And thus from such subjection woman is naturally subject to man; because naturally discretion of reason abounds more in man. Nor is the inequality of men excluded by the state of innocence." 1 p., q. 92, a. 1 ad 2, q. 96, a. 4.

6. But this discretion of reason, more abundant in man, weaker in woman, certainly is not from a diversity of species between man and woman. Diversity of species is from form; and the form in man and woman is the human soul. Now the human soul of man and woman is the same in species. For one human soul does not differ from another except by reason of the diverse disposition of the body. Hence it is that one understands better than another, according to St. Thomas, 1 p., q. 85, a. 7. And hence also, according to the same St. Thomas, is the distinction of the sexes, male and female. 1 p., q. 99, a. 2.

7. The aforesaid subjection of woman under man is confirmed from the very fact of all centuries, as is evident from the history of the human race. It is also asserted and declared by Sacred Scripture. In Genesis 3, 16, at the beginning of the human race, it is said to woman: "You shall be under the power of man, and he shall rule over you." And St. Peter repeats the same, 1 Ep. 3, 16: "Let women be subject to their husbands ... just as Sarah obeyed Abraham, calling him lord."

8. But since dominion of this sort of man over wife ought not to be despotic and tyrannical, but economic, as regards domestic matters, man at the same time is commanded both to love and to honor his own wife. "Husbands, love your wives, as Christ also loved the Church." Thus St. Paul to Eph. 5, 25. And St. Peter, 1 Ep. 3, 7, says: "Husbands, likewise dwelling together according to knowledge, giving honor as to the weaker feminine vessel, as also to coheirs of the grace of life; that your prayers be not hindered." As the authority of man is moderated by that love, so the subjection of woman is ennobled by this honor.

9. As regards domestic matters there is the dominion of the man; for, as regards the conjugal matter, husband and wife are of equal right. Whence it is clear, more than sufficiently, with how great reverence a man ought to treat his wife.

10. From this dominion of the man woman can withdraw herself, choosing virginity before marriage, and virginity is indeed more excellent than that marriage. Yet, although she is then constituted in this most excellent state of virginity, nevertheless she is far from becoming superior to man; indeed she does not even attain equality with man, but always remains in the natural condition of her inferiority. The matter concerns, as is clear, woman and man; not such a woman, such a man.

11. And here it must be noted that those women who, from religious devotion, do not wish to remain unmarried and to consecrate their virginity to God, regularly speaking, are destined by God to marriage; otherwise they would be exposed to several dangers as regards the eternal salvation of their own soul. St. Paul in 1 Tim. 4, 11 ff. asserts concerning younger widows that they think of nothing else except entering a new marriage, and therefore that marriage is to be entered by them. "For when," he says, "they have grown wanton in Christ, they wish to marry: having condemnation, because they have made void their first faith. At the same time also, being idle, they learn to go about houses: not only idle, but also talkative and curious, speaking things which they ought not. Therefore I will the younger to marry, to procreate children, to be mothers of families, to give no occasion to the adversary for the sake of reproach." And concerning woman generally the same Apostle says in chapter 2, 15: "But she shall be saved through the generation of children, if she shall have remained in faith, and love, and sanctification with sobriety."

12. Now then, if in the natural order man exercises dominion, and woman is subject in domestic society, man also is the one who in civil society, by the natural order, exercises rule and command. For civil society arises from domestic society, by the natural evolution and extension of this society. Likewise man, on account of the natural excellence of his talent and the greater strength of bodily powers, is destined by nature itself to exercise greater offices in civil society. It is indeed impossible to restrict the subjection of woman to the family. For man, in the very first creation of things, was constituted by God to preside over the whole earth, Gen. 1, 27, not woman, who did not yet exist; and when she had been made, she was constituted by God simply under the power of man, Gen. 3, 16. Hence the Apostle, in 1 Cor. 11, 7, says that man ... is the image and glory of God, but woman is the glory of man. And afterward the same Apostle deduces the inferiority of woman in the Church. And indeed the inferiority of woman in the family follows her into every other society that arises, because, as we have heard from the Angelic Doctor, naturally discretion of reason abounds more in man. Cases that can be

objected to the contrary, especially of royal families, are altogether particular cases, which in no way can weaken the general doctrine. And thus the Abbesses of the place of Fontevrault, in France, who often were from the royal family, governed priories of men and women at the same time. Likewise there are various cases in which a female succeeds in a fief. Feuds, l. 4, tit. 104. But the general rule is altogether different. And it appears in all laws. In all laws of more recent right the condition of women is worse. And this is also expressly affirmed in Roman law. In L. 9, de Statu hominum, it is said: "In many articles of our law the condition of women is worse than that of males." And in L. 3, de Muneribus et honoribus, § 3, it is said: "Bodily munera are denied to women by sex itself."

13. But since woman is not without her own capacity of intellect, and also bodily power, she can well and usefully exercise several arts and businesses for which woman also has a special aptitude. In Eccli. 36, 27 it is said: "Where there is no woman, the sick man groans." "There are indeed many works," says Cajetan on S. Th. 1 p., q. 92, a. 1, "which are performed better by a woman than by a man, by reason of affection, greater custom, instruction, etc." And Aristotle, book 1, chapter 3, n. 4 of the Economics, says that some works are proper to the man, and others to the wife in the house; and in book 8 of the Ethics, chapter 12, n. 7, he says: "male and female are joined in human beings not only on account of the necessity of generation, as in other animals, but also on account of domestic life, in which there are different works of man and woman, and in which man is the head of woman." S. Th. 1 p., q. 92, a. 2.

14. Truly, although human nature and person is substantially the same in man and in woman, nevertheless there are several accidental differences, as regards the intellectual, moral, physical order, between man and woman, since their organization is not evolved in the same way in them, nor operates in the same way. Hence the disposition of man and woman is regularly diverse. The former undertakes laborious and dangerous things; he handles grave, difficult, and involved businesses. The latter sustains adversities with greater patience, and dispatches lighter and easier businesses with greater care and diligence. Hence it naturally follows that just as woman is under the protection and guardianship of man, so also she is under his subjection, and, speaking per se, woman cannot insert herself into those works which are proper to men. Nevertheless she can well exercise the arts and offices suitable to herself, which do not impede the office of mother of a family. And indeed this is not only lawful, but altogether praiseworthy, and also now necessary, with attention to the condition of present society. Surely all those women would be praiseworthy who, for promoting the due education of children and procuring the sustenance of the family, bring assistance by their own labor to their husbands; if, when their husbands have ceased from labor by sickness, old age, or another cause, they alone sustain the whole family by their own industry. The same, as is clear, will be much more necessary for those women who do not marry; nor can all marry, since women are more numerous than men, which happens on account of various and continuous causes, although almost as many men are born as women. They themselves are bound to provide for the necessities of their own life, when they lack family goods, and very many are destitute of the goods of fortune.

15. Wherefore the education and instruction of women can well exceed the limits of domestic things, whether as regards lower arts to be exercised outside the home, or as regards learning

the more humane letters, so that they may exercise teaching, or even as regards completing higher studies, so that they may exercise some office of greater importance. Women can well be employed in hospitals for caring for sick women, in the institution and government of boarding schools for the education and instruction of girls, in secondary and lesser offices of private businesses, or even of public administrations. But primary and greater offices, such as public munera which regard the government of the state, the handling of political affairs, the administration of justice, are altogether foreign to women. "Women," says Ulpian, L. 2 de Regulis Iuris, "are removed from all civil or public offices, and therefore they can neither be judges, nor bear magistracy, nor plead, nor intervene for another, nor exist as procurators." In this rule civil and public offices are openly distinguished, and rightly: for public offices are also civil; not, conversely, are all civil offices public. But offices are called public not by reason of the end or place, but by reason of authority, namely those which are exercised with public authority; two examples of this sort are recalled in the aforesaid rule: to be a judge, and to bear magistracy with jurisdiction and command, from the discharge of which women are prohibited. But civil offices are those which are carried out in the sight of citizens and exceed the mode of domestic care; three examples of this sort are recalled in the same rule: to plead or advocate, to intercede for another, namely by a certain judicial work, and to exist as a procurator, from the discharge of which women also are prohibited.

16. The question in particular is made concerning the office of advocate publicly exercised. But that this does not befit a woman is clear from the highest difficulty of natural and positive law, and from the still greater difficulty of applying laws to particular cases; and also from the natural distraction which the pleading of a woman, especially if she were ingenious, would cause in the mind of the judges. Hence in L. 18 de Procuratoribus C. it is openly said: "To undertake the defense of another is a manly office, and it is established to be beyond the feminine sex."

17. Hence also the office of public procurator or fiscal is a manly office. But nothing can prevent a woman also from acting for others from charity or from piety. And thus L. 41 de Procuratoribus ff. establishes thus: "Women are sometimes permitted to act for parents, the cause having been known, if perhaps sickness or age impedes the parents, and they have no one who may act." Similarly the office of arbiter is a manly office, and much more that of judge. In L. Fin. Cod. de Receptis arbitris it is said: "We decree that women, mindful of their own modesty and of the works which nature has permitted to them, and from which it has commanded them to abstain, even if they have been constituted of the highest and best reputation, if they have undertaken arbitration in themselves, or if they have been patronesses, even if they have interposed their hearing between their freedwomen, are to be separated from every judicial company, so that from their election no penalty, no exception for the party, may be had against their just contemners."

18. Much less also do those offices suit women which are not exercised without public struggles, without a thousand artifices, and are not rightly exercised without most ample knowledge of public affairs and international affairs. The gentle disposition of women, the weakness of their talent, their domestic life, abhors these political offices, as also military offices. "Women," says St. Thomas (on 1 Cor. c. 14, lect. 7), "are subject, and do not preside, because they are

defective in reason, which is especially necessary for one presiding. And therefore the Philosopher says, Politics 1, 4, c. 11, that corruption of government exists when government comes to women."

19. But the office of physician, unless it concerns exercising the art of obstetrics and perhaps curing diseases of women, certainly does not befit woman's modesty, and the fragility of her body and soul; "nor," as Albert the Great says, "would she honestly run about from town to town." Albert. Magn., In Evang. Matth. 1-21, Works, vol. 20, p. 52, ed. Paris, 1893.

20. If it is shameful, as is had in Deut. 25, 5, for a woman to be clothed in male dress, it is more shameful for a woman to exercise male offices. It is certainly most shameful for a woman that she wishes to be a man, as for a man that he wishes to be a woman. The Imperial Constitution of Leo 48, That Women Should Not Furnish Testimony in Contracts, has these things among others: "A frequent coming before the eyes of men is a dishonor to a woman, but a modest and honorable woman brings about the avoidance of the same thing.... To what end would the testimony of women go forth into public businesses? And indeed how, apart from immense absurdity, does this not also contain a confusion of the boundaries of nature by which the male and female sex are determined?... For what else will this be except an insult, and indeed a very grave one, if the female sex also should proceed to those things, the handling of which is especially proper to men?"

21. The office which seems especially to suit women is the office of instructress of boys and girls. This office, if at the same time it joins both the teaching of letters and, for girls, also domestic and feminine labors, is exercised by women with the greatest utility. It is their proper office; for it closely approaches the office of mother of a family and assists and supplies it. And woman, as was already said at the beginning, from the general intention of nature was destined for the help of man in the procreation and education of children.

22. Therefore opportunity is to be given to women, so that those who are strong in talent and fitness can apply themselves not only to domestic but also to extradomestic cultivation, whether as regards undertaking higher studies of letters and sciences, or as regards learning lower arts. Wherefore, both for protecting the natural modesty of women and for averting dangers against religion and good morals, which would be had from common association with males, special schools and academies for their instruction, and special workshops, should be instituted, which in reality is already done in some places. And for this same reason they themselves afterward should always perform labors and offices in places separated from men, as far as can be done. But they should never be burdened with excessive labor, nor, because they are women, should they be defrauded of a just wage; in this matter it belongs to civil law to protect them.

23. Before we pass to other things, it is worthwhile to confirm by the authority of St. John Chrysostom the things that have been set forth thus far. For in the Homily: Praise of Maximus, and What Sort of Wives Are to Be Taken, par. 4, the holy Doctor most accurately reviews the proper offices of man and woman, as though he were writing today concerning the arisen question of feminism: "Woman," he says, "has one office, to guard what has been acquired, to preserve revenues and care for the domestic matter; for on this account God gave her, that in this matter and in the others she may be a help to us. For since this life of ours consists of two

things, private matters and public matters, God assigned to each its own part: to the feminine sex indeed the care of the domestic matter, but to men public businesses, forensic affairs, senatorial judgments, military affairs, and finally all the rest. A woman cannot whirl a spear or hurl a dart; but she can take the distaff, and weave cloth, and splendidly undertake the other businesses. She cannot pronounce an opinion in the senate; but she can pass judgment concerning the family matter, and often she has looked after domestic matters better than the husband. She cannot administer public matters; but she can beautifully educate children, which indeed is the principal possession: she can detect the misdeeds of maidservants, and keep the household in its duty, furnish other securities to her husband, and free him from solicitude, while she herself cares at home for the pantry, the work of wool, the kitchen, the beauty of garments, and the other things neither becoming to males nor easy, if they should wish to usurp them for themselves. For this also is of divine providence, that he who is useful in greater businesses is found worse in lesser ones, so that the work of women is necessary. For if in both things the man excelled, the feminine sex would easily be despised; on the contrary, if in the more excellent things there were greater use of women, they would be full of insolence. Wherefore He did not commit both to one, lest the condition of the other sex become worse, as superfluous; nor nevertheless did He distribute offices equally, lest among those equal in honor a contention over primacy arise, with wives not deigning to yield prerogative to men. But so that He might provide both for concord and for becomingness, He distributed in order to each sex its own functions, so that the more useful and more necessary part should fall to the man, but the lesser and inferior to the woman; and he indeed, on account of his principal use, would become honorable; but she, on account of the lower ministries, would not rise up against her husband." And in Homily 61, otherwise 60, Migne, vol. 8, col. 419 ff., the same holy Doctor teaches: "that the man, in the middle of the forum and before the tribunal, is agitated by external things, as by waves; but the woman ... sits at home ... enjoys perpetual tranquility ... and calms and restrains the husband arriving disturbed.... Certainly nothing is stronger than a pious and prudent woman for forming a man, and instructing his soul as she wishes. He will not bear friends, not teachers, not princes, in the same way as a wife admonishing and giving counsel. For such admonition is joined with a certain pleasure, because she is much loved."

24. And these things thus far concerning the natural order. Let us now make a step to the supernatural order. From civil society let us pass to the Church, from earth to heaven.

25. Man indeed glories in Jesus Christ, our Lord, eternal King and Savior of the world. Woman glories in the Blessed Virgin Mary, Our Lady, Queen of heaven, and Mediatrix before God. Jesus Christ ascended into heaven in soul and body. The Blessed Virgin Mary also was assumed into heaven in soul and body.

How great indeed is the dignity and nobility of some family, if in its offspring some greatest Prince, King, Emperor is numbered. Hence the supreme honor done to the human race by God is easily clear: hypostatically assuming to Himself human nature in the Person of the Only-begotten Son of the Father. And the Word was made flesh. John 1, 14. Now, if the Son of God assumed man, whence man is from this most honored, the same Son of God was born of a woman; whence woman also is in great honor. All generations shall call me blessed. Luke.

26. Christ died for women equally as for men. And if St. John stood beside the Cross of the Lord, beside the same Cross of the Lord stood also the Blessed Virgin Mary and other pious women. And Christ, rising from the dead, manifested Himself to women equally as to men, and first appeared to His Most Blessed Mother and to Mary Magdalen. If the Apostles, if the Disciples followed Christ teaching, most pious women also heard Him teaching with docility, solicitously ministered to Him, and followed Him all the way to burial. And even after the death and burial of Our Lord Jesus Christ, women are those who appear with the greatest honor, bearing before themselves no slight love and fortitude of soul.

27. And after Christ's Ascension into heaven, the Apostles of Christ themselves "were persevering unanimously in prayer with the women and with Mary His mother and His brethren." Acts 1, 14. To the Samaritan woman, for the first time, Christ explicitly asserted that He was the promised Messiah: "I am He, who speak with you." John 4, 26. Likewise the first miracle performed by Christ was at the wedding of Cana of Galilee, "and He manifested His glory, and His disciples believed in Him." John 2. But Christ most greatly extols the condition of woman, not only by His presence at the wedding, but by elevating marriage to the supernatural dignity of a sacrament, and, with divorce and polygamy abrogated, establishing the unity and indissolubility of marriage.

28. But in the course of the centuries, as very many men shine with distinguished sanctity, very many women also gleam with most excellent sanctity. In the Canon of the Mass, male martyrs are celebrated; women martyrs also are commemorated with no lesser praise. Also in the Litanies of the Saints, holy men and holy women are invoked.

29. In the Church, however, women are indeed in an inferior condition. They are altogether excluded from the hierarchy of the Church. Just as they lack the sacred power of order, so also they lack ecclesiastical jurisdiction, and are kept away from the sacred ministry of the apostolate. The solemn edict of the Apostle is: "Let a woman learn in silence with all subjection. But I do not permit a woman to teach ... but to be in silence." 1 Tim. 2, 11, 12. And again: "Let women keep silence in the churches, for it is not permitted to them to speak, but to be subject, as the law also says." 1 Cor. 14, 34. "But if they wish to learn anything, let them ask their husbands at home. For it is shameful for a woman to speak in church." Ib. v. seq. But several women also have been chosen by God, so that by their work both the glory of God and the salvation of souls in the Church might be promoted. St. Bridget, St. Clare, St. Teresa, St. Gertrude, St. Mary Magdalen de Pazzi, St. Catherine of Siena, St. Jane Frances de Chantal, and very many other most holy and most zealous women, in a wonderful way cooperated by their prayers and by their works for procuring the salvation of souls, and for the prosperity and increase of the Church. Several men indeed founded religious orders of men for the assistance of the Church; but several women also founded religious orders of women, to the great adornment of the Church. How many and how great works of pious beneficence and Christian charity do the more recent Institutes of women exercise, which tend only to the good of souls and to propagating the Name of Jesus Christ! Religious Sisters, who have truly maternal care of the aged, who furnish diligent assistance even to the sick with contagious diseases, who receive into hospices orphan girls destitute of every human help, who impart women's labors and literary and religious instruction to young women of the common people as well as to

noble young women, who move about among the soldiers themselves in the fields of war, rivaling and surpassing the fortitude of soldiers: are they not rightly and deservedly the most worthy helpers of the priests themselves and of apostolic missionaries? Certainly they are heroic virgins, associates of heroic men, whose lamps shine day and night, lit and gleaming with the flames of distinguished charity.

