COMMENTARY ON THE THIRD BOOK OF THE DECRETALS (LECTURA SUPER III DECRETALIUM)

St. John of Capistrano, O.F.M.

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Dedication to Pope Sixtus V

To the most holy and most blessed Lord Sixtus V, Supreme Pontiff.

Since two kinds of study are set before men in letters, the sacred and the profane, I have always been of the opinion that a Christian man ought to despise the latter and strive with all his might toward the former. In this, since I distrusted myself and knew that I could accomplish nothing out of my own resources or wit, I judged that I should at least labour at this: to bring to light the writings of pious men, especially of the region in which I was born. When, therefore, certain excellent little works of my great great-uncle, Blessed Bernardino, of the Order of Friars Minor of the Observance, composed nearly a hundred years ago, had come into my hands, sought out by me with sharp labour and no slight expense, I then went to Venice and, out of my devotion toward him, had them printed. Following the same course in those works which were written by that great man and (not to alter Biondo's words) most celebrated man, John of Capistrano, a pupil who adorns the Seraphic Order of Francis, and who shone in his life with miracles, and frequent ones, a thing rare and almost unheard of since the times of the Apostles, I wished likewise to bring to light these Commentaries of his on certain titles of the Canon Law, which were granted to me two years ago when I was visiting my native country, lest over a longer space of time they should perish, as has happened to some other works of his, not without great sorrow of my mind. These Commentaries will meanwhile soften that sorrow; and I have resolved that they should appear under the invincible and venerable protection of your name on earth, most holy and most blessed Father: both because he was of the institute of the same Saint Francis, to which your Beatitude also belongs, so that here a Franciscan is commended to a Franciscan; and because he treats those subjects by which the life and ministry of priests is expressed, of whom you have been constituted by Almighty God, beyond any ambiguity of doubt, President, Prince and Universal Pastor; all of whom you rule and preserve by your virtues, and with fervent inclination of mind and zeal nothing is closer to your heart than that the members should agree with the head, live rightly, and duly perform in order the things that belong to their office. Nor ought it to seem strange to anyone if men living an innocent, chaste and blameless life desire that what they strive to have in themselves should come to pass in others also. For, as the whole Church of God bears witness, you, most holy, presiding most holily and deservedly having obtained the chair of Peter, show yourself by your most holy life worthy of it, so that all the faithful of Christ can truly say that a Holy One has been given to the Holy See. For they saw in you, before you possessed the throne of Peter, with how constant, how strong, how invincible a breast you despised, drove out and cast down all human things, prosperity and adversity, joys and sorrows, riches and calamities; by which you made yourself so conspicuous with unconquered strength that, once raised to the Pontificate, you have been a terror not only to those who were troubling the public and private state of Italy with robberies, crimes and oppressions, but even heretics, Turks and all the enemies of Christ seem to dread your name with astonished minds. But these and other things men of happier genius will commend in their writings to the admiration of posterity. I shall live content with this one thing, if the offering of these Commentaries pleases your Beatitude and, as is your wont, you receive it with a glad countenance, so that I may persevere more readily, more cheerfully and more boldly in the task which I have undertaken piously enough. Here at last, most holy Sixtus, I halt the course of my speech, lest I keep your Beatitude longer from your most holy occupations and cares; and with the

Christian piety I owe to God I kiss your most blessed feet with the mouth of my heart, since it is not granted me to do so in person. May Almighty God grant you long life, I pray, so that, as you have begun, you may instruct the men of this world who are corrupt and thoroughly defiled in holy, pious and religious rites and morals, and may most abundantly cherish the flock divinely entrusted to you by the Lord to feed, sustaining it with your wings; so that the saying may be found true which they say this Blessed John prophesied of you: *The Sun shall rise and shall illumine the world*, and so on.

Your Holiness's most humble servant,

Antonius Amicius of Aquila.

Prooemium

Of the Reverend Father John of Capistrano, a man of great holiness, Doctor of Theology and of both Laws: Clear Commentaries on certain titles of the Third and Fifth Books of the Decretals.

Whatsoever you do in word or in work, do all in the name of our Lord Jesus Christ (Colossians 3; dist. 23, c. *In nomine Domini*; and *De testibus*, c. *In nomine Domini*). *For I judged not myself to know anything among you but Jesus Christ, and him crucified* (1 Corinthians 2).

Summary

One who desires to attain any knowledge must be attentive, docile and well-disposed.

Hearers are made docile in three ways.

Well-disposed hearers must have three things.

The good is threefold.

Clerics must have a threefold knowledge; and nos. 6 and 8.

Which are the sciences of piety.

How long one should go on learning.

Come, children, hear me: I will teach you the fear of the Lord (Psalm 33). Let the words set forth be spoken not in the person of me, a little worm, but in the person of him who said them, the eminent among the prophets, holy David, as though he wished by his invitation to make his hearers attentive, when he says *Come, children*; docile, when he says *hear me*; well-disposed, when he says *I will teach you the fear of the Lord*.

It is indeed incumbent, and it is necessary, for those who wish to reach the fruitful goal of any science and to come cheerfully to the end, to be attentive in hearing subtle things explained, docile in understanding difficult things made clear, and well-disposed in retaining useful things disclosed. The holy prophet therefore exhorts us to toil in the study of wisdom and doctrine, saying with attention of mind, *Come, children*, and so on. So Proverbs 7: *My son, hear me, and attend to the words of my mouth.* Isaiah 49: *Give ear, ye islands, and hearken, ye people from afar.* Psalm 77: *Attend, O my people, to my law; incline your ears to the words of my mouth.* Proverbs 8: *Doth not wisdom cry aloud, and prudence put forth her voice?* saying, *O ye men, to you I call, and my voice is to the sons of men … Hear, for I will speak of great things, and my lips shall be opened to preach right things*; and further on, *Receive my instruction, and not money; choose knowledge rather than gold.* And Proverbs 23: *When thou shalt sit to eat with a prince, consider diligently what is set before thy face.* So much for the first point. *The unprofitable servant cast ye out into the exterior darkness* (Matthew 25, on the hidden talent). *Woe is me, because I have held my peace* (Isaiah 6). And since, as Pythagoras taught in his precepts, he who will not bear the shame of discipline for a short time will remain for all time in the shame of foolishness, I therefore beseech you: let neither shame, nor weariness, nor toil draw you back from the dignity of knowledge, as Clement testified, speaking even of any prelates whatever: "Let no bishop, through the reproach of old age or of nobility of birth, neglect to inquire of little ones and of the least of the learned, if perhaps there is anything of profit or

of salvation. For he who lives rebelliously and refuses to learn and do good things shows himself rather a member of the devil than of Christ, and is shown to be rather unfaithful than faithful" (c. *Nullus*, dist. 38).

Secondly, it makes them docile, and so on. Ecclesiasticus 39: *He shall show forth the discipline of his teaching*. Psalm 118: *Teach me goodness and discipline and knowledge, for I have believed thy commandments;* which the very Wisdom of God promises, saying: *I will give thee understanding, and I will instruct thee in this way in which thou shalt go*. For they will be made docile if they trust in the teacher. Jerome: "The living voice has some hidden power of instruction, a different energy." Hence he likewise exhorts Paulinus not to enter the way of wisdom without a teacher. Proverbs 5 [22]: *My son, incline thine ear, and hear the words of the wise.* Secondly, if