30. Formerly there were also deaconesses in the Church, who were consecrated not only for preserving chastity, but also for undertaking certain ecclesiastical offices. These offices were exercised concerning women and were analogous to the offices of deacons concerning men. They were instituted by the Apostle himself, who in the First Epistle to Timothy, chapters three and five, teaches the qualities and requisites of deaconesses, corresponding to the qualities and requisites of deacons, and in the Epistle to the Romans, chapter sixteen, commends "Phoebe our sister, who is in the ministry of the church, which is in Cenchreae," that is, who was a deaconess, a deacon of the Church. And immediately the Apostle adds: "That you receive her in the Lord worthily of the saints; and assist her in whatever business she shall need of you: for she also has assisted many, and me myself." Therefore the Apostle commends Phoebe not only because she is our sister, that is, on account of the communion of faith and Religion, but also on account of her ministry, with the Church, that is, the congregation of Christian faithful; nor only because she is holy, but also because she brought help to many Christians, and to Paul himself. Moreover, in the same Epistle and the same chapter, besides several other men, he also salutes distinguished women, on account of their distinguished labor and conspicuous works: "Salute Prisca and Aquila, my helpers in Christ, who for my life laid down their own necks." Prisca and Aquila, wife and husband, were helpers of Paul in announcing the Gospel, because they devoted their work to propagating the faith. Nor this only, but they exposed themselves to danger of death for saving the life of Paul. Likewise Paul salutes "Mary, who labored much," namely toward the Romans in introducing the Gospel, and had studied much and was inclined toward procuring their spiritual salvation.

He likewise salutes "Tryphaena and Tryphosa, who labor in the Lord ... Persis the most dear, who labored much in the Lord." And he adds: "Salute Rufus, elect in the Lord, and his mother and mine." This labor in the Lord is work which is furnished by the faithful for the Gospel of Christ, and which these women had excellently furnished. Moreover he calls the mother of Rufus also his own, because he had received benefits from her, and because she was a help to Paul as to her own son according to the flesh.

31. Therefore, as regards procuring one's own sanctity and obtaining eternal glory, there is indeed no distinction between man and woman. In Christ "there is neither male nor female. For all are one in Christ." Gal. 3, 28. The destination of man and woman to faith, to grace, to glory, is the same. Each, man and woman, can acquire the filiation of God and can take possession of the inheritance of eternal life. Each, man and woman, can aspire and come both to common sanctity and to Christian perfection. Whence the offices and rights of both as regards procuring the salvation of their own soul are the same. Both man and woman have their place among the Angels in the kingdom of heaven. And then "they shall neither marry, nor be given in marriage, but shall be as the Angels of God in heaven." Therefore the true nobility and dignity of woman is to be derived from the doctrine of the Church, and by no means from the erroneous tenets of

more recent materialism and epicureanism. It was indeed the Christian Religion which restored, I would say, a human condition to all human beings, defended and propagated the true civilization of cities, and against the monstrous servitude of men always labored as much as it could, by word and deed. And the defense especially of women, and the guardianship and increase of their dignity, is indeed chiefly owed to the Church. For, as the diligent guardian of the doctrine of its founder, who teaches that all, both men and women, have been created from the same origin, redeemed by the same price, and all called to the same eternal beatitude, it has always undertaken also to defend the cause of women. If woman in past ages was oppressed and treated as a handmaid, and almost as a thing, and only as an instrument of pleasure, nevertheless the Church always held her in honor, and always defended her honor, with polygamy destroyed, purely civil marriage proscribed, and the sanctity of marriage constantly preached. By the unceasing zeal of the Church the pious works of Religion and Christian charity have always grown and do grow for the assistance of girls, widows, and all women, for their religious education and instruction in letters and arts, and also for protecting their modesty and for passing life honorably. All women ought to celebrate the Church; they ought always to praise and exalt it with those words of the Jewish people directed to Judith: You are the glory of Jerusalem, you are the joy of Israel, you are the honor of our people. From you is our glorious name, from you our joyful life, from you the highest honor is born to us. "And the daughters of Judah rejoiced." Ps. 96, 9.

On the Study of the Doctrine of St. Thomas

To n. 700 bis. ON THE STUDY OF THE DOCTRINE OF ST. THOMAS

"...Since it had been said by Us that chiefly the philosophy of Aquinas was to be followed, not uniquely, some persuaded themselves that they obeyed Our will, or at least did not resist it, if they held promiscuously as things to be followed whatever any one of the scholastic Doctors had handed down in philosophy, even though these were repugnant to the principles of St. Thomas. But their mind greatly deceived them. It is plain that when We gave Thomas as the principal guide of scholastic philosophy to our people, We wished this to be understood especially of his principles, on which, as on foundations, it rests. For just as that opinion of certain ancients is to be rejected, that it makes no difference to the truth of the Faith what each one thinks concerning created things, provided that he thinks rightly concerning God, since error concerning the nature of things brings forth false knowledge of God; so the principles of philosophy posited by Aquinas are to be preserved holy and inviolate, by which both such knowledge of created things is obtained as most fittingly agrees with Faith (Contra Gentiles, book 2, c. 3 and 2), and all the errors of all ages are refuted; and it is permitted to recognize with certainty those things which belong to God alone and are to be attributed to no one besides Him (Ib. c. 3 and 1, q. 12, a. 4; and q. 54, a. 1); and wonderfully is illustrated both the diversity and the analogy which exists between God and His works. This diversity and analogy indeed the Fourth Lateran Council had expressed thus: 'between Creator and creature there cannot be noted so great a likeness that a greater unlikeness is not to be noted between them' (Decretal II, Damnamus ergo, etc. Cf. S. Thom., Quaest. Disp. De scientia Dei, art. 11). - Moreover, if we speak of these principles of Thomas generally and universally, they contain nothing other than what the noblest of the philosophers and the chief Doctors of the Church had found by meditating and arguing concerning the proper reasons of human knowledge, concerning the nature of God and

other things, concerning the moral order and the ultimate end of life to be attained. But so splendid a store of wisdom as this, which he received from the elders and by his almost angelic faculty of mind polished and increased and applied to sacred doctrine for preparing, illustrating, and defending it in human minds (In librum Boethii De Trinitate, quaest. 2, art. 3), sound reason does not wish to be neglected, nor does Religion permit it to be diminished in any part. All the more because, if Catholic truth should once be destitute of this powerful defense, in vain would one seek for support to defend it from that philosophy whose principles are either common with Materialism, Monism, Pantheism, Socialism, and the various errors of Modernism, or certainly are not opposed to them. For those things which are chief points in the philosophy of St. Thomas ought not to be held in the genus of opinions, concerning which it is permitted to dispute on either side, but as foundations on which all knowledge of natural and divine things consists; and if these are removed or in any way depraved, this also necessarily follows, that the students of the sacred disciplines do not even perceive the very meaning of the words by which divinely revealed dogmas are proposed by the magisterium of the Church.

Therefore We have already wished all who devote labor to handing down philosophy and sacred theology to be admonished of this: if they departed from Aquinas by even any trace, especially in metaphysics, it would not be without great detriment. But now We further declare this: that those do not merely not follow Thomas, but wander very far from the holy Doctor, who perversely interpret or altogether contemn those things which in his philosophy are principles and greater pronouncements. But if the doctrine of some author or saint has ever been approved by Us or by Our Predecessors with singular praises, and also in such a way that persuasion and command were added to the praises for spreading and defending it, it is easily understood to have been approved insofar as it cohered with the principles of Aquinas or in no way was opposed to them.

We have judged it of the Apostolic office to declare and prescribe these things, so that in a matter of the greatest importance, all who are from both clergy, secular and regular, may have Our mind and will thoroughly understood, and may effect them with that alacrity and diligence which is fitting. But the teachers of Christian philosophy and sacred theology will fulfill this with a certain special zeal, who indeed ought well to remember that the power of teaching was not therefore made for them so that they may communicate their own preferred opinions to the students of their discipline, but so that they may impart to them the most approved doctrines of the Church.

Now, as regards sacred theology properly, We will that the study of this discipline always be illustrated by the light of that philosophy of which We have spoken; but in common seminaries of clerics, provided suitable teachers are present, it is lawful to use the books of those authors who set forth in summary form the doctrines derived from the fountain of Aquinas; books of this kind are available, and highly approved.

But for cultivating this discipline more deeply, just as it ought to be cultivated in Universities of studies and great Athenaea, and also in all those Seminaries and Institutes to which the power has been given of conferring academic degrees, it is altogether necessary, with the ancient custom recalled, which never ought to have fallen away, that classes be held on the Summa Theologica itself; also for this reason, that by commenting on this book it will be easier to understand and illustrate the solemn decrees and acts of the teaching Church, which have been published thereafter. For after

the blessed death of the holy Doctor, no Council has been held by the Church in which he himself was not present with the riches of his doctrine....

Therefore "that the genuine and entire doctrine of St. Thomas may flourish in the schools, which is especially dear to Us," and that "that manner of teaching, which rests on the authority and judgment of individual teachers," may now be removed, and on account of that "has a changeable foundation, from which diverse opinions, often fighting among themselves, arise ... not without great detriment to Christian knowledge" (Leo XIII, Epist. Qui te, dated the day 19 June 1886), We will, command, and prescribe that those who hold the teaching office of sacred theology in Universities, great Lyceums, Colleges, Seminaries, and Institutes which have from apostolic indult the power of conferring academic degrees and the laurea in the same discipline, have the Summa Theologica of St. Thomas as the text of their lectures, and explain it in the Latin tongue; and place diligent labor in this, that their hearers may be excellently affected toward it. This has already laudably been customary in several Institutes; this very thing the most wise Founders of Religious Orders wished to be done in their houses of studies, with Our Predecessors indeed greatly approving; nor did holy men who were after the times of Aquinas have any other supreme teacher of doctrine for themselves except Thomas. But thus, and not otherwise, it will come about that not only will theology be recalled to its former dignity, but also to all sacred disciplines their own order and their own weight will be restored, and whatever is held by intelligence and reason will in some way grow green again.

Wherefore in the future there will be granted to no Institute any power of conferring academic degrees in sacred theology, unless that which has here been prescribed by Us is observed holily among it. But Institutes or Faculties, also of Orders and Regular Congregations, which already legitimately have power of this sort to confer academic degrees in theology, or similar documents, even only within domestic limits, will be deprived and are to be regarded as deprived of the same, if after three years, for any cause whatever, even one by no means voluntary, they have not religiously obeyed this prescription of Ours.

And these things We establish, notwithstanding anything to the contrary." Pius X, M. P. Doctoris Angelici, 29 June 1914. For Italy and the adjacent islands. A. A. S. v. 6, p. 336 ff.

Theses Contained in the Doctrine of St. Thomas

"After our Most Holy Lord Pope Pius X, by the Motu Proprio Doctoris Angelici, issued on the day 29 June 1914, salutarily prescribed that in all schools of philosophy the principles and greater pronouncements of Thomas Aquinas be held holily, some teachers of diverse Institutes proposed to this sacred Congregation of Studies certain theses to be examined, which they themselves were accustomed to hand down and defend as exact according to the principal principles of the holy Teacher, especially in metaphysics. This sacred Congregation, after the aforesaid theses had been duly examined and submitted to the Most Holy Lord, by mandate of His Holiness, responds that they plainly contain the principles and greater pronouncements of the holy Doctor. And they are these:

I. Potency and act so divide being that whatever is either is pure act, or necessarily coalesces from potency and act as from first and intrinsic principles.

II. Act, as perfection, is not limited except by potency, which is the capacity of perfection. Therefore in the order in which act is pure, in that same order it exists only as unlimited and unique; but where

it is finite and multiple, it falls into true composition with potency.

III. Wherefore in the absolute notion itself of being, one God subsists, one and most simple; all the other things which participate being itself have a nature by which being is restricted, and consist of essence and being as principles really distinct.

IV. Being, which is denominated from being, is not said univocally of God and creatures, nor nevertheless wholly equivocally, but analogically, by an analogy both of attribution and of proportionality.

V. There is besides, in every creature, a real composition of the subsisting subject with forms secondarily added, or accidents; but this could not be understood unless being were received in an essence really distinct from it.

VI. Besides absolute accidents there is also the relative, or toward something. For although toward something does not signify, according to its proper notion, something inhering in something, nevertheless often it has a cause in things, and therefore a real entity distinct from the subject.

VII. A spiritual creature is altogether simple in its essence. But in it there remains a twofold composition: of essence with being, and of substance with accidents.

VIII. But a corporeal creature, as regards its very essence, is composed of potency and act; and this potency and act of the order of essence are designated by the names matter and form.

IX. Neither of these parts has being per se, nor is produced or corrupted per se, nor is placed in a predicament except reductively as a substantial principle.

X. Although extension into integral parts follows upon corporeal nature, nevertheless it is not the same for a body to be substance and to be quantified. For substance, by reason of itself, is indivisible, not indeed after the manner of a point, but after the manner of that which is outside the order of dimension. But quantity, which gives extension to substance, really differs from substance, and is an accident in the true name.

XI. Matter designated by quantity is the principle of individuation, that is, of numerical distinction, which cannot exist in pure spirits, of one individual from another in the same specific nature.

XII. By the same quantity it is effected that a body be circumscriptively in place, and that in one place only it can be in this way by any power whatever.

XIII. Bodies are divided in two ways: for some are living, others lacking life. In living things, so that in the same subject the part moving and the part moved may be had per se, the substantial form, designated by the name soul, requires organic disposition, or heterogeneous parts.

XIV. Souls of the vegetal and sensitive order in no way subsist per se, nor are produced per se, but are only as the principle by which the living thing is and lives; and since they depend wholly on matter, when the composite is corrupted, by that very fact they are corrupted per accidens.

XV. On the contrary, the human soul subsists per se, which, when it can be infused into a sufficiently disposed subject, is created by God, and by its nature is incorruptible and immortal.

XVI. The same rational soul is united to the body in such a way that it is the unique substantial form of the same, and through it man has that he is man and animal and living and body and substance

and being. Therefore the soul gives to man every essential grade of perfection; moreover it communicates to the body the act of being by which it itself is.

XVII. Faculties of a twofold order, organic and inorganic, emanate from the human soul by natural resultance; the former, to which sense pertains, are subjected in the composite; the latter in the soul alone. Therefore the intellect is a faculty intrinsically independent of an organ.

XVIII. Intellectuality necessarily follows immateriality, and indeed in such a way that according to the grades of distance from matter, there are also grades of intellectuality. The adequate object of intellection is commonly being itself; but the proper object of the human intellect in the present state of union is contained in quiddities abstracted from material conditions.

XIX. Therefore we receive knowledge from sensible things. But since the sensible is not intelligible in act, besides the intellect formally understanding, there must be admitted in the soul an active power which abstracts intelligible species from phantasms.

XX. Through these species we directly know universals; singulars we attain by sense, and then also by intellect through conversion to phantasms; but to the knowledge of spiritual things we ascend by analogy.

XXI. The will follows, it does not precede, the intellect; the will necessarily seeks that which is presented to it as a good satisfying the appetite from every side, but among several goods which are proposed as to be sought by a changeable judgment, it freely chooses. Therefore choice follows the last practical judgment; but that it is last, the will effects.

XXII. That God is, we neither perceive by immediate intuition, nor demonstrate a priori, but certainly a posteriori, that is, through those things which have been made, with the argument led from effects to cause: namely, from things which are moved and cannot be the adequate principle of their own motion, to the first unmoved mover; from the process of worldly things from causes subordinated among themselves, to the first uncaused cause; from corruptible things which have themselves equally to being and non-being, to an absolutely necessary being; from those things which, according to diminished perfections of being, living, understanding, more and less are, live, and understand, to Him who is maximally understanding, maximally living, maximally being; finally, from the order of the universe to the separated intellect which ordered, disposed, and directs things to the end.

XXIII. The divine Essence, through this, that it is identified with the exercised actuality of being itself, or through this, that it is subsisting Being itself, is proposed to us as well constituted in its, as it were, metaphysical notion, and through this same thing exhibits to us the notion of its infinity in perfection.

XXIV. Therefore by the very purity of His being, God is separated from all finite things. From this it is inferred, first, that the world could have proceeded from God only through creation; then, that the creative power, by which being inasmuch as being is reached per se and first, cannot be communicable, even miraculously, to any finite nature; finally, that no created agent influences the being of any effect whatever, unless by motion received from the first Cause. Given at Rome, on the day 27 July 1913."

On the Procurement of Abortion

To n. 742 ff. ON THE PROCUREMENT OF ABORTION

1. Abortion is commonly defined: the ejection of an immature fetus. It is said immature, i.e., not yet apt for vital birth, in such circumstances of the time of gestation that, although the fetus may still come forth into the light living, nevertheless it must necessarily die soon. Wherefore, as is clear, abortion and the mere acceleration of birth are not in reality the same. In acceleration of birth the fetus is not immature, and although it comes forth into the light before the completed time of gestation, nevertheless it can naturally live. Certainly there are those who wrongly confuse abortion with the mere acceleration of birth. They do this, departing from the common manner of speaking of theologians, so that they may more easily conclude, from the mere acceleration of birth, the lawfulness of the direct procurement of abortion. Every abortion is a certain acceleration of birth, but not a mere acceleration of birth; every acceleration of birth is not truly abortion. Abortion properly has place in the first seven months of gestation; in the remaining two months there is mere acceleration of birth, commonly speaking and from the general rule.

2. It is said besides, ejection of the fetus; wherefore abortion is properly distinguished from any action which per se and first is not ejective of the fetus, but injurious to the same fetus, such as that surgical operation which is called craniotomy and embryotomy for the reason that it is the cutting of the skull of the infant, or fetus, for extracting him from the mother's womb. From the general rule. Absolutely speaking, the fetus can live outside the womb after six months, six and a half months, and even before this term, if extraordinary means for nourishing the fetus are present. But, so that the moral danger of the death of the fetus may be excluded, the term of seven months is to be awaited.

3. The ejection of the fetus can be procured in two ways: 1. directly and per se, 2. indirectly and per accidens. Direct procurement of abortion or of the ejection of the fetus is had by applying a means or medicine effective per se and ordered per se and first to expelling the fetus, as are those local causes which have action on the womb for expelling the fetus, such as the cutting or rupture, by the help of some instrument, of the afterbirth, or of that leathery membrane in which the fetus is enclosed and floats in fluid; when this is removed, he can no longer live there, but is necessarily ejected. Wherefore direct procurement of abortion is understood here not only by direct intention, insofar as someone intends the ejection of the fetus, but also by direct exterior action, insofar as this tends effectively per se and first to expelling the fetus. Indirect procurement of abortion is had by applying a means or medicine ordered per se and first to conferring health on the mother, from which nevertheless the expulsion of the fetus also follows; or also by employing a means or medicine from which equally there is had the health of the mother and the expulsion of the fetus. Of the former kind are certain irritating and violent drugs, which per se and first tend, by their own efficacy, to correcting bad humors and bad dispositions of disease, but consequently also procure abortion. Of the latter kind are those remedies which cause the relaxation of fibers, such as a bath, a flow and emission of blood; whence while health is at the same time being cared for, abortion is produced by one and the same cause. This indirect procurement of abortion is indirect at once in action and in

intention. But nothing prevents someone, with direct intention toward procuring abortion, from employing a means indifferent of itself and ordered per se to another honorable end.

4. From the common opinion of the older doctors, and from the practice of the S. Penitentiary, the fetus is said to be animated after a space of 40 days, if male, 80 if female. From the view of several more recent authors, with no distinction of sex made, the fetus is said to be animated from conception itself, as soon as he begins to be formed, which indeed they judge to happen immediately from the fertilization of the ovum. Their reason is this, that from experiments made it is established that even from the beginning of conception the fetus lives, and gives signs of life by his motion. But this reason does not demonstrate the matter; for one thing is that the fetus lives, another that he lives by a rational soul. Wherefore we adhere in this matter to the doctrine of St. Thomas, which is in no way obsolete, as several pretend. First the soul only vegetative informs the embryo, and thus sufficiently are explained all the phenomena of motion and life which are observed from the beginning in the embryo. Then, when the embryo has arrived at greater perfection, the sensitive soul succeeds, through which the vegetative is expelled. For "since the generation of one thing is always the corruption of another, it is necessary to say that ... when the more perfect form arrives, the corruption of the prior form occurs; yet in such a way that the following form has whatever the first had, and still more; and thus through many generations and corruptions one arrives at the ultimate substantial form, both in man and in other animals.... Thus therefore it must be said that the intellective soul is created by God at the end of human generation, which is at the same time both sensitive and nutritive, the preexisting forms having been corrupted." S. Thom. 1 p., q. 118, a. 2 ad 2. Cf. Contra Gent. l. 2, c. 90. Nor indeed in the present matter is this question to be despised, nor with excessive facility is that to be asserted as certain which is not certain, since the matter concerns protecting the very life of the mother and also the bodily and spiritual life of the infant, with a most grave collision of rights standing on either side. St. Alph., l. 3, n. 394, question III, asks when offspring is judged informed by a soul, and says: "Proposition 25 was condemned by Innocent XI, which said: It seems probable that every fetus, so long as he is in the womb, lacks a rational soul, and that he first begins to have the same when he is born; and consequently that homicide is committed in no abortion. Conversely, some have spoken badly in saying that the fetus is animated in the first instant in which he is conceived, because the fetus certainly is not animated before he is formed, as is gathered from Sacred Scripture, Exod. 21, where according to the version of the Seventy it is said: He who strikes a pregnant woman, and she miscarries, if it was not yet formed, shall be fined with money. It is certain, therefore, that the fetus is not animated immediately." This is confirmed from the theses contained in the doctrine of St. Thomas, and most recently approved. For the soul requires organic disposition, or heterogeneous parts. Thesis 13. The human soul is then created by God and infused into the body, when the subject is sufficiently disposed. Thesis 15. S. C. of Studies, 27 July 1914, A. A. S. v. 6, p. 385.

5. It is sometimes lawful indirectly to procure abortion, or rather to permit it, namely by supplying to the mother, laboring under a grave disease, remedies suitable per se for curing the disease, even if consequently abortion can follow, or remedies equally suitable per se for curing the disease and harmful to the fetus. It is proved: 1. from the common doctrine of theologians. S. Alph. l. 3, n. 394; Struggl, Tr. 7, q. 3, n. 15; Sanchez de Matr. l. 9, D. 20, n. 13 ff.; Diana Tr. 6

de abortu, Res. 38 ff.; Gury n. 402; Scavini, etc. 2. For when some remedy, by itself and by one and the same efficacy, can produce both effects at once, that of healing the mother and that of killing the offspring, whether primarily the health of the mother and consequently abortion follows, or whether these effects are parallel to one another, one is not necessarily assumed, either in reality or in intention, as a means for procuring the other. Therefore there is then present the case of a good or indifferent action, from which there follows a twofold effect, one good, but the other evil, which it is lawful to posit, if the end of the agent is honorable, namely if he does not intend the evil effect, and if a proportionately grave cause is present.

6. Hence it is said, it is sometimes lawful, namely if the matter concerns a lethal disease of the mother, whose life to be preserved is a proportionately grave cause with respect to the temporal life of the offspring. "It is certain," says St. Alph. l. c., "among all that it is lawful to furnish a remedy to a pregnant woman, directly for curing her, even with danger of abortion, if the disease is mortal, otherwise if it were not such"; and below: "If the remedy tends directly to saving the life of the mother, as would be purging of the body, cutting of a vein, a bath, etc., these are certainly lawful, when otherwise it is morally certainly judged that the mother will die with the offspring," namely if the remedy is not employed; or when there would be equal danger of abortion, whether the remedy is employed or not; or when it is morally certain that the fetus is not yet animated, as can be held at least for the first days of conception. 1 Reg. 1, 19, 20. The reason is because then the safety of the mother is cared for without greater danger of the offspring, and "because, as Busembaum has it in the same St. Alph. l. c., in equal necessity the mother can look out for herself rather than for the offspring." And the necessity is equal; for no hope indeed is present of procuring baptism for the offspring in the first and third case; but that hope in the second case is equal.

7. On the contrary, the necessity is not equal when indeed the death of the mother is certain if she does not take the medicine; but if she takes it, the death of the offspring is certain, not only temporal but also eternal, because baptism will not be able to be administered to him, which, however, certainly could be administered to him if the mother abstained from the medicine; because the offspring will certainly survive the dead mother: and then "the mother is indeed held from the order of charity to abstain from medicine, and to prefer to her own bodily life the spiritual life of the offspring." Thus St. Alphonsus l. c., who there continues, saying: "so also from the same charity she is held to abstain, when there is doubt about the safety of the mother and of the offspring," namely when it is doubted whether, the mother dying, the offspring can survive and be baptized. And the same holy Doctor soon adds: "And even if the death of the mother were morally certain, if she does not take the remedy, not even then would I dare to permit medicine to her, if some reasonable hope shone forth that, the mother dead, the offspring would survive and could be baptized: because it is lawful for no one, for protecting his own temporal life, positively to expose a neighbor constituted in necessity to the danger of eternal death. But conversely I think it must be said with Sylv., Tourn., etc. and the common opinion, if there were no reasonable hope concerning the life of the offspring after the death of the mother, such that she could be brought to the grace of baptism; because then charity does not seem to oblige the mother placed in extreme necessity, that she neglect her own life by abstaining from remedies, on account of the slight and most remote hope of the life of the offspring."

8. "And here, as far as regards practice, the same holy Doctor notes, l. c., that physicians, as regards furnishing drugs to mothers, are not to be tormented scrupulously, because it is most probable that the case is most rare and morally impossible, that it is almost a miracle, that when the mother perishes the offspring should survive so that he can receive baptism." Yet this matter is not so to be neglected; because it has happened more than once that, on account of the skill of surgeons, immediately when the mother had breathed forth her spirit, the womb of the mother having been cut open, the offspring was extracted living and baptized. Consequently, mere acceleration of birth is lawful when the fetus can live outside the womb, from ordinarily occurring circumstances, and provided that provision is made seriously and opportunely for the life of the fetus and of the mother, as far as can be done, and a grave necessity for the aforesaid acceleration is present, whether the necessity is on the part of the life of the mother or on the part of the life of the offspring himself.

9. In no case ever, or for any cause, is it lawful directly to procure abortion, even if the fetus were supposed still inanimate. It is proved. For 1. if the discussion is of direct procurement of abortion improperly so called, namely through means or medicines by which there is a direct tendency to injuring and destroying the fetus or infant, as, for example, when physicians, by the help of forceps, crush the skull of the little infant in the mother's womb itself, afterward violently to extract the dead fetus; there is had most truly a homicide, directly intended and directly exercised, which is never lawful.

10. Nor indeed is it valid in any way to say that in reality the death of the infant is not intended, but the health of the mother. For although the death of the infant may not be explicitly intended, nevertheless it is implicitly intended; since that surgical operation is directly killing of the fetus or infant. Wherefore any intention, even implicit, of not killing the infant is retracted by the fact itself, since in fact the infant is directly killed; and the intention, at least in the exercised act, is had of direct killing of this sort. Anyone acting in a human mode always intends to do that which in reality he does, in at least some way, either explicitly or implicitly.

11. Nor likewise is it valid to say that that action is not directly killing of the fetus. For that compression of the skull, in an infant already born and in an adult man, is certainly directly killing of the infant and the man. Therefore also of the fetus and infant still existing in the maternal womb; for the nature of that action is not changed thereby. But, the adversaries insist, it is changed: for that action becomes from that circumstance an action merely extractive and bringing out of the fetus and infant from place to place. But this is altogether nothing: since that action first by nature and time is lethally injurious and killing, and then extractive; by this means the fetus and infant is extracted, by lethal compression of the skull; and thus the life of the mother is saved. Now evils are not to be done that goods may come.

12. Defenders of craniotomy appeal to the collision of the rights of the life of the mother and the life of the infant: and the right of the mother in that matter, as the more important and more effective, ought to prevail. But this doctrine concerning the collision of rights is of no assistance to the adversaries. For in a collision of rights, the more important and more effective right ought indeed to prevail; if it can prevail without an intrinsically evil means being assumed for that prevalence. But in the case, so that the right of the mother may prevail and

her life be preserved, there is assumed as means that which is intrinsically evil, the direct killing of an innocent.

13. If the discussion is of direct procurement of abortion through means or medicines which directly cause only the premature acceleration of birth, from which the offspring, necessarily, from the very laws of nature, must succumb to death, "after animation this would be directly to kill the infant, which is never lawful": for to eject by positive action an immature infant outside the womb is positively to withdraw from him the means instituted by nature itself for the conservation of his life, which is directly to kill someone. "But before animation it is not lawful directly to procure this either, just as it is not lawful to procure the effusion of seed even to save life, in which case Tertullian seems to speak in Apol. cap. 3; for he gives the universal reason: he is a man who is going to be one, for the fruit is in the seed." Lugo de Iust. et Iure, Disp. 10, S. 5, n. 130. Wherefore, since even the non-animated fetus is ordered to forming a man, his ejection is anticipated homicide. Hence Ithur., Cas. 21, n. 5, says that direct procurement of abortion "most certainly is always infected with grave malice."

14. There are indeed grave and several doctors, whom Sanchez follows and reports, de Matr. l. 9, D. 20, n. 9, and Struggl, Tr. 7, q. 3, n. 16, who think that abortion directly procured, where nevertheless the matter concerns only true premature acceleration of birth, but by no means direct injury to the fetus, is not so intrinsically illicit that it is not lawful at least in the case of saving the life of the mother, who is in extreme danger from present disease. But Sanchez limits this opinion to the single case of an inanimate fetus. "Where," says the praised Theologian, "it has been established that the fetus is already animated, or this is doubtful, it is established among all authors to be referred to in this whole disputation that this is by no means lawful"; n. 7. But his reason and that of others is, both because since that fetus is part of the viscera, the mother is not held to preserve him with so great a danger to her life, and all the more because, if the mother perishes, the fetus will by no means be animated; and because the mother in that case can expel him as an aggressor against her own life. Hence the same Sanchez expressly limits that opinion still more and excepts a twofold case, n. 10. The first case is if the mother, by giving birth at another time, had experienced danger of death; and on account of this it is not lawful to expel the fetus, as the common opinion of theologians teaches, because in that case there is no present aggressor, since the danger is much distant, and the mother will be able meanwhile to die from another cause. And this is confirmed from another common doctrine, which the same Sanchez hands down there, n. 2 and 10, namely that it is never lawful for a mother, on account of any danger whatever, to take a potion for impeding conception. The other case is when the mother, unless she expelled the fetus, would undergo danger of being killed by relatives, or of her own reputation; that this is altogether illicit is established from the condemned proposition 34 by Innocent XI: "It is lawful to procure abortion before the animation of the fetus, lest a girl discovered pregnant be killed or defamed." But the reason is that, even with that reason admitted which is taken from the aggressor, or from the fact that he is part of the viscera, one thing is that the fetus be an aggressor per se and intrinsically in the case of the lethal disease of the mother; another that he be so per accidens and extrinsically. For anyone can kill an aggressor lest he be killed by him; nevertheless he cannot kill another lest he himself be killed by an enemy. Likewise the fetus, says the same Sanchez, considered as part of the viscera of the mother, has an order per

se to the conservation of the whole; whence, just as it is lawful to cut off a member, so also to expel the fetus, if the conservation of the whole demands this. But to that killing to be inflicted by relatives, and to that infamy, one can oppose by other means and by sought pretexts. This opinion, enclosed within all these restrictions, St. Alph. indeed affirms probable, adding that "the opposite is altogether to be embraced as safer," since the former can serve nothing for practice. Cf. Struggl, Tr. 7, q. 3, n. 16; Laymann l. 3, Tr. 3, C. 4, q. 2; Tamburini, Explic. Decal. l. 6, C. 2, § 4.

15. Now then, to omit extrinsic authority, as regards the reasons on which that opinion rests, Sporer, de matr. P. 4, C. 4, S. 1, n. 706, says these things shrewdly: "The fetus," he says, "is not properly part of the mother, nor on account of the mother; but has another end intended per se by nature; indeed, inchoatively, in becoming, he is already a human individual distinguished together with her. Certainly seed is more clearly and more properly part of man, and at least in some respect on account of man, since it itself also is nourishment of contiguous parts according to the teachings of physicists: therefore, etc. But if by reason of aggression it is lawful to procure abortion of an inanimate fetus, certainly abundant seed attacks human life far more violently in those most acute diseases than that little substance of a fetus still inanimate. Therefore, a fortiori, why would it not similarly be lawful in that case to procure the emission of seed? Indeed, why not also the abortion of a fetus already formed by a soul, since an innocent can no less defend himself from an animated aggressor than from an inanimate one?" But in no way indeed is the fetus an unjust aggressor. For one who from the mere course of natural causes becomes naturally the cause of death to another cannot be called an aggressor, whether formally or materially unjust; for an aggressor inflicts unjust force, and that force cannot be called unjust which proceeds from the very course of natural causes. Indeed, neither is he simply an aggressor. For an aggressor is per se the cause of death; but the fetus does not per se threaten death to the mother, but this happens altogether per accidens. And for the most part it is not the fetus, of small bulk and inert, but rather the mother who is the aggressor, either on account of narrowness of the womb, or because of the grave disease from which she suffers, or because of another inconvenience.

16. Lugo expressly attacks and refutes the doctrine of Sanchez, l. c. n. 130, 131, "because," he says, "even in the latter cases (namely when death would be feared from the future difficulty of birth, or from infamy), the fetus is an aggressor, since by the effort by which he will try to come forth from the womb, the mother is to be brought into manifest danger of death. Add that, if this is rendered lawful by reason of the invasion by which the mother is invaded by the fetus, it would also be lawful to procure his abortion after the fetus is animated, since an innocent can no less defend himself by any way from an animated invader than from an inanimate one. But that the danger is not present matters little, both because even the infirmity against which it is lawful to procure abortion can bring danger of death not today, but after a month, and nevertheless today a means for abortion can be applied, nor is the last article of necessity and danger to be awaited, but one ought to forestall, remedies being employed in time, because afterward medicine is prepared too late, and perhaps it will not be useful after the disease has by longer delay become too strong. Whence in the same way one could forestall by procured abortion against death to be inflicted from outside after some months, if the crime is published; and also because the danger can be present in the latter case,

as if a husband soon to arrive, if he should find his wife pregnant, is believed about to kill her. Finally, that in these cases one can oppose the danger by other means does not solve the difficulty. For the question is when, other means having been tried, no other occurs, nor is any useful one hoped for, except abortion alone.

17. "Therefore it is better universally to deny that this is ever lawful, which Vazquez also universally taught, Cap. 3 de rest. § 2, dub. 6, n. 52, which the example brought forward seems to prove concerning the obligation never to procure the effusion of seed. To this, however, the same Sanchez, n. 12, responds that the reason why effusion of seed is never lawful is not the harm of generation, but because nature has denied every administration of seed outside intercourse for generation, on account of the imminent danger from the excessive pleasure which is felt in its effusion; and this reason has no place in abortion. But if it is weighed rightly, the same reason can be applied to this, that the procurement of abortion is never lawful: because just as nature never permitted the effusion of seed outside copulation for generation, because if sometimes it could lawfully be procured outside copulation, there would be danger that men, content with that pleasure outside copulation, would care less for begetting offspring; so also, much more, the procurement of abortion ought to have been altogether prohibited, because if that were ever lawful, there would also be danger that men would seek the pleasure of copulation with this mind and confidence, that afterward, from some supervening cause, abortion could be procured, so that birth might be impeded; and great occasion would be given for fornications and rapes, from which fear of offspring and future birth deters, and this fear would cease in great part if afterward, from some cause, it were lawful to procure abortion. Therefore it must be admitted that nature has reserved to itself the administration of the fetus just as of seed, with the faculty denied to parents of disposing of seed or fetus except for the end of generation intended by nature itself; because any other administration granted to them could easily bring inconveniences against the end of generation." Cf. Salmant., Tr. 13, C. 2, n. 58-66.

18. The authority of the older theologians in no way favors the more recent theologians in this controversy. For the ancient theologians who defend the lawfulness of abortion commonly restrict it to the abortion of an inanimate fetus. But the more recent theologians, defending the lawfulness of abortion, defend it indiscriminately; indeed, with the new views standing, of which they are very keen supporters, they almost altogether reject the hypothesis of an inanimate fetus.

19. But they enter upon another way to demonstrate the lawfulness of abortion. First they confuse abortion with acceleration of birth, and use one for the other. Then they reduce direct procurement of abortion to procurement of abortion by direct intention, with the nature of the action by which abortion is procured put aside. Moreover, they assume as a certain principle that the question concerning acceleration of birth does not look to whether it is lawful to deprive the offspring of life, but rather to how far the mother is held to conserve the life of the offspring. Finally, since surgical art has now found an instrument by which the membranes enveloping the fetus are cut in such a way that water injected by the help of a little siphon can certainly touch the fetus immediately, and therefore we can be wholly certain concerning the validity of Baptism conferred in this way on infants enclosed in the womb, the difficulties and

questions moved by the older doctors concerning the dangers which the mother is held to undergo so that provision may be made for the eternal salvation of the offspring almost cease.

20. Hence, they say, the lawfulness of abortion is easily shown. For what the Doctors commonly hold with St. Thomas, that the death of an unjust aggressor in just defense follows only indirectly, for the reason that the direct intention of the killer is borne only toward his own defense, but the other effect, namely the death of the aggressor, is outside the intention and per accidens; this very thing can have place in acceleration of birth, namely when the will tends directly not to the temporal harm of the offspring, which follows per accidens and outside the intention, but to another end.

21. Therefore, where 1. the death of the mother is certain unless the fetus is expelled, and the matter concerns only the temporal death of the offspring, because, for example, Baptism can be conferred upon him according to what has been said, the mother is not held to die so that she may conserve temporal life for her son. "The mother," says Lugo, De Iust. et Iure, D. 10, n. 133, "is not held, with so great danger and detriment of her life, to procure and conserve the fetus: just as neither is she held, with danger to life, to nourish and retain a son already born, nor even to preserve milk in her breasts for nursing him, when for protecting her own life it would be necessary for her to dry up her breasts."

22. 2. If the mother, seized by disease, labors under grave danger of death unless the fetus is expelled by accelerating birth, but there is probable hope that by the help of medicine it can be effected that the fetus come forth living into the light, and thus, if not temporal life, at least eternal life, he will obtain, then an expulsion of this sort seems not only lawful, but commanded. The reason is that the danger and death of the mother would profit nothing for the temporal life of the offspring, and moreover would cast the offspring itself into very grave danger of eternal salvation. Nor ought it to obstruct that perhaps the death of the offspring is accelerated a little. For first, according to Lugo, the mother is not held with so great a danger to conserve the life of the offspring further. Then "in that case," says St. Alph., l. 6, n. 106 at the end, "that small loss of life can be neglected, so that the infant may obtain eternal life."

23. 3. If from the force of the disease there probably threatens a danger of abortion, and at the same time there presses the danger lest, if abortion in fact follows from the disease, the offspring die in the womb; but, on the contrary, probable hope shines forth that, birth having been accelerated through medicines, the offspring may come forth living into the light, and thus provision can be made for his eternal salvation: the uncertain hope of temporal life does not seem to be preferred to the more probable hope of eternal salvation, and therefore it would be lawful to accelerate birth. And this indeed must be said to be valid, even if the disease brings no danger to the life of the mother, but the matter concerns only the better good of the offspring.

24. The preceding doctrine of the more recent theologians is indeed such that it cannot approve itself. Let us weigh each point gradually and briefly. Abortion cannot be confused with acceleration of birth. This new manner of speaking about abortion as acceleration of birth is proved false from the constant doctrine of the older theologians, which is altogether to be retained unless a grave reason recommends a new way of speaking. If theologians have

constantly spoken of abortion in an altogether different way, this certainly must have been done not without a grave foundation. To consider abortion as acceleration of birth is certainly not a subtle consideration which could have escaped the keenness of the older theologians. Moreover the Supreme Pontiffs do not speak of abortion in such a way as to regard it as acceleration of birth. They speak of abortion as of the ejection of an immature fetus, namely one not yet apt for life outside the mother's viscera. Among others, let the Constitution of Sixtus V, Effraenatam, 29 Oct. 1588, be consulted, which expressly treats of abortion and turns wholly around this matter. Now Sixtus V defines abortion: "the ejection of an immature fetus, both animated and also inanimate, formed or unformed." Ib. § Nos igitur. Besides, from reason itself it is established that simple acceleration of birth is a thing well diverse from abortion; as birth itself is a thing well diverse from abortion. For acceleration of birth, although it is accelerated birth, is still birth, and therefore imports offspring already so formed and perfected that it can live outside the mother's viscera. Abortion, on the contrary, from its concept and from the most common acceptance of all, even vulgar, imports offspring which, from premature exit from the maternal womb, is unformed and imperfect, so that it is altogether unfit for life outside the mother's viscera; whence in this same sense the word abortion is also accustomed to be used metaphorically.

25. The other point which is brought into the middle concerning procurement of abortion by direct intention, with direct procurement of abortion on the part of the action itself put aside, is altogether most false and most pernicious. Most false, for when on the part of the thing there stands an action directly procuring abortion, only illusorily can someone affirm that he does not intend abortion, but, for example, the health of the mother, and merely permits abortion. For it is impossible that someone acting in a human way not intend that to which his action is directly ordered, as a means per se and first conducing to it. Most pernicious, for there is no sin perpetrated by exterior work which could not be made honorable by that doctrine.

Although, by an action directly procuring pollution, someone procures this in himself, nevertheless if he does it with the intention, for example, of health, then certainly he would not sin at all. The same can be said about any other matter.

26. The third assertion likewise is altogether alien from the truth: namely that in this question the matter concerns the obligation of the mother to conserve the life of the offspring. As is most evidently clear from the Constitution itself of Sixtus V, Effraenatam, here the matter concerns homicide; it concerns the deprivation of the life of the infant. To eject an immature fetus from the bosom of the mother is not simply not to conserve the life of the fetus, but positively to deprive him of life, through a positive action tending and ordered by its nature to the destruction of the offspring. If it were otherwise, it would have to be said that immature offspring can live equally in the womb of the mother and outside it, which is altogether absurd, with attention to the physical laws of nature; it would have to be said that to eject an immature fetus is only not to help him in prolonging life, and to bear oneself merely negatively as regards his death.

27. Lastly, what is said in the fourth place about the invention of that instrument does not remove the difficulties and questions in this matter, but increases them. For the invention of that instrument can be praised as altogether useful for conferring Baptism on an infant in the best way in which it can be done, if the offspring survives after the death of the mother, or where the matter truly concerns mere acceleration of birth. Nevertheless, where the question is instituted about abortion itself, the adversaries assume as certain that, even in this case, without any controversy, it is lawful to confer Baptism by the help of such an instrument. But this is in no way certain. For since with the introduction of that instrument the afterbirth is cut, and that fluid in which the fetus floats and lives flows out, already that action, by nature and time first, is direct procurement of abortion, and then the conferral of Baptism; just as in craniotomy that action of bringing out the infant from the maternal bosom by forceps is first killing of the infant, and then extractive. Wherefore if it is lawful directly to procure abortion and to kill the infant in order to baptize him, then indeed it will also be lawful to confer Baptism in that way. Now St. Alph., l. 6, n. 106, says: "It must altogether be held ... commonly against some, that it is never lawful to throw an infant into a river in order to baptize him, although he is soon to die without Baptism; because it is never lawful for any cause whatever directly to kill an innocent.... And for the same reason it is not lawful to cut the belly of a mother very near death, so that her infant may receive Baptism, as they also commonly say ... from St. Thomas, who in 3 p., q. 68, a. 11 ad 3 expressly teaches this, saying: A man ought not to kill the mother in order to baptize the child; if, however, the mother has died, with the offspring living in the womb, she ought to be opened so that the child may be baptized.... With respect to the surgeon I say that then he can cut the mother if the danger of her death is remote; otherwise if it is proximate or probable. For just as it is illicit to kill the mother so that the child may be baptized, as we have seen with the common opinion from St. Thomas, so also it is illicit to expose the mother to probable danger of death.... But with respect to the mother ... I say that if the danger of her death is probable, she is neither held, nor can she by her positive consent concur in the incision; only she could and would be held to suffer it, if the surgeon, without her consent, while she bore herself altogether negatively, cut her, and probable hope were present that the offspring would be baptized, and the death of the mother were not certain; for in doubt probable on both sides she is held to prefer the spiritual life of the offspring to her own temporal life. But if her death is certain, and the salvation of the offspring doubtful, namely if the offspring is not certainly to be baptized, she is not held to lose life certainly." Now if it is not lawful to kill the mother in order to baptize the infant, if it is not lawful to kill the infant himself in order to baptize him, neither is it lawful directly to procure abortion in order to baptize the infant. For direct procurement of abortion is evil by its intrinsic nature, as homicide is evil by its intrinsic nature. Wherefore just as it is not lawful to throw a child into the sea in order to baptize him, so neither is it lawful, in order to baptize him, to eject him immature from the maternal bosom, by cutting the membrane in which he is enclosed; whence abortion must necessarily then follow. Nor indeed must it be passed over that, at least practically, it cannot be held as altogether certain that Baptism has been conferred on an infant still enclosed in the maternal womb. Benedict XIV, De Synodo, l. 7, C. 5; S. Alph. l. 6, n. 107; Billuart, Tr. de Bapt., D. 3, a. 3; S. Thom. 3 p., q. 68, a. 11 c. and ad 1.

28. Therefore what is deduced as though a corollary, the lawfulness of abortion, must be converted into the opposite corollary, of the unlawfulness of abortion. But the confirmation which is taken from the doctrine of St. Thomas and the common doctrine of theologians concerning the unjust aggressor either proves nothing or proves the contrary. Truly what is assumed, namely that the death of an unjust aggressor in just defense follows only indirectly for the reason that the direct intention of the killer is borne only toward his own defense, is altogether false, and shows that Doctors of this sort have not understood, and perhaps have not even read, this question in the Angelic Doctor. The reason why it is lawful to kill an unjust aggressor is because it is lawful to repel force by force. That which is lawful is not to kill the unjust aggressor, but to repel force by force, which is an action well diverse: since it is an action which has a twofold effect, the defense of oneself and the killing of the aggressor. And thus the death of the unjust aggressor in just defense follows only indirectly, not because the direct intention of the killer is borne only toward his own defense, but because that action, to repel force by force, is an action indifferent of itself, having a twofold effect: the good of defending one's own life, the evil of offending the life of another; the good effect is intended, the evil is permitted. And indeed natural right and positive right, and all positive rights, do not proclaim that it is lawful to kill an unjust aggressor; but all rights proclaim that it is lawful to repel force by force. Whence commonly is added that well-known phrase concerning the moderation to be preserved of blameless defense, and this moderation certainly would have no place if it were lawful per se to kill an unjust aggressor, and if something else were not rather lawful per se, namely to repel force. C. Si vero 3, De Sent. excomm., says in so many words: all laws and all rights permit force to be repelled by force.

29. Let St. Thomas be heard. 2. 2, q. 64, a. 7. The Angelic Doctor asks "whether it is lawful for someone to kill someone by defending himself"; and in order to resolve the question he establishes this principle: "It must be said that nothing prevents one act from having two effects, of which one alone is in the intention, but the other is outside the intention. But moral acts receive their species according to that which is intended, not from that which is outside the intention, since it is per accidens." With this principle established concerning the objective indifference of an action having two effects, and concerning the specification of the human act which turns around it, immediately the holy Doctor concludes as regards the act of repelling force by force: "Therefore from the act of someone defending himself a twofold effect can follow: one indeed, the conservation of his own life; the other, the killing of the invader. Therefore an act of this sort" - namely of self-defense, certainly not of killing the invader, as it would have to be according to the interpretation of the adversaries - "from this, that the conservation of one's own life is intended, does not have the notion of the illicit, since it is natural to each that he preserve himself in being as far as he can." But so true is it that the holy Doctor is not speaking of the lawfulness per se of killing the invader, but of the lawfulness per se of defending oneself, or of repelling force by force - for this is to defend oneself - that immediately he notes: "Nevertheless some act proceeding from a good intention can be rendered illicit if it is not proportioned to the end. And therefore if someone, for defending his own life, uses greater violence than is necessary, it will be illicit. But if he repels violence moderately, it will be lawful defense: for according to the rights, it is lawful to repel force by force, with the moderation of blameless defense. Nor is it necessary for salvation that a man

omit the act of moderate defense in order to avoid the killing of another; because a man is held to provide for his own life more than for the life of another." Wherefore again that which is properly lawful is not the killing of the invader, but moderate protection, or repelling force by force; and this act is lawful, since, as is fitting, man intends in it the conservation of his own life, but by no means the killing of a man, even an unjust aggressor; for the killing of a man by private authority is altogether illicit. And that this, in reality, and not another, is the mind of the holy Doctor is clear not only from the preceding things, but also from those things which he soon adds; for he says: "But because it is not lawful to kill a man except by public authority on account of the common good, it is illicit that a man intend to kill a man in order to defend himself, unless he is one who has public authority; and he, intending to kill a man for his own defense, refers this to the public good, as is clear in a soldier fighting against enemies, and in a minister of the judge fighting against robbers; although these also sin if they are moved by private passion." Therefore no argument can be taken for the direct procurement of abortion from the common doctrine concerning the unjust aggressor, and in particular from St. Thomas, who, speaking generally of abortion in 4 Sent., D. 31, in the exposition of the text, affirms abortion to be a grave sin, to be numbered among malefices, and against nature. Let the adversaries see whether an act against nature can, from an otherwise honorable intention of the agent, become an action according to the order of nature.

30. But as regards the first practical case: concerning the conferral of Baptism by the help of a little siphon, it has already been said. But what is asserted, that the mother is not held to undergo death so that she may conserve temporal life for her son, is most true if the matter concerns mere non-conservation of the life of the son, which indeed is verified in indirect procurement of abortion. And thus, where the necessity of mother and son is equal, we ourselves said above, cf. n. 6, from the common opinion of theologians, that it is altogether lawful indirectly to procure abortion. Lugo l. c. speaks of mere non-conservation of the life of the offspring. But if the matter concerns the positive deprivation of the life of the offspring, which is had in direct procurement of abortion, it is altogether illicit for the mother, whether on account of her own bodily health, or even on account of the spiritual salvation of the son, as we have already seen from St. Thomas, from St. Alphonsus, and from the common doctrine, to destroy the offspring by positive action. Through direct procurement of abortion, the mother by positive action ejects immature offspring from the womb, and does not merely cease to retain him in the womb. As regards Lugo, from what has already been said it can be sufficiently clear what his doctrine is.

31. But so that it may be manifested more, how falsely Lugo is brought forward for direct procurement of abortion, and how false from the same Lugo is that doctrine concerning illicit procurement of abortion direct in intention, but not direct also in action, it is worthwhile to bring forward the entire sentence of Lugo, and it will also appear in what sense the words of Lugo, reported by the adversaries, are said by him. "If a drug," he says, l. c. n. 130-132, "is taken, and the same is true of the emission of blood by cutting a vein, directly for abortion, it is lawful in neither case" - namely of an inanimate and animated fetus. "But when a drug or remedy would not be taken directly for that end, but for protecting the health and life of the mother, again a distinction must be made according to what has been said above; for if it conduces to the life of the mother in no other way except insofar as it excuses abortion, then

abortion is already directly intended, although it is not intended for its own sake, but on account of another end, as above we were saying about an action which can be useful for killing an enemy in no other way except insofar as it kills an innocent, and the same will have to be said in our case. But if that drug is useful for the life of the mother, yet consequently causes abortion, and outside the intention, then if the fetus is not animated, that remedy will be lawful, just as also that which is taken for health, although consequently, outside the intention, it is foreseen to bring the expulsion of seed, which is not intended, nor conduces to health, but is caused by that remedy through which health is obtained from another source, insofar as it purges other harmful humors. For the reason is the same as regards this concerning the expulsion of seed and of the fetus not yet animated: so that neither can be procured, each can be permitted indirectly on account of health, and in this almost all agree. The difficulty is whether also after the animation of the fetus it is lawful to take or apply such a medicine.... It must be said, speaking per se and with attention to the order of nature alone, that this can be done, because the mother is not held, with so great danger and detriment of her life, to procure and conserve the fetus; just as neither is she held, with danger to life, to nourish and retain a son already born, nor even to preserve milk in her breasts for nursing him, when for protecting her own life it would be necessary for her to dry up her breasts. Nevertheless the moderation pleases which Vazquez later added to this doctrine, saying that this is to be understood of emission of blood, a bath, or remedies of this sort, which do not tend to the killing of the fetus except negatively, by the withdrawal of fluid necessary for his sustenance, but not of remedies which would positively concur to the death of the fetus, such as a potion which by a positive alteration would kill the fetus; for this would be to give poison positively to an innocent, so that you may free yourself from death, which is never lawful"; such also would be to cut the membrane in which the fetus is enclosed and to eject him immature from the maternal womb; for this would be positively to deprive the fetus of life, so that you may preserve your own, which likewise is never lawful. It would certainly not be lawful to throw into the sea a man infected with plague, in order to free others from plague, or to throw him down from a high tower, although he would not be killed by iron. For it would always be directly to kill a man. But the matter is most clear: Lugo speaks only of indirect procurement of abortion; and if he moves a special difficulty in the case of an animated fetus, this certainly is not because he thought direct procurement of an animated fetus could be lawful, after he had affirmed the unlawfulness of direct procurement of abortion even of an inanimate fetus; but because even in only indirect procurement of abortion of an animated fetus there is a special difficulty, which can render the very indirect procurement of abortion of an animated fetus illicit. And thus Lugo, in affirming that lawfulness, restricts the question to the matter merely inspected per se, with attention to the order of nature alone, and so, speaking only generally, he affirms the lawfulness. Nor indeed can that withdrawal of fluid make difficulty; for as is clear from the whole context, Lugo certainly does not speak of that withdrawal of fluid, or rather outflow of fluid, which is had from the cutting of the membrane in which the fetus is enclosed, by the help of the more recent little siphon or another instrument. For he speaks of withdrawal of fluid which would be had by weakening the powers of the mother through emission of blood, through a bath, and remedies of this sort; and the

cutting of the afterbirth through the aforesaid little siphon of the more recent authors certainly does not pertain to remedies of this sort.

32. The other case concerning abortion directly to be procured in order to baptize the offspring cannot be admitted. The reason is clear from what has been said, from which it is also clear what must be said to the reason brought from Lugo. But as regards the reason brought from St. Alphonsus, from what has already been said it is first established what the opinion of the holy Doctor is concerning direct procurement of abortion. Whence it becomes clear that the reason of the holy Doctor, like the reason of Lugo, can be brought forward altogether beside the point for direct procurement of abortion, since St. Alphonsus, like Lugo, holds it to be illicit. But in order that the reason brought by the holy Doctor may be understood, it is necessary to weigh the whole context. The holy Doctor, l. 6, n. 106, teaches: "it must altogether be held that it is never lawful to throw an infant into a river in order to baptize him, although he is soon to die without Baptism." How then, in the same place, could he assert the very contrary, contradicting himself so openly, that a small loss of life can be neglected so that the infant may obtain eternal life? He indeed asserted this without any contradiction, because he was treating another question, of conferring Baptism through an action indifferent per se, having a twofold effect; and thus, with an action supposed that is not evil per se, as directly killing, but indifferent, the holy Doctor reasoned excellently, saying that in the case there is a sufficient reason for permitting or neglecting, namely by not impeding, that brief loss of life. But on the contrary, in the preceding question, concerning an infant to be thrown into a river in order to baptize him, the holy Doctor regarded that action as directly killing of the infant, and therefore illicit even for conferring Baptism on the infant. For immediately he added this reason: because it is never lawful for any cause whatever directly to kill an innocent. Hence in the following question he said: "But although it is not lawful to throw the child into a river, nevertheless it is lawful to baptize a child soon to die with water even cold, if no other can be had, even if it were feared that death would be accelerated from this: both because death then would not occur per se, but per accidens, since such an action per se tends not to killing but to ablution"; and with this supposed, then because, he afterward added another then because, saying: "then because in that case that small loss of life can be neglected, so that the infant may obtain eternal life." Wherefore the argument from St. Alphonsus can excellently and better be turned back. The expulsion of the fetus from the maternal womb, like his throwing into the sea, in order to baptize him, is not only not commanded, but altogether illicit, although the infant is soon to die without Baptism, because it is never lawful for any cause whatever, on account of any good intention whatever, directly to kill an innocent.

33. It follows from what has been said that neither can the third case be admitted. What nature does by force of the natural laws which God has established, it does well; but we cannot always lawfully do that very same thing. It is altogether natural that man die, yet therefore it is not lawful to kill a man, or to accelerate his death, even by the briefest time, although he himself may suffer immense pains, and there perhaps would be proximate danger of death for others on account of the pestiferous infection of the disease. Pollution also is often natural; yet it is not lawful therefore to procure it directly. Similarly, although abortion follows from the laws of nature, and from the same laws the offspring dies before he is ejected from the womb, it is not

therefore lawful to procure abortion directly. Cf. Gury-Dumas, Compend. Theol. Mor., T. 1, n. 402 ff.; Cas. Consc., T. 1, n. 402, 403, etc.

34. Hence it is clear that laparotomy for extracting ectopic or extrauterine fetuses, still immature, from the bosom of the mother is also illicit. On the contrary, when necessity compels, laparotomy is lawful for extracting ectopic conceptions from the bosom of the mother, provided that the lives both of the mother and of the fetus are seriously and opportunely cared for, as far as can be done. -

Since they cannot be born, they often bring with themselves the death also of the mother.

35. And the preceding doctrine, which already several years ago was publicly proposed in print, was afterward confirmed by several Decisions of the Holy Office, which are had in the Enchiridion Morale, ed. 4, p. 99, 100.

On the Response of the Holy Office Concerning Craniotomy

To n. 742 ff. -

1. The doubt having been proposed by the Archbishop of Lyons: "Whether it can safely be taught in Catholic schools that the surgical operation which they call Craniotomy is lawful, namely when, if it is omitted, the mother and infant are going to perish, but if it is admitted, the mother is to be saved while the infant perishes?", the S. C. U. I. on 28 May 1884 responded: "All things having been weighed long and maturely, with account also taken of those things which, in this matter, were written by expert Catholic men and transmitted by Your Eminence to this Congregation, they judged that it must be answered: It cannot safely be taught. Which response, our Most Holy Lord fully confirmed." Immediately when a response of this sort of the Holy Office was published, doubt began concerning its value, namely whether it in reality settled the controversy and truly condemned the opinion concerning the lawfulness of that surgical operation. For there were not lacking, nor are lacking, grave theologians who thought and still think that that decree has no other value except merely disciplinary, and does not render improbable the opposite opinion concerning the lawfulness of craniotomy. Wisely, they say, the S. C. judged that it should be responded thus, both because each opinion is not without its own probability, and especially because in practice abuse would perhaps happen very frequently. At another time perhaps it will become probable which now is held as improbable or as slightly probable. For slight or light probability is more than sufficient, so that it can be said of an opinion of this sort, especially when the matter concerns so great harm to a third party: it cannot safely be taught. Therefore it will not be displeasing to students of moral matters briefly to weigh the force of the aforesaid decree.

2. The preceding Response can be declared by a twofold consideration, extrinsic and intrinsic. Let us begin from the first. A similar question was proposed to the S. R. U. I. concerning Ontologism, namely: "whether the following propositions can safely be handed down": there follow seven noted propositions concerning Ontologism. The Sacred Congregation, Wednesday, 18 Sept. 1861, wrote back: "The Eminent and Reverend Lords, with the vote of the Lord Consultors having been had beforehand, after maturely weighing all and each of the

propositions enunciated above, responded to the proposed doubt: Negatively," namely: that they cannot safely be handed down.

3. By this decree theologians and philosophers themselves understood a true condemnation and proscription of the doctrine. Wherefore those who defended Ontologism attempted to show that in those seven condemned propositions there was not contained the doctrine of Ontologism which they themselves were defending, but another doctrine well diverse. Cf. the little work of the most learned philosopher and theologian Joseph Kleutgen, L'Ontologismo e le sette tesi censurate dalla Sacra Inquisizione, Rome, with the types of the "Civilta Cattolica," 1867, p. 10 ff.

4. Nor only did private and public Professors interpret that decree in this way, but also the Roman Congregations themselves understood that decree in this sense, namely of true condemnation and proscription. These things are read in the decree transmitted by His Eminence Cardinal Patrizi to His Eminence the Cardinal Archbishop of Mechelen concerning the philosophical books of G. C. Ubaghs, dean doctor in the University of Leuven. "Moreover, what already, as from my letters given to the individual Bishops in Belgium on 11 Oct. 1864, the aforesaid Cardinals had reserved to themselves to do, they undertook to examine other doctrines which are contained in the more recent editions of the works of the same author. And indeed they had to perceive that in those books doctrines fully similar to some of the seven propositions are handed down ... which the Supreme Congregation of the Holy Office on 18 Sept. 1861 judged could not safely be handed down; ... hence it will be altogether necessary that not only those books and those similar to them be kept away from the Catholic University and from all schools, but also," etc. Rome, 2 Mar. 1866. Cf. the cited little work, p. 84 ff.

5. After the decree reported in the preceding number, new doubts arose on the part of the defenders of Traditionalism and Ontologism. For they said that the decisions given were disciplinary, not doctrinal; that they could not teach, but could keep in heart, those things which before were handed down; and that these were still probable and lawful. When these things had been denounced to the Supreme Pontiff by His Eminence the Cardinal Archbishop of Mechelen and the other Bishops of Belgium, in letters given 1 Aug. 1866†, His Eminence Patrizi, in the name of the Most Holy Father, wrote these things back to them: "In the letters ... given to the Most Holy Pius IX, judgment is sought from the Apostolic See concerning certain doubts raised ... about the responses of the sacred Congregations of the Holy Office and of the Index, sanctioned by the authority of the Supreme Pontiff both in the year 1864 and in this year 1866. But these are not such doubts as require a new interpretation and declaration of a matter already defined; for to dissolve these thoroughly, there is more than enough through the very responses of the Sacred Congregations. Indeed, it was heard not without wonder that doubts of this sort had been proposed.... Now Catholic men, but much more ecclesiastics, have this duty, that they subject themselves fully, perfectly, and absolutely to the decrees of the Holy See, with contentions removed from the middle which would obstruct the sincerity of assent." Rome, 30 Aug. 1866. Cf. the cited little work, p. 86-89.

6. After the preceding letter had been received, His Eminence the Cardinal Archbishop of Mechelen and the other Bishops of Belgium, on 17 Dec. 1866, gave letters to the Rector and

Professors of the University of Leuven, in which, speaking of the resolution of both Congregations, of the Holy Office and of the Index, of 2 March 1866, cf. above n. 5, they assert these things: "These decisions are so clear that the cause is to be regarded as definitively decided. But we know that the most firm will of the Most Holy Lord is that, errors having been removed, all think the same. Therefore, so that all dissensions may remain extinguished forever, and in a question long agitated and now defined nothing may remain to be wished for or awaited, we send the formula of letters to be subscribed by all who either handed down the reproved doctrines, or in some way adhered to the same." But in the formula it is said: "I subject myself fully, perfectly, and absolutely to the Decisions of the Holy Apostolic See of the day 2 March and 30 August of this year 1866, cf. above n. 4, 5, and from my soul I acquiesce. And therefore from my heart I reprove and reject any doctrine opposed," etc. Cf. the cited little work, p. 90, 91.

7. Retraction of Ontologism, by force of the condemnation pronounced by the Holy Office, was required from Rev. D. Ugonin, when he was proposed for the Episcopate. This was the formula of retraction: "Since I, the undersigned, have received from His Eminence and Most Reverend Lord Archbishop of Myra, Apostolic Nuncio in France, that the doctrine which I set forth in my philosophical work on Ontologism (Etudes philosophiques, Ontologie) is disapproved by the Holy Apostolic See, as one which especially, whether explicitly or implicitly, favors those propositions which the S. R. and U. I. decreed in the year 1861 cannot safely be handed down; I myself, with no delay interposed, freely and spontaneously declare that I hold and disapprove the aforesaid doctrine in exactly the same way as the Holy See judged, as deviating more or less from the sound principles of philosophy; and at the same time I promise that, as far as is in me, I will take care in the future that it no longer be handed down in schools. Given at Paris on 13 Oct. 1866." The cited little work, n. 15. Cf. also the Letter of Leo XIII, Litteris ad te, 1 June 1889, concerning the forty Propositions of Rosmini condemned by the Holy Office.

8. Therefore if craniotomy was condemned by the Holy Office in the same way as Ontologism was condemned, if parity stands for both condemnations, certainly it appears how great is the force of that juridical censure concerning craniotomy, it cannot safely be taught. Nor indeed may it be objected that proscriptions and decisions intervened not once, but several times, against Ontologism on the part of the Sacred Congregations and of the Holy See itself, which has not yet been had against craniotomy. For those repeated proscriptions and decisions do nothing other than inculcate and confirm that first condemnation of the Holy Office on 18 Sept. 1861, by force of which His Eminence Cardinal Patrizi, in his Letter and Decree of 2 March 1866, pronounces books infected by that doctrine to be kept away from the University of Leuven and from all schools; and the Most Reverend Bishops of Belgium regard the cause as definitively decided; and the cause was also concerning Ontologism; and, errors having been removed, they exhort all to subscribe to sound doctrines. But that Decision of 28 May 1884 was again confirmed by the Holy Office on 19 Aug. 1889†. Cf. Enchirid. Moral., ed. 4, p. 99.

9. Let us now make a step to the intrinsic consideration of the matter. That is called safe which is without danger. Therefore an opinion which cannot safely be taught is an opinion which cannot be taught without danger. And thus in the cited Decree of 2 March 1866, given through His Eminence Patrizi, after it had been affirmed that in the philosophical books of G. C.

Ubaghs "doctrines plainly similar to some of the seven propositions are handed down ... which the Supreme Congregation of the Holy Office on 18 Sept. 1861 judged could not safely be handed down," it is then said that in the same books doctrines or opinions are found which cannot be handed down without danger.

10. Now this danger is danger of error, if we wish to understand the aforesaid decision of the Holy Office in its proper and obvious sense. For it is said that it cannot safely be taught, and danger in teaching some opinion properly and in the obvious sense is nothing other than danger of error. Wherefore that Decree is not merely a certain disciplinary prohibition of teaching or handing down that opinion in public schools or even private schools; but it is a true doctrinal judgment concerning the truth and falsity of the same opinion, which consequently can no longer be handed down in all schools, but must be kept altogether away from them.

11. Nor indeed should it be said that this danger is to be understood from the subject matter, which is a certain practical matter. For the matter with which it is concerned is practical and most practical, but it is a matter not regarding ecclesiastical and positive discipline, but regards morals and touches the natural law itself. Wherefore from consideration of the subject matter it does not follow that that decree is merely disciplinary, but that it is doctrinal in the matter of morals. For that decree involves this in other words: that opinion concerning craniotomy cannot be taught without danger of error in the matter of morals. Nor should one press by saying that it can very well happen that that opinion cannot safely be taught, even speaking speculatively, because practically someone could easily abuse it, by applying it badly to practical cases, and by not rightly distinguishing the cases in which it can lawfully be given to execution from the cases in which this is altogether illicit. This insistence is not valid; for this confusion of a case of lawful application and a case of illicit application is impossible, and therefore that danger is not this danger, of badly applying the aforesaid opinion practically, and of confusing case with case. Truly the opinion concerning craniotomy in the abstract, considered according to itself and generally, was not condemned; but the opinion concerning craniotomy in the concrete, according to determinate circumstances, and considered in particular, was condemned. For the question proposed, which the Sacred Congregation resolved by its decision, is not: "Whether it can safely be taught in Catholic schools that the surgical operation which they call Craniotomy is lawful," thus generally, but in that peculiar and determinate case concerning which there was question and controversy among theologians, "namely when, if it is omitted, the mother and son are going to perish; but if it is admitted, the mother is to be saved while the infant perishes." Certainly in this case the doctrine concerning craniotomy is declared dangerous. Therefore the very application to the determinate case is declared a dangerous doctrine; it cannot safely be taught. Therefore that danger is not the danger of practical abuse, the danger of illicit application, but is the danger of error in the opinion enunciating the lawfulness of craniotomy in that aforesaid case.

12. But it is still objected that the aforesaid opinion could well be called not safe, although determined to that peculiar case concerning which there was question, on account of the very practical danger of discerning the case of true necessity: namely that, if craniotomy is omitted, the mother and son truly are going to perish, but if it is admitted, the mother truly is to be saved while the infant perishes. This cannot reasonably be objected. For that case of necessity

is supposed certain in that proposition concerning the lawfulness of craniotomy. Only in such a hypothesis was the question being made by Theologians and proposed to the Sacred Congregation, and the Sacred Congregation certainly understood it in this sense; for it says in its Response, "with account also taken of those things which, in this matter, were written by expert Catholic men and transmitted by Your Eminence to this Congregation." Besides, this objection would then have force, when in reality that case of necessity would be difficult to know; but where the matter concerns craniotomy the matter is most clear and subject to no difficulty, unless the Surgeon is wholly stupid, which is per accidens and is not attended to in the condemnation of a general proposition. For the matter is considered per se.

13. One danger is intrinsic, another extrinsic; likewise one is proximate, another remote. The danger of error in asserting the lawfulness of craniotomy cannot be from a circumstance extrinsic to craniotomy itself, insofar as it is employed in such circumstances of things as render it illicit. For, as was just observed, the lawfulness of craniotomy in general is not condemned, but the lawfulness of craniotomy in the aforesaid circumstance of the death of the mother and son if that operation is omitted, and of the safety of the mother and death of the son if it is done. Now if any circumstance can be imagined which could render craniotomy lawful, certainly it is no other than the one just enunciated, when without that operation neither mother nor son is saved, but with it employed, the son is not constituted in a worse condition and the mother is saved. But the Holy Office, in this very case, declares that it is dangerous to teach the lawfulness of craniotomy. Therefore the danger of error is intrinsic to craniotomy itself, namely because it is the direct killing of an innocent. The danger of error is intrinsic to the very complex, that is, to craniotomy clothed with the aforesaid circumstance; for in that complex craniotomy remains with its whole nature, which is by no means changed by that most favorable circumstance. Now if the danger of error is intrinsic, namely by force of craniotomy itself, that danger of error consequently cannot be remote, but is proximate and most proximate; for nothing is more proximate to some thing than its intrinsic and intimate nature. Therefore the lawfulness of craniotomy cannot be taught without proximate and intrinsic danger of error.

14. An action which is a danger of sin is an action distinct from the very action of sin, and it is sin not properly and strictly speaking by reason of itself, but by reason of that action sinful in itself with which it is connected. Likewise an opinion containing danger of error is an opinion distinct from another certain and unshaken doctrine against which that opinion contains the danger of erring, and thus it is connected with it insofar as it is opposed to it. Therefore generally, and speaking per se, an opinion which cannot safely be taught, or which contains danger of error, is an opinion which, although in itself it is not error, nevertheless is connected with error; at least insofar as of itself and in the obvious sense, and not per accidens from mere lack of consideration, it labors under equivocation between error and truth in such a way that it easily turns toward error rather than toward truth, and he who adheres to it is judged indeed to embrace error, not truth. Yet when, from the subject matter, a proposition is so determined that no way lies open to truth, although it is defined merely as not safe, and by reason of the note or censure itself cannot be held except as merely dangerous, or containing danger of error, nevertheless consequently that proposition is to be held as error, namely by reason of legitimate deduction. And hence it is easily explained why, although those seven propositions

of Ontologism were not marked with another censure than that they cannot safely be handed down, nevertheless in the Schools they were commonly held as altogether improbable after that Decision of the Holy Office. The same seems to happen in our case. For no true sense can be imagined, since in the most favorable case itself it is said that it cannot safely be taught. Wherefore it does not appear how craniotomy can still be probably defended.

15. That adverb safely can be declared in another way; but the conclusion is almost the same. That adverb can be resolved into an adjective, and then the understood substantive is to be sought. Now this substantive, which can be thought of more favorably in the present matter, is conscience; so that it cannot safely be taught is the same as it cannot be taught with a safe conscience. This interpretation, which pertains especially to a moral and practical matter, seems altogether to agree with the decision of the Holy Office of which we treat; for in it the matter concerns a moral and practical thing. Now in Moral matters, that opinion is called safe in the merely speculative order which someone can hold in mind and externally teach to others without danger and fear of erring against some certain law or precept. In our case that certain and unshaken law is the law, Thou shalt not kill. Wherefore that craniotomy cannot safely be taught in that case set forth above is the same as that craniotomy cannot be taught without danger and fear of error against the law, Thou shalt not kill. But this danger and fear of error would then, on the part of the thing, remain a mere danger of error and would not consequently become error, if a case could be given in which in reality the law Thou shalt not kill would not be broken. But this case cannot be given. For if this case were given, it would be no other than the proposed case itself. But that proposed case would then, on the part of the thing, remain a mere danger of error and would not become error directly against that law Thou shalt not kill, since it would not already be ultimately determined by every favorable circumstance, and could still be determined further. Therefore, although by force of the condemnation that opinion is only a not safe doctrine, nevertheless in reality by force of the matter that opinion becomes altogether improbable.

16. But someone will ask why then the Holy Office negatively said that opinion was not safe, and did not positively say that it was erroneous, if not safe is in reality the same as erroneous? First it is answered: it did not say this, because this was not being asked, but that; and the Sacred Congregations respond to proposed doubts with customary formulas, nor in their brief responses are they accustomed to make a treatment of the matter in question, so as to set it forth and explain it. Secondly it is answered: although the not safe opinion in our case, by reason of the matter, by legitimate conclusion, falls back in reality into an erroneous or false opinion, nevertheless that theological censure, not safe, is not the same as another censure: erroneous or error, which is a far graver censure. We contend the former, not the latter. But we say erroneous or false, also to narrow the signification of error, since strictly speaking error and false are not the same.

"From Augustine in the Enchiridion, cap. 17, and Contra Academicos, cap. 4, to err is nothing other than to approve true things as false, or false things as true. In this signification error is nothing other than a false proposition, and thus it can be found not only in the matter of faith or Theology, but also in any natural or human matter whatever; but according to the common manner of speaking, error, as though by antonomasia, in each matter is accustomed to signify not any false judgment whatever,

but, by a certain exaggeration, that which is more evidently or more certainly false." Suarez, De Fide, D. 19, S. 2, n. 11. Hence the same Suarez, discoursing concerning an erroneous proposition, insofar as it is distinguished from a heretical one in theological censures, says that it is one "which is opposed to a truth certain by theological certainty, which does not attain the certainty of faith; because in no way is it immediately revealed, as is supposed; but it is a conclusion evidently inferred from one proposition of faith and another evident by the natural light.... A proposition contrary to such a proposition does not attain the grade of a heretical proposition, because it does not have the highest opposition to a proposition of faith, such as an immediate one is. But that it is erroneous is manifest, because after a heretical proposition, it has the highest repugnance with the truth of faith, namely mediate, through evident inference." l. c. n. 14. The doctrine of Cardinal Lugo is the same, De Fide, D. 20, S. 3, n. 73: "The word error, taken most broadly, can be attributed to any false proposition in any matter; for he who believes the false as true errs from the true and is deceived. Commonly, however, that word is accustomed to be restricted to the false which is opposed not only to the true, but to the evident, or certain, which among all is commonly known certainly. Nor is any false opinion in Philosophy called error, but one which is opposed to a doctrine certain and received as such among philosophers. Wherefore in Theology only that is called error which is opposed to some certain truth which among Catholics and Theologians is held as certain." But insofar as error is a special censure below heresy, according to the same Lugo, "error properly is that which is opposed not immediately, but only mediately to the doctrine of faith, insofar as it immediately denies a proposition which is not of faith, but only a theological conclusion, evidently deduced from one proposition of faith and another evident by the light of nature." l. c. n. 78.

17. Wherefore if that censure, it cannot safely be taught, is taken altogether properly and strictly by reason of itself, according to the general rule of interpreting condemned propositions, the aforesaid opinion concerning craniotomy is a dangerous opinion, which namely cannot be taught without danger of error; but consequently it is also a dangerous opinion, which cannot be reduced to practice without danger of sin. But if the censure, it cannot safely be taught, is considered in the subject matter, that same opinion concerning craniotomy is simply false, and in this sense it can also be called not safe, dangerous, in the true and proper sense; for it contains an intrinsic and proximate danger of denying an evident, certain, and universally received truth, namely Thou shalt not kill.

18. The doctrine set forth in the present Commentary can be confirmed by another Response of the Holy Office, 14 Aug. 1889, which was published after the present Commentary had been issued. It is of the following tenor: "In Catholic schools it cannot safely be taught that the surgical operation which they call craniotomy is lawful, as was declared on 28 May 1884, nor any surgical operation directly killing of the fetus, or of the mother bearing it."

19. Lastly it must be noted that if craniotomy cannot safely be taught, neither can direct procurement of abortion be safely taught in the same circumstances. This follows by legitimate reasoning. For first, the arguments by which craniotomy was defended are the same as the arguments by which direct procurement of abortion is defended. Besides, it matters little whether the infant's head is cut apart or compressed, or the infant is infected with poison, or an immature fetus, by mere ejection from the maternal womb, directly and per se is deprived

of the natural element altogether necessary to him for life. It is indeed the same thing to kill a man by iron, by poison, or by throwing him into fire or immersing him in water.

On the Dominion of Authors

To n. 875 ff. ON THE DOMINION OF AUTHORS

1. "It is certain," says Fr. Gury, Comp. v. 1, n. 566, "that any man has by natural right a right in the fruit of his industry and of his talent. For if a thing bears fruit for its owner, a fortiori this ought to be true of internal faculties, since nothing can be more proper to man. Therefore anyone can use to his own advantage those things which he has thought out by his own talent in the sciences. Therefore the inventor of some art has a strict right that his secret not be stolen and, against his will, divulged to the public. But if this happens, the damager, according to the measure of the injury inflicted, is altogether held to restitution. But the difficulty is whether an author, once his works have been emitted into the light, can keep them proper to himself and exclude others from their use."

2. This use, of which the question treats, is that by which others commit works once published to the press themselves, and sell them for their own profit. If the author retains to himself a right of property absolutely and unlimitedly in his works already emitted into public light, certainly he can impede others from publishing and selling his works; or, as is commonly said, the author can reserve to himself the right of property as regards this use. But if the author now retains no right of property for himself in those works, he cannot reserve to himself the aforesaid use, of publishing and selling the book.

3. This question can be treated from natural right and from positive right. If natural right is considered first, there are those who hold that the aforesaid right of property, from natural right, altogether strictly belongs to the author. The reason is because if the law of nature itself demands that to each be preserved his own right in the fruit of his industry and talent, and no fruit of industry in our matter can be perceived unless the work is handed over, as they say, to the community, certainly the same law of nature demands that this handing over or publication of the work to the community not deprive the author of the fruit of his industry. On the contrary, there are those who hold that the author, by the right of nature, does not have a right in his work once already published and made public, because a thing once handed over to the community becomes by that very fact of common right; and therefore the right of nature cannot demand that the author be able to reserve to himself the use of the work and exclude others from publishing and selling it.

4. In order that the question be rightly resolved, the strict demand of right must be distinguished from fittingness or congruity and equity. Furthermore, a book formally considered, namely as regards that series of doctrine and its exposition and explanation which it contains, must be distinguished from a book materially considered, namely as regards that material edition which the author made. Now the question concerns neither mere congruity of right nor mere equity, nor is a question moved concerning the material edition made by the author himself. It is evident that it is altogether fitting and equitable that the author be permitted to enjoy the advantage and profit which comes from a book composed by him, and he perhaps will be able

to perceive this advantage and profit only in small part unless the right is reserved to him of excluding anyone else from the aforesaid use of his book. Wherefore a positive law acceding and defining a right of this sort is certainly an altogether just law and obliging in conscience; and with that law standing, the author has a strict right of property in his own book. Likewise it is evident that the author, by natural right itself, has a strict right of property in that edition of his book which he himself took care to have made in his own name.

5. But if the discussion is of the strict demand of commutative justice, from natural right, and of another edition of the book to be made and sold by another in his own name, it seems far more probable that this is not opposed to natural right. And indeed the right of property is either a right in the substance itself of the thing and its utility, or in one or the other only. If the matter concerns the substance itself of the thing, since truth is the proper object of the human intellect, as soon as truth and a complex of truths has been published in public light, it becomes the property of each one. Wherefore, just as as soon as an Astronomer has manifested the existence of some star in the sky, all can see it, nor can the Astronomer retain to himself the right that he alone see the star with the exclusion of others, or that they at least pay some tribute to him if others wish to see the star in the sky with their own eyes; so the author of a book, as soon as he has publicly set forth some truth, or series of truths, certainly cannot impede others from understanding the truth, with no tribute paid to him, and perhaps even persuading themselves of it better than he himself. And this is confirmed from the very intention and scope of the writer, preacher, professor: for all these intend that readers and hearers be persuaded and make the doctrines handed down their own. And this is their greatest praise, if they obtain it.

6. Nor indeed can any difficulty be taken from the disposition of things, order, exposition, and the very diction or writing by which things are enunciated and manifested to others. For all these things are reduced to the truth itself and to art and science, which by natural right pertain to all. Nor indeed can there be any right of property in these things, since they can be useful to all; nor do they have in themselves the limitation which material goods have, so that if they serve and are useful to one, they cannot serve another, nor be useful to him. Does the author of a book understand and reason less because others understand what he taught in the same way, and reason in the same way as he does?

7. Hence another point is most easily demonstrated: once a work has been emitted into public light, the author does not preserve dominion in the use of his work, formally inspected, as we have already explained in n. 4; and in this sense we always speak of the author's dominion, and the question is debated among doctors. Truly, if the author does not preserve dominion in the substance of the thing as soon as the work has been made public, how, dominion in the substance having been transferred, will he himself preserve dominion in the use? If this could be done, someone could also by mutuum transfer to another the dominion in the substance of money, with the dominion of the use of the money reserved to himself, which afterward he would sell.

8. Besides, if the author preserves to himself dominion of the use of truths which he perhaps found, explained, and ordered, someone could not use them by study and meditation, and from them proceed by reasoning to other truths perhaps also to be found, as can easily happen in

the chemical, physical, mathematical arts and sciences, etc., by proceeding even to the practical application of those truths, which indeed is of the greatest utility and also of the greatest profit. Likewise someone could not publish another's book with notes added for explaining things; nor could he refer texts from another's book in his own book; nor could he thoroughly refute another's book, and remove all authority from it as erroneous, scandalous; which imports dominion not only in the use but also in the very substance of the thing, which he destroys as by his own right.

9. Once the use of his book, publicly published, has been reserved to the author, to the professor in his lecture which he gives in a public academy, to the preacher in his sermon which he gives in a public church, now another writer cannot use that book for composing another and better book, since it is easy to add to inventions; now a hearer could not repeat the lecture to friends and discourse about it in another academy; now another preacher, retaining well by memory the sermon he has heard, could not without sin of injustice deliver the same sermon to the people, and perhaps with greater fruit on account of his personal qualities. But it matters little, as is clear, whether someone retains by memory a lecture pronounced by mouth, a sermon heard, and repeats it to others, or learns by memory and repeats another's lecture or another's sermon published in type. Likewise it matters little that someone repeat another's lecture or sermon orally to others, or transmit it by letters to friends, or by lithography, or even by public type, in the same language, or in another, or even in different languages. But since here one's own talent, one's own ability, one's own industry and labor also intervene, why can someone not perceive the fruit of his own talent and labor, or why must he abstain from exercising his own talent, from exercising his own labor?

10. Moreover, if the author had the aforesaid dominion in his own work, he could transfer it by testament to his heirs, and they to others. Now those who defend the aforesaid dominion of authors are content to assert it only for a determinate time. This limitation shows that in reality, in this question, the strict demand of right is confused with mere fittingness of right and natural equity. Likewise, if the author cannot claim for himself an absolute right in the use of his own book, how is a right of this sort restricted at least to excluding others from publishing and selling the book? For among the other uses of a book this also is numbered. And if someone buys a book, and thus by purchase has made it his own, materially also inspected, how can he be impeded from publishing that same book himself, and selling it in his own name, at his own expense and profit? If someone has a nursery of trees and sells trees, he certainly cannot prevent another, having bought a tree, from himself forming a nursery and then himself also selling trees from it, at his own expense and for his own profit. The same is altogether valid concerning another edition of a book.

11. Nor indeed does the argument of the adversaries prove anything; for since it proves too much, it proves altogether nothing. Truly, what is assumed is certainly true, that the very law of nature demands that to each one his own right in the fruit of his industry and talent be preserved. But a fruit of this sort is that which the author in reality perceives from the edition and from the editions which he himself makes of his own book. That a fruit of this sort also extends to editions made by another, or that another is therefore impeded from making these editions, is not drawn from that; indeed the contrary follows: for another uses his own talent,

his own industry and labor, and therefore possesses and enjoys by right its fruits. The other point which is added, that the same law of nature demands that, if no fruit of our industry can be perceived unless the work is handed over to the community, that handing over not deprive the author of the fruit of his industry, likewise proves nothing. For first this would prove that the handing over of dominion in a mutuum ought, a fortiori, not to deprive the owner of money of the fruit to be perceived from money. Moreover, if the author of a book, lest he be deprived of the fruit of his industry, can impede another from publishing the book, translating it into another language, etc., a merchant, businessman, craftsman, etc., can impede other merchants, businessmen, craftsmen, from exercising the same commerce and business and the same art; for from that he is deprived of the fruit of his industry. Nor is it of force that he himself found the mode of manufacturing goods, of conducting business in such or such a way, of exercising the art. This is opposed to common sense itself and to the practice of the God-fearing. And thus if someone discovers a way of finding water in fields and publicly manifests it, who would ever impede proprietors of fields from finding water in their own land, or impede others from exercising this art and perceiving profit from it? Nor is it true that then the author of a book, for example, could perceive no fruit of his talent and of his industry. He certainly perceives the fruit of that edition, or of those editions, which he himself makes. This one thing is true in the case, that the author of a book does not perceive every fruit which can be had from it. But this contains no difficulty. For this is verified almost everywhere in all contracts. And thus he who sells a horse perceives only the price of the horse. The buyer uses the horse for several uses, and by his own industry perhaps earns each year money exceeding the very price of the horse. Nor could someone say that the law of nature demands that, if no fruit of his own thing can be perceived unless the dominion of the thing is handed over to another, that handing over not deprive the owner of the fruit of his own thing. Once the handing over of dominion has been made, that fruit is no longer the fruit of his thing, but of another's; and the thing bears fruit for the other owner, not for the prior owner, whose thing it no longer is. Besides, if someone attends even lightly to the force of the argument brought forward, it is plainly such that it altogether concedes what the adversaries affirm, namely that the thing is handed over to the community, and consequently that the author is deprived of that right of property, and that the thing becomes of common right. But what is asserted, that even in such a case the law of nature demands that the author not be deprived of the fruit of his industry, is consequently said indeed of congruity, of a certain fittingness, of a certain natural equity, but logically it cannot be said of strict right by force of commutative justice.

12. With these things presupposed, we now resolve various particular questions. And first: does he violate another's right who publishes in type a manuscript work without the consent of the author? R. Affirmatively. The reason is that the work, so long as it has not been emitted into the light, remains altogether under the dominion of the author. Wherefore such a usurper is held to restitution of the manuscript and compensation of damages.

13. Likewise, does he violate another's right who publishes in type the lectures of some professor, or the sermon of an orator? R. There are those who generally affirm this, even concerning a public lecture or sermon. The reason is that to teach or preach publicly is not to hand one's work over to another for publishing or selling. But it seems that a distinction must be made. For if the matter concerns a private lecture, a private sermon, it is a clear thing that the

professor or preacher retains his whole right in his lecture or sermon. But if the matter concerns a public lecture or sermon, the argument already made has force: that the thing has already been handed over to the community, and by that very fact has been made of common right. And this is confirmed by the fact itself, for there is no one who condemns as injurious to others those who publish public speeches in type, in newspapers, of Deputies or Senators in Parliaments, or of others in public assemblies. The very words of the Supreme Pontiff in public receptions of the Christian faithful are publicly published, and there is no one who accuses this as a grave sin against justice.

14. Can a recently published book be committed to type in another place without the permission of the author? R. If the matter concerns a very distant place, those Doctors themselves who contend that by the right of nature the author retains the right of property in his book to be published again, so that others are excluded from such a right, concede that in such a case a right of this sort seems less to be urged; since an edition in very distant regions less impedes the author from perceiving a congruous fruit of his industry. And this reason still more clearly shows that the author in reality does not retain a right of property in his work; since if he retained that right, it would matter little whether the book is published in a neighboring or distant region without permission, against the will of the author. Certainly it matters little, as regards injustice, that someone occupy another's house, another's field, and use and enjoy them against the will of the owner in a neighboring or most remote region. Nor is it of force to say that someone in such a most remote region could not defend and protect his right of property; otherwise, as the Doctors themselves shrewdly note, it would be lawful for anyone to take crops or grapes for himself at will, because the owner of the field or vineyard is not able to guard them. But if the matter concerns a neighboring place, and treaties are present between various dominions, by force of which the author can enjoy the same right elsewhere as in his own country, commutative justice is certainly wounded, and the violator of another's right is held to compensate damages according to the norm of the laws. But if no convention is present between various regions, since law has no force outside the territory of the legislator, although perhaps such a law is present in the place of the author, nevertheless in another place the editor of the book is not bound by it; and therefore the matter is to be defined only by natural right. But by natural right a right of property of this sort is none, or is very uncertain. Therefore he who uses his own right and publishes another's book cannot be accused as a violator of another's right and as a damager. And this is much more valid if someone did not merely publish another's book, but first translated it into another language. For then one's own industry and one's own labor enter still more.

On Grave Matter in Theft

To n. 1297 ff. ON GRAVE MATTER IN THEFT

1. The reason for doubting in this matter is that it seems necessary at present to exceed the limits fixed beforehand both by the older Theologians and also by St. Alphonsus, l. 3, n. 527, 528, because from their age up to our own no slight difference is detected concerning the value of money. For all now complain that the prices of things have grown notably in comparison with past times, or, what comes back to the same thing, that the value of money has decreased.

Whence it is necessary that grave matter in theft now reach a greater quantity of money. But on the contrary it seems that one must not depart either from the opinion of the older theologians, which is always to be held in the greatest account in a moral matter, nor, and much less, from the doctrine of St. Alphonsus, which had special approval from the Holy See. Moreover, although it must be conceded that, according to the variety of times, variety has also been introduced in the value of money, nevertheless if a proportion of this sort were to be preserved, since now the prices of things have grown immensely, the grave quantity in theft would also have to be increased immensely, which would yield to the evident harm of Society. To resolve this question we inquire into three things: 1. How many kinds of grave matter are to be distinguished in theft?

2. What in our age is to be judged matter both relatively and absolutely grave in theft?

3. What is to be judged concerning the proposed reasons for doubting?

2. As regards the first question it is enough to note that, properly speaking, grave matter in theft is always relative, nor can it be absolute. The reason is because, as the Angelic Doctor says, 2. 2, q. 73, a. 3, "sins which are committed against one's neighbor are to be weighed per se according to the harms which are inflicted on the neighbor, because from this they have the notion of fault. But the harm is so much the greater, as a greater good is taken away." Notwithstanding this, theologians commonly distinguish in theft absolutely grave matter and relatively grave matter. Relatively grave matter is that which is grave with attention to the conditions of the person in particular, to whom a grave harm is in reality brought. This is altogether consonant with the doctrine of St. Thomas just set forth, l. c. and q. 66, a. 6 ad 3. But as regards absolutely grave matter, Scavini, Milan ed. 1874, book 2, n. 697, says: "theft will be absolutely grave when, independently of the damage which the owner suffers, in the sense of men it is judged per se to suffice for constituting a lethal sin." This definition is either inexact, as incomplete, or in reality says and explains nothing; because, if precision and abstraction is made from the harm of the neighbor, no judgment of grave matter can be formed. And if the common sense of men judges such or such matter grave, it judges so because in such or such matter it considers grave harm of the neighbor. Otherwise that judgment of common sense would be a judgment without foundation and sense. Absolutely grave matter, according to the common doctrine of Theologians, is matter which is grave with respect to all, of whatever condition they may be, whether they are poor or rich; whether they are individual persons or moral persons; as that which in any conditions of state whatever always brings grave harm to the neighbor, for such a place or time. It is said for such a place or time, because the same thing in this place or time, on account of abundance, is esteemed little, and consequently its taking away inflicts light damage; but in another place or time, on account of rarity and necessity, it becomes of greater value, and consequently the taking away of the same thing brings grave damage. Hence what the same Scavini adds, l. c., is also inexact: "But it is clear that the determination of absolute matter, and matter in itself, for judging concerning the gravity of sin, ought to have place only then when the state and condition of the damaged person is unknown." And he asserts this absolutely grave matter to be about five or six lire.

3. Aptly Lugo, de Iust. et Iur., D. 16, S. 2, n. 23: "And indeed it cannot be denied that the malice of theft is respective, nor has anyone denied this. For although they say that some matter of theft can be given which is grave absolutely, and another respective..., nevertheless they do not will that it be grave without any respect to the damage of the neighbor; but they only signify that there is some matter of such a kind through which grave damage is inflicted on all, and therefore, with such matter standing, there is no need to examine and weigh the condition of the person suffering damage, since it is established that every person, of whatever condition he may be, suffers grave damage from theft of this sort. Nor can it be denied that some matter exists which is not grave with respect to all, but is light with respect to one and grave with respect to others.... For the gravity of the malice is taken from the gravity of the damage inflicted; but the gravity of the damage comes from the greater need by which the neighbor needs that thing. Wherefore, since not all equally need the thing which is taken away, it follows that they do not suffer an equally grave injury, and therefore one person can suffer a light injury, another a grave injury, through theft of an equal sum."

4. As regards the second question, there is a twofold criterion or rule for judging and determining matter relatively grave. For one criterion is intrinsic, the other extrinsic. Let us speak first of the intrinsic. That which reasonably and, speaking per se, brings grave displeasure to our neighbor is a grave sin against charity; and if justice enters into it, it is a grave sin against justice, which obliges more strictly than charity. The Angelic Doctor, 2. 2, q. 66, a. 6, uses nearly this reasoning to prove that theft per se is a mortal sin. "Mortal sin," he says, "is that which is contrary to charity, insofar as it is the spiritual life of the soul. But charity consists principally indeed in the love of God, secondarily in the love of neighbor, to which it pertains that we will and work good for the neighbor. But by theft man inflicts harm on the neighbor in his goods; and if men everywhere stole from one another, human society would perish. Whence theft, as contrary to charity, is a mortal sin." Now to deprive some person and his family of daily sustenance, necessary according to his own condition, reasonably brings grave displeasure to our neighbor, who sees himself and his own deprived of the things necessary for life according to their proper state. Whence it evidently appears that the harm is grave, by computing in sustenance not only food, but also clothing and habitation. "Commonly the Doctors say," says St. Alphonsus, l. 3, n. 527, "that in theft that is grave matter which would suffice someone according to his condition for the sustenance of himself and his family for one day; in which, as La-Croix rightly notes, n. 985, with Sporer, Gobat, and others, not only food is computed, but also clothing and habitation." And here it must be noted that by sustenance of this sort, speaking per se, honorable pleasures and lawful recreations must also be comprehended, those fitting to one's proper condition, and of which someone would also be deprived with altogether reasonable displeasure. For man does not live only by bread and flesh, water and wine, in a strict measure, nor does he live solitarily, but he lives physically also by other things, and in a fittingly good and gathered measure, if not always overflowing; but morally he lives in his own family and in society; and therefore expenses of pleasure, for the sake of honorable and fitting recreation and also of due honor, must at least sometimes be sustained. Theologians seem to understand this implicitly by that sustenance of the family which they call congruous and fitting to one's state.

5. But as regards grave sin, although deprivation of sustenance in the sense set forth is certainly and among all grave, nevertheless a still lesser quantity suffices for grave sin, according to the principle established. For if someone were deprived of daily sustenance necessary only for his own individual life, and not also for the life of his own family, he certainly would experience grave and reasonable displeasure. Indeed, to constitute grave sin from the principle already established, it is not necessary that someone be deprived of all that which is necessary for the daily sustenance of his own individual life, as this sustenance has just been explained, but it suffices that he be deprived only of a notable part of it. Truly, would someone not perceive a grave and rational displeasure if even for one day he were deprived of necessary food, or clothing, or habitation, or therefore could not fulfill the offices of his own state and condition?

6. Wherefore, considering 1. what at present, and as regards Italy, is expended for the sustenance of life by the poor, by workers, by various persons of civil and noble condition; what is expended daily in Colleges and Seminaries, in Religious Communities, in families which live decently and fittingly, but also with due economy; considering 2. the wages of workers, physicians, advocates, public officials, and the profits of merchants, the pensions of students in Colleges and Seminaries, the dowries of Nuns, the ordinary revenues of the rich; it seems possible to establish at present as regards Italy, and perhaps also, at least more or less, for other European regions, the following relatively grave matter: 1. for the poor, 1 lira, and somewhat less or more according to the degree of their poverty; 2. for workers and craftsmen, 1 lira, 2, 3, according to the various trades and arts, more or less lucrative; 3. for persons of civil and ordinary condition, who live by revenues, or by the exercise of trade and commerce, or of a liberal profession, 5, 6, 7 lire, according to the various degree of comfort of life; 4. for ordinary rich persons, 10, 11, 12 lire, and for ordinary moral Bodies and for the more opulent rich, 10-20 lire, according to the degree of riches; 5. finally for persons extraordinarily rich, such as reigning and non-reigning Princes, Nobles and very wealthy Merchants and Businessmen, Moral Bodies and Societies possessing exorbitant Capital, relatively grave matter cannot be designated; recourse must be had to absolutely grave matter. And indeed, when a private Prince, for example, possesses 50 and 100 millions, who daily for letters alone and telegrams expends 5, 10, 15 lire and more, it is evident that theft of 10, 20 lire certainly will not deprive him in any way of fitting sustenance. Therefore to assert that matter of this sort is relatively grave for them is merely arbitrary, and is in no way confirmed by the enunciated intrinsic criterion and rule for judging concerning relative gravity.

7. But let us make a step to the extrinsic criterion and rule. Since here the matter concerns a moral judgment in a moral matter, such criterion and rule is contained in the authority of Theologians. "Besides," says St. Alphonsus, l. c., "to make a just measurement of this gravity, the Salmanticenses rightly say, de Rest., c. 5, n. 12, that the judgments of the wise contribute greatly; and their greater authority on this point seems to me to constitute greater probability. Wherefore I have taken care diligently to gather here the diverse opinions of the Doctors," etc. But more recent theologians, with few excepted, by a slight difference, of which account cannot be taken in moral matters, agree altogether in the matter assigned. For they agree in this, that for European regions relatively grave matter at present is almost twice as great as that which St. Alphonsus established for his own time. Now the holy Doctor, l. 3, n. 528, with no distinction made between the lowest, middle, and highest grade of riches, assigns: 1. for the

poor, 1 julian, 54 centesimi; 2. for workers, 2 julians, 1 lira, 8 centesimi; 3. for craftsmen, 2 and a half julians, 1 lira, 35 centesimi; 4. for the moderately rich,

4 julians, 2 lire, 16 centesimi; 5. for the absolutely rich and for very opulent merchants, 6 julians, 3 lire, 24 centesimi; 6. for the very wealthy magnates, 1 gold coin, 5 lire, 38 centesimi; 7. for a very opulent Community, one and a half gold coins, 8 lire, 7 centesimi; 8. for Kings, 2 gold coins, 10 lire, 76 centesimi. But the holy Doctor adds, l. c. n. 527, that very many doctors extend this quantity up to 3 gold coins, 16 lire, 14 centesimi. And this quantity, as is clear, reaches fairly nearly half the quantity assigned. For a julian is worth 54 centesimi of a lira. But a gold coin is worth 5 lire, 38 centesimi. Cf. Finardi, Prontuario del Commerciante, etc., Rome 1862. To omit others for the sake of brevity, the most learned Joseph D'Annibale has these things in Summula Theolog. Moral., Part 2, n. 201, ed. 2, Milan, 1882: "I should have St. Alphonsus before my eyes, with the price of things almost doubled since the time in which he lived. Therefore for the present value of coins I would say that damage which does not reach about one lira is always light per se, even if to a beggar; on the contrary I would say that damage which exceeds about 30 lire is grave per se, even if it were inflicted on the very richest person, or on a King. Between these the damage ought to be measured relatively, that is, from persons: therefore I judge grave 1. for the poor, that is, for a beggar, or a worker, or a craftsman, damage of 1 lira or 2 or 2 1/2; 2. for merchants, according to each one's fortune, whether lowest, middle, or highest, 2 1/2, or 4, or 8; 3. for the rich, insofar as from their own income, expenses having been deducted, nothing remains over, or little, or much, or very much, 3 and perhaps less, or 4 or 7 or 10. Finally, as regards moral persons which have the body of a College, damage is grave which is valued at 10, or, if they are opulent, at 20." This quantity also is not very remote from the matter assigned. And meanwhile the abundance of money and the facility of procuring it legitimately for oneself has grown much.

8. Let us come to absolute matter. As for relative matter the damage of individuals is attended to, all particular circumstances having been considered, so for absolute matter the damage of Society itself must especially be considered. And once this has been admitted, it is then easily understood how absolutely grave matter is always grave, namely grave for all without distinction, although the matter concerns those extraordinarily and exorbitantly rich. With this principle established, absolutely grave matter seems to be that which exceeds forty or thirty lire, the quantity designated by D'Annibale. But someone will object: how can forty or thirty lire bring grave damage to Society, if they do not bring grave damage even to an extraordinarily rich individual, such as are great bankers, or money merchants in Europe, to whom the loss of 30 and even 300 lire and more in their commercial operations is scarcely sensible, and is immediately compensated by so many and so great other profits? It is answered that the common doctrine relative to fornication is that it is prohibited in all cases by natural right itself, on account of the uncertain education of the offspring. Although in some particular case, which is not very difficult to be verified, both father and mother, otherwise very rich, agree between themselves that the offspring be educated in due mode; indeed even that they themselves immediately undertake care of a fitting education, and therefore by a sincere and efficacious will promise that marriage is immediately to be entered, fornication would always remain prohibited by natural right; because if it were lawful and permitted in some particular case, there would always be the most grave danger of disordered license with immense harm to

the offspring. In a similar way, although a determinate quantity, already quite large in itself, does not bring grave harm to some individual in particular, nor even for the same individual is there danger at least of further grave harm: nevertheless it is sufficient for constituting a grave and most grave danger for Society itself, and, speaking per se, even for the individuals themselves. Wherefore it will always be, absolutely speaking, grave matter in any case. For if the grave damage of the individual and of society is considered, it is necessary to take account not only of expenses necessary for the sustenance and decorum of one's own state, but also of light thefts, which are frequent enough not only among thieves by profession, but even among persons of one's own family, community, society; especially, however, among persons to whom the administration of the goods of others is entrusted, especially of public dominion and utility. "Namely," says the renowned D'Annibale, l. c. n. 257, note 20, "it is very difficult for the things of masters to be administered so faithfully by others that something not adhere to the hands of those handling them." Therefore with such danger posited, not only is it evident that the designated quantity is sufficient for constituting absolutely grave matter; but perhaps that quantity can even seem, not without reason, excessive and to be restricted to narrower limits. For where the gravity of sin does not deter, and a rather notable hope of greater profit invites and incites to new theft, several men, and commonly far more, would commit it, and our fortunes would be most gravely injured, unless they were deterred by fear of graver sin. Hence it is clear why, although the excess of the wealth of a most opulent King above the wealth of an ordinary rich man, or even of a Marquis or Count, is far greater, without any proportion, than the excess of a rich man above the wealth of a citizen, or common man, nevertheless not so great a proportionate excess is required in grave theft done to a King above theft done to a rich man, as in this latter with respect to theft done to a common man. And this doctrine seems conformable to the doctrine just reported of the Angelic Doctor concerning the gravity of theft, who declares it absolutely, saying: "But by theft man inflicts harm on the neighbor in his things, and if men everywhere stole from one another, human society would perish." Cf. also Lug. l. c. n. 29 ff.

9. Nor indeed should the authority of Cardinal De Lugo be objected, as asserting, l. c. n. 21, that a quantity absolutely grave in theft cannot be established. For Lugo l. c. does not assert this, but a well diverse matter, namely "that it cannot be defined what are the borders of each matter" - namely light and grave - "so that below such a sum it is light, and above it it is grave." Certainly one thing is that this quantity cannot be mathematically defined, another that absolutely grave matter cannot even be determined morally, with a certain moral latitude, namely a little more or a little less; and this is what Cardinal De Lugo himself attempts to effect in the following paragraphs. Cf. n. 29 ff., where he designates the universal reason of the malice of grave theft, namely absolutely grave theft. Cf. also n. 35.

10. Nor likewise should it be objected that from the discourse made it would follow that any theft is grave, since from any light theft the most grave detriment of Society and individuals could be feared. For men are not so enticed to these lesser thefts, from which they take little profit, as they are enticed to those other greater thefts in which profit not contemptible appears, if they could be done without grave sin, as the same Lugo has it, l. c. n. 33. But the assigned quantity of forty or thirty lire certainly brings profit not contemptible, more than sufficiently enticing to stealing.

11. Finally, the authority of Lugo is still objected against the assigned quantity of 30, 40 lire as absolutely grave. For Lugo asserts this quantity to be 100 gold coins, l. c. n. 21. Therefore, if in the time of Lugo this was the absolutely grave quantity, in our time it ought certainly to be still greater. It is answered that the assertion is altogether false. For Lugo does not say that for his own time that was the absolutely grave quantity, but that it was a quantity evidently and certainly grave; which is well diverse; and he asserts this indeed by a certain almost exaggeration. For in that same number he is not speaking of matter to be determined absolutely, so that he determines it, but he is speaking only of the difficulty of determining that grave matter, and much more of defining the limits of that grave and light matter, on account of the very difficulty of finding in this matter some rational principle and some fixed rule. Hence in the following numbers, 22-29, he reports various opinions of Theologians and various rules assigned by them, which he weighs and shows to be insufficient. But before he sets forth in n. 29 his rule and rational principle, so that the malice of grave theft, namely absolutely grave theft, may be understood, he openly declares that he in reality does not depart from the opinion of others, with attention also to the decrease of money at that time; and he says at the end of n. 28: "Wherefore I will not unwillingly consent in reality with the aforesaid, that in order to Kings and wealthy Magnates the theft of one gold coin is required; for the rich, six or seven silver coins; for craftsmen, four; for the poor, the value of daily food, or the average wage which in the middle time between winter and summer is given to a digger." A silver coin is the same to Lugo as a julian or royal, n. 22-26; but an ordinary royal is worth 26 centesimi of a lira. But since he takes a silver coin for a julian or royal, and says in n. 26 that one Ducat contains eleven royals or Julians, by royal he understands not an ordinary copper royal, real de vellon, but a silver royal, real de plata, of value about twice as great, and about equivalent to a julian. And in n. 31 he still more definitively establishes that theft of one gold coin is absolutely grave, on account of the danger of grave detriment which is in it: "for," he says, "from several thefts of one gold coin, done to you by diverse persons, your family goods would truly undergo a most grave detriment." Likewise in n. 32 he affirms the same altogether clearly, extending that absolutely grave matter not to 100 gold coins, but to one or two gold coins. Finally in n. 35, again discoursing on the difficulty of precisely defining the limits of grave and light matter, although he speaks hypothetically and only by way of example, he certainly brings into the middle not 90 or 80 gold coins, but 6 julians. This can also be confirmed by the authority of St. Alphonsus, who in n. 527 lists Lugo among the authors who, "with respect to the very wealthiest Magnates ... say that one gold coin suffices for grave matter." But from the opinion of Lugo, n. 29, with respect to these very wealthy persons, matter relatively grave is not to be required, but absolutely grave, which he then establishes according to this rule and principle: namely "that some things are prohibited not precisely on account of the damage which they bring when they are done once, but on account of the damage which they would bring, repeated more often, if they were lawful.... Thus therefore in the present matter it seems that it must be said that although theft of one gold coin, or of half, done only once, would not bring great detriment, especially to a rich man; and therefore considered according to itself would not seem sufficient for inducing eternal damnation; nevertheless consequently it would bring great detriment, because if such a theft were light and could be done without grave sin, thefts of this sort would be multiplied, from the frequency of which the greatest detriment

would follow even for rich men and princes." And from these things it is more than sufficiently clear how false it is to assert that absolutely grave matter according to Lugo is the sum of 100 gold coins, namely more than 500 lire, since a gold coin is equivalent to 5 lire and 38 centesimi.

12. Let us come to the third question. The reason brought forward, that one should depart from the limits designated by the ancient Theologians and by St. Alphonsus, is excellent. For since the value of money has changed and has been lessened, and notably lessened, the damage brought at present to the neighbor in equal circumstances is much less than what it formerly was. And in the matter of theft it is precisely this damage, grave or light, which renders the matter grave or light. St. Alphonsus himself, l. c. n. 527, says that the gravity of the matter of theft "is to be measured respectively according to the circumstances of the person, thing, place, and time." Lugo has the same, l. c. n. 24, 25. But that which is asserted on the contrary, that it is not lawful to depart from the doctrine of the ancient theologians and of St. Alphonsus, whose works received special approval from the Apostolic See, truly has no place in our case. For we do not depart even by a nail's breadth from their doctrine and principles, although the conclusion is diverse, because the circumstances are diverse, as St. Alphonsus himself and Lugo teach that they ought to be. Finally, what is added, namely that grave matter in theft would assume almost enormous proportions if attention had to be given to the changed value of money and price of things, is most false. Certainly a certain more recent theologian, relying on a certain catalogue of prices which is found in a certain Police Ordinance of the City of Bourges in France in the year 1598, from a comparison of the aforesaid prices with the prices of the same city in the year 1883, finds the proportion to be one to thirteen. And hence he deduces that grave matter for a king is at least 150 lire. This assertion is a very true exaggeration, and without any solid foundation. It is not enough to compare the price of a few goods and the wage of some workers, which are found in that Ordinance of the City of Bourges. But in order that we may come to a conclusion seriously deduced and founded, it is necessary to examine and weigh the whole present State of Society relative to public and private riches, relative to the value of money and all necessities of life. And first indeed, the poor, who live from the goods of the rich, are at present as many as before and perhaps more, and much more, than before. If money is more abundant, taxes and revenues are also greater, in an equal proportion at least, if not greater. The wage of public officials has been increased, but certainly it has not been increased thirteenfold, nor tenfold, nor much less in relation to the wage of the time immediately past. But the necessities of life at present have been increased; and money, if, with attention to actual commerce, it is more fruitful by the force of industry than before, the increase certainly is not thirteen times greater, but scarcely by a third or a half. On the contrary, the cultivation of fields in several places is far less fruitful, and in some almost abandoned. But with attention to the evolution of commerce, the loss of Capitals on account of cessions of goods, fires, shipwrecks, etc., is far greater than before. And although there is now a greater activity, course, and, as it were, motion of riches, notwithstanding this, those who now are extraordinarily and exorbitantly rich do not seem in reality to be richer than those who were extraordinarily rich in past times, as can easily be deduced from their great works and foundations of beneficence, of most splendid buildings, Monasteries, Hospitals, etc., which they erected and founded. Finally, if according to that Ordinance of the

City of Bourges a pound of beef and a hen today is of thirteen times greater price than before, a proportion of this sort is not true for all cities and towns of Europe, indeed not even of the same France, as is established from the Catalogues of prices which are published in public Newspapers. And thus, for example, in the City of Bourges the best hen of all is bought for 3 lire and 90 centesimi; at Turin it is bought for 2 lire and 40 centesimi. Cardinal Lugo himself observed this for his own time; for he says, l. c. n. 24: "I saw at Madrid that the common price of one hen was eight silver coins, while nevertheless at Salamanca, when I was studying there, it was commonly bought for two silver coins." Besides, how many other things there are which formerly were bought at a much dearer price, but today are had at a cheap price, as is easy to perceive in the transmission of letters, in the transport of merchandise, in journeys, in things made by machines, in combustibles necessary for lighting and for burning, etc. Therefore the excess of grave matter in theft at present can in no way be enormous. All things well weighed, it scarcely perhaps reaches the double, as can also be confirmed from the stipend of Masses, which whether from custom or from diocesan Statutes has been increased about double. And thus in the time of St. Alphonsus and Benedict XIV, the stipend of manual Masses was 10 solidi; but that of founded Masses was 26, 27 solidi, cf. Benedict XIV, Instr. 56, n. 19 ff.; but today it is 1 1/2, 2 lire for various places. Nearly the same must be said concerning the wage of soldiers, physicians, etc. In the year 1856 the Sacred Congregation, for the furnishing of alimony, decreed the sum of 6 ducats monthly, about 30 lire, etc. Cf. Bizzarri, Collect., etc. Moreover, in the time of Molina, who died in 1600, the variation of money was from 1 to 6. De Iust. et Iure, Tr. 2, D. 685, n. 2. In the time of Lugo, who died in 1660, the variation of money was from 1 to 3. De Iust. et Iur., D. 16, n. 25. St. Alphonsus also affirms variation from 1 to 2, l. 3, n. 383. Nor indeed did these doctors increase grave matter of theft for their own time by this proportion. Therefore that grave matter of theft is to be increased according to the ratio of the change of the value of money, by the same proportion, is proved neither by reason nor by authority.

The Law of Fasting

To n. 1573 bis. THE LAW OF FASTING From the Decree of the Holy Office FREQUENTES PLURIBUS, 5 Sept. 1906.

1. The present law is valid for Italy and the adjacent Islands, for Sicily, for Sardinia, and also for the island of Malta.
2. Wherefore for the same regions there remain revoked any local indults, concessions, privileges to the contrary, even of the Bull of the Crusade as regards the indult of abstinence, and customs even immemorial.
3. The general law of the Church is that which now is in force in place of the general law previously in force in Italy. Wherefore there are still to be observed the fasts and abstinences which in some places were observed from a peculiar vow, as at Rome the fast on the vigil of the Purification and in Sicily the fast on the vigil of the Immaculate Conception. Likewise there are still to be observed by Religious the fasts and abstinences which are prescribed from their own Rules. For the Decree of the Holy Office regards only the fasts and abstinences to be observed

in Italy from the general law of the Church, to which Religious consequently also are held. The Law Of Abstinence Alone

4. This is the abstinence to be observed from flesh-meats and from meat broth. Wherefore eggs, dairy products, and all condiments are permitted in any meal.

5. The mixing of flesh-meats and fish in the same eating is not prohibited to those dispensed or excused from abstinence. For it is prohibited only on days of fasting.

6. But the aforesaid law of abstinence obliges on all and each Friday through the year, without obligation of fasting. Wherefore on Saturday there is no longer an obligation of abstinence. The Law Of Fasting Alone

7. The law of fasting is the law of one meal per day, which nevertheless does not exclude the evening collation and the morning morsel.

8. Flesh-meats and meat broth are permitted in the one eating for those who are held to observing the fast. Consequently eggs, dairy products, and all condiments are permitted in the same eating. In the little supper, for the same fasting persons, flesh-meats and meat broth are prohibited; eggs and dairy products are prohibited; but all condiments are permitted, from the fat of any animal, and also from butter and margarine.

9. But he who, for any cause whatever, is not obliged to fasting can eat flesh-meats, eggs, and dairy products several times in the day. For when there is no obligation of fasting, no distinction of meals is made as regards the free use of eggs, dairy products, and condiments, art. 4, unless it is expressly provided otherwise, as in art. 2, where besides fasting or one eating, the law of stricter abstinence is also simply prescribed to be observed. Cf. Invit. of the Sacred Cardinal Vicar of the City of His Holiness for the year 1908.

10. For all, both those fasting and those not fasting, during Lent, Sundays not excluded, and on all other fasting days, the mixing of flesh-meats and fish in the same eating is prohibited, though not also broth from meat and condiments from fish.

11. This law of fasting alone obliges on Monday, Tuesday, Wednesday, and Thursday, even of Greater Week, during Lent, except Ash Wednesday, Wednesday of the Ember Days, and the vigils of St. Joseph and of the Annunciation, when this falls in Lent and each feast is to be observed by precept. Cf. n. 13. The Law Of Fasting And Milder Abstinence

12. This law, besides the one eating to be observed by those fasting, prohibits flesh-meat and meat broth, however expressed; not other foods coming from flesh, milk, cheese, butter, eggs. But both in the principal meal and in the little meal otherwise permitted, though not in the morning morsel, it is lawful to use condiments from any fat, butter, margarine, and similar condiments; and therefore it is not lawful to take milk or cheese in the evening little meal. From any fat, and therefore also from fat which is collected from meat broth and is floating on its upper surface. Wherefore those fasting cannot use eggs and dairy products in the little supper.

Those not fasting can use these whenever they eat during the day. Cf. Invit. of the Sacred Cardinal Vicar of the City of His Holiness, year 1908.

13. This law obliges on Ash Wednesday; on Fridays and Saturdays of Lent and Advent; on Wednesdays and Fridays and also Saturdays of the Ember Days; on the Vigils of St. Joseph, Spouse of the B. V. M., and of the Annunciation of the same B. V. M., where these feasts are recalled under precept, and, as regards the Vigil of the Annunciation, provided that it falls within Lent. Wherefore, since these feasts now are no longer of precept, the law of abstinence, by force of these feasts, is no longer had, unless from a peculiar vow or peculiar statute of a Religious Order abstinence still has to be observed somewhere. S. C. C., 25 Feb. 1912, Acta Apost. Sed., v. 4, p. 142. - It obliges besides on the Vigils of Pentecost, of the Holy Apostles Peter and Paul, and of All Saints. The Law Of Fasting And Stricter Abstinence

14. By this law, besides fasting or one eating, abstinence also is to be observed from flesh-meats, and from all those things which draw their origin from flesh: namely milk, butter, cheese, eggs, and condiments from any animal fat.

15. Wherefore, besides flesh-meats, dairy products and condiments from fat are prohibited both in the principal meal and in the evening little meal.

16. This law obliges only on four days, namely 1. on the Friday of the Ember Days in Lent; 2. on Friday of Greater Week; 3. on the vigil of the Assumption of the B. V. Mary; 4. on the vigil of the Nativity of Our Lord Jesus Christ.

17. Therefore on these days even those who do not fast are held to observe the aforesaid abstinence. For besides fasting, on these days, the law of abstinence from flesh-meats is also to be observed, and from all other things which draw origin from flesh and from condiments from any animal fat. Faculty Granted To Bishops

18. The Ordinaries of places have the habitual faculty of anticipating fasting and abstinence, or even of dispensing concerning them for the whole diocese or for some determinate places, yet from most grave causes and excepting the time of Lent or Advent, when fasting or abstinence occurs to be observed in the following cases.

On some feast day from among the more solemn ones in the Church; on the feast of the Titular or principal Patron of some place or diocese; in some extraordinary religious solemnity, such as a centenary, pious pilgrimage, etc.; in public annual fairs which are celebrated with an unusual concourse of people.

19. Excepting the time of Lent and Advent. Wherefore they can anticipate and dispense abstinence on Fridays outside Lent and Advent, and the fasts of the Ember Days of summer and autumn, and of the vigils of Pentecost, of the Holy Apostles Peter and Paul, of the Assumption of the B. V. Mary, of All Saints, and of the Nativity of Our Lord Jesus Christ.

20. Anticipation can well be done by reason of the very occurrence of the aforesaid feast, solemnity, and fairs; but dispensation is to be granted only from a most grave cause, if, for example, it is foreseen that even if fasting or abstinence were anticipated, they would not be observed, and there would be very many sins. Vigils Of Suppressed Feasts

21. On the vigils of feasts very recently suppressed by the Motu Proprio of the Holy Father, fasting and abstinence are to be observed as before. For by the aforesaid Motu Proprio dispensation

was made from fasting and abstinence only for the days of double feasts of precept, besides Sundays preserved, and for the feasts of Patron Saints, when these are celebrated solemnly and with a great concourse of peoples or of the people. Nevertheless this leaves unchanged what was asserted in n. 13, on account of the clause which is had in the Decree of the Holy Office: where these feasts are recalled under precept. Where these feasts are recalled under precept, and, as regards the Vigil of the Annunciation, provided that it falls within Lent. Wherefore, the precept of observing the feast now having been abolished, abstinence on the vigil of each feast is no longer to be observed, unless from a peculiar vow or peculiar statute of a Religious Order it is to be observed somewhere. And indeed, by the Decree of the S. C. C. of 18 Sept. 1911, by which it was declared that the vigils of feasts suppressed by the Motu Proprio of 2 July 1911 must be observed, the Decree of the Holy Office of 5 Sept. 1906, issued for Italy, was not derogated as regards the vigils of St. Joseph and of the Annunciation of the B. M. V. S. C. C., 25 Feb. 1912.

From the Constitution Vacante Sede of Pius X, 25 Dec. 1904, concerning the Apostolic See vacant and concerning the election of the Roman Pontiff.

Power of the Sacred College

To n. 178, 181, 182, 251, 283. POWER OF THE SACRED COLLEGE

"During the vacancy of the Apostolic See, the Sacred College of Cardinals shall have absolutely no power or jurisdiction in those things which pertained to the Supreme Pontiff while he was living, neither of doing grace nor justice, nor of handing over to execution what was done by the dead Pontiff; but it is held to reserve all these things to the future Pontiff. Therefore We decree to be invalid and void whatever of power or jurisdiction pertaining to the Roman Pontiff while he lives, unless insofar as it is expressly permitted in this Our Constitution, the assembly of Cardinals should judge ought to be exercised, the same Church being vacant." N. 1.

"But the Pro-Datary or Sub-Datary, and the Secretary of Briefs or his substitute, shall hand over to the Sacred College under closed seal the supplications of graces which are in their possession." N. 11. "The offices of the Camerarius of the Holy Roman Church and of the Major Penitentiary do not cease through the death of the Pontiff." N. 12. "The office and jurisdiction of the Cardinal Vicar in the City do not expire by the death of the Roman Pontiff." N. 19. "Likewise the office and power of Legates, Nuncios, and Apostolic Delegates do not cease while the See is vacant." N. 20.

The Almoner of the deceased Pontiff continues to exercise his office with due subjection to the Sacred College of Cardinals and dependence on it. N. 21.

The Sacred Congregations have only ordinary faculties. Moreover they use these only in granting those graces which are lesser. N. 25. To n. 521. OATH

All Cardinals in the Conclave for the election of the Supreme Pontiff are held to emit an oath according to the prescribed formula. N. 11. Likewise all Conclavists are held to emit an oath, according to the prescribed formula, concerning the secret to be kept, under penalty of excommunication latae sententiae reserved in a special manner to the future Pontiff, even privatively as regards the Sacred Penitentiary, and under penalty of privation of any benefice, pension, office, or

munus, to be incurred by the very fact of transgression. N. 40. To n. 521, 550, 958, 1540. SIMONY, OATH,

"All and each of the Cardinals not impeded by health, when the little bell has been rung for the third time through the accustomed places of the conclave, must come together for the scrutiny; and if anyone shall not obey this law, he shall incur the penalty of excommunication latae sententiae." N. 37. "Once the Conclave has been closed, let no one be admitted to conversation with the Cardinals or others having part in the Conclave, unless in the presence of the Prelates to whom the custody of the Conclave is entrusted, and unless they speak in a voice and language intelligible. And if someone perchance, which God forbid, should secretly enter the Conclave itself, let him exist by that very fact deprived of every honor, grade, office, and benefice." N. 49. "We likewise will that letters, or writings of any kind, even printed, whether to those who are in the Conclave, not excepting the Cardinals of the Holy Roman Church themselves, or especially from the Conclave to those who are outside, can in no way be sent, unless first all and each are subjected to the examination and inspection of the Secretary of the Sacred College, and at the same time of the Prelates deputed to the custody of the Conclave. But We absolutely forbid all, lest daily or periodic newspapers be sent outside the Conclave. But those who act contrary shall be subject to the penalty of excommunication latae sententiae." N. 50.

"Moreover, as already in the formulas of oath reported above, both for the Cardinals of the Holy Roman Church and for the Conclavists, it has been expressed, We strictly prescribe and command that by all having part in the Conclave the secret be most religiously kept in all those things which pertain to the election of the Roman Pontiff, and in those things which are done in the Conclave, or in the place of election. Hence they are altogether held to avoid and beware of whatever can in any way violate the secret directly or indirectly, whether words, or writings, or signs, or any other things whatever; so that those violating this law incur excommunication by that very fact, from which, just as from any other penalty of excommunication imposed and inflicted against any persons, or to be imposed and inflicted below, they can be absolved by no one, not even by the Major Penitentiary by force of any faculty, except by the Roman Pontiff, unless in the article of death." N. 51.

"But specially, under penalty of the same excommunication, We prohibit the Cardinals from revealing to their familiars or Conclavists or to any others whatever those things which directly or indirectly regard the scrutiny, and likewise those things which, in Congregations of the Cardinals, whether before the Conclave or during it, were done or decreed." N. 52.

"Furthermore We prescribe, their consciences being gravely burdened, to the Cardinals of the Holy Roman Church, that a secret of this sort be kept even after the election of the new Pontiff has been accomplished, nor may it be violated in any way, unless a peculiar faculty or express dispensation for this has been granted by the same Pontiff. We will this precept to be extended to all others who had part in the Conclave, if perhaps, in good or bad faith, they have learned anything concerning those things which were done in the Conclave." N. 53.

"The crime of simony, detestable by both divine and human right, in the election of the Roman Pontiff, just as it is established to be reprobated, so We also reprobate and condemn; and We bind the guilty of this crime with the penalty of excommunication latae sententiae; nevertheless the invalidation of a simoniacal election, which God avert, established by Julius II, or by any other pontifical decree whatever, having been removed, so that the pretext for attacking the value of the

election of the Roman Pontiff may be cut off. Constitution of Julius II, Cum tam divino, 19 Kal. Feb. 1905." N. 79.

"Likewise, under penalty of excommunication, We prohibit anyone, even if he shines with the honor of the Cardinalate, while the Roman Pontiff is living and without his having been consulted, from presuming to treat of the election of his Successor, or to promise any suffrage, or for this reason, private little assemblies having been made, to deliberate and decree anything. Pope Symmachus in Synod. Rom., c. 2, D. 79; Constitution of Paul IV, Cum secundum Apostolum, 17 Kal. Jan. 1558." N. 80.

"But those things which in Our aforesaid Constitution Commissum Nobis concerning the civil Veto or Exclusive, as they call it, in the election of the Supreme Pontiff We declared and sanctioned, renewing here in every part and integrally, We will to be confirmed. Wherefore again in virtue of holy obedience, under threat of divine judgment and penalty of excommunication latae sententiae, We prohibit all and each of the Cardinals of the Holy Roman Church, both present and future, and likewise the Secretary of the Sacred College of Cardinals and all others having part in the Conclave, from receiving, under any pretext, from any civil power the task of proposing the Veto or

Exclusive, even under the form of a simple desire, or from making known this Veto itself, known to them in any way, either to the whole College of Cardinals gathered together, or to individual purple-clad Fathers, whether in writing or orally, whether directly and proximately, or obliquely and through others, whether before the Conclave or while it is enduring. We will this prohibition to be extended to all interventions, intercessions, and any other modes whatever by which lay powers of whatever grade and order wish to involve themselves in the election of the Pontiff." N. 81.

"Moreover, let the Cardinals abstain from all pacts, conventions, promises, and any other obligations whatever by which they could be bound to give or not give suffrage to someone or some persons; all and each of which, if in fact they have intervened, even with an oath added, We decree null and void, and that no one is held to the observance of them; and those acting contrary We bind from now with the penalty of excommunication. Nevertheless We do not understand that treaties to be had for the election, while the See is vacant, are forbidden. Greg. X, cap. 3, Ubi periculum, § 4, de Elect., l. 6, in Sext.; Constitution of Pius IV, In eligendis, § 26; Constitution of Gregory XV, Aeterni Patris, § 18." N. 82.

"Likewise We forbid the Cardinals, before they come to the election, to draw up capitulations, or to establish certain things by common consent, to the observance of which they bind themselves if they are assumed to the Pontificate; which likewise, if in fact they have intervened, even with an oath added, We declare null and void. Constitution of Pius IV, In eligendis, § 3; Constitution of Gregory XV, Aeterni Patris, § 18." N. 83.

"Finally, with the same words as Our Predecessors, We vehemently exhort the Cardinals of the Holy Roman Church that in electing the Pontiff, led by no inclination or aversion of soul, inclined by the favor or obedience of no one, moved not by the intercession of the powerful in the world, not by force or fear or popular breath, but having before their eyes solely the glory of God and the good of the Church, they confer their votes on him whom in the Lord they have judged suitable before the rest for fruitfully and usefully governing the universal Church. Greg. X, cap. 3, Ubi periculum, § 4, de Elect., l. 6, in Sext.; Constitution of Pius IV, In eligendis, § 26; Constitution of Gregory XV, Aeterni

Patris, § 23; Constitution of Clement XII, Apostolatus officium, § 5; Constitution of Pius IX, Licet per Apostolicas, 6 Id. Sept. 1874; Constitution of Leo XIII, Praedecessores Nostri; Constitution of Pius X, Commissum Nobis." N. 84.

"But since the faithful ought not so much to rely on the helps of human industry, even solicitous, as to hope in the urgency of humble and devout prayer, We add to this sanction that in all cities and other places at least more notable, as soon as the news of the Pontiff's death shall have arrived, by the Clergy and people, solemn funeral rites having been celebrated for him, humble and assiduous prayers are to be poured forth each day, until the Roman Church shall have been provided concerning its Pastor, to the Lord, that He Himself, who makes concord in His high places, may so effect the hearts of the same Cardinals in electing by concord that a swift, unanimous, and useful provision, as the salvation of souls demands and the utility of the whole world requires, may follow from their unanimity. And lest so salutary an edict of the present sanction happen to be neglected under pretext of ignorance, We prescribe that Patriarchs, Archbishops, Bishops, and other Prelates of Churches, and the rest whose office it is to announce the word of God, in their sermons diligently excite the Clergy and people, to be gathered more frequently for this especially, to frequent the suffrages of suppliant prayers for the swift and happy outcome of so great a business; and by the same authority exhort them not only to frequency of prayers, but to the observance, as circumstances to be weighed shall have advised, of fasts. Greg. X, cap. 3, Ubi periculum, § 5, de Elect., l. 6, in Sext." N. 85.

"But We ask Our elected heir and Successor that he not, deterred by the arduousness of the office, withdraw from undertaking it, but rather humbly subject himself to the counsel of the divine will: for God who imposes the burden will Himself also put His hand under it, lest he be unequal to bearing it; for He who is the author of the burden is Himself the helper of its administration; and lest the weak man succumb under the magnitude of grace, He who conferred the dignity will give strength. Constitution of Leo XIII, Praedecessores Nostri." N. 87.

"This consent having been furnished within the term, insofar as there is need, to be determined by the prudent judgment of the Cardinals through the greater number of votes, immediately the elected one is true Pope, and actually acquires full and absolute jurisdiction over the whole world and can exercise it. Hence, if anyone should dare to attack letters concerning any businesses whatever, prepared by the Roman Pontiff before his coronation, We bind him with the sentence of excommunication." N. 88.

"Then the new Roman Pontiff is published to the people waiting by the Prior of the Deacons." N. 89.

"But if the elected one is not yet Priest or Bishop, he will be ordained and consecrated by the Dean of the College of Cardinals." N. 90.

"Finally he is crowned by the Dean Cardinal Deacon." N. 91.

"Therefore, the whole cause of the matter having been gravely considered, We establish and prescribe these things, decreeing that these present letters and whatever things are contained in them ... always and perpetually exist and shall be firm, valid, and efficacious, and obtain and possess their full and integral effects, and support those whom they concern and for the time will concern, and ought to be observed by them respectively and inviolably; and that it is invalid and void if it should happen otherwise that anything be attempted concerning these things by anyone, by any authority, knowingly or ignorantly. "We also will that these Our Letters be read before all in the first

Congregations accustomed to be held after the death of the Pontiff, as above (n. 11, a); again after entrance into the Conclave, as above (n. 45); likewise when someone has been raised to the honor of the purple, with an oath interposed concerning religiously retaining those things which are decreed in the present Constitution." Pius X, Constitution Vacante Sede, 25 Dec. 1904. Fr. A. LEPIDI, O.P., Master of the Sacred Apostolic Palace FRANCIS FABERI, Assessor, Vicar of the City

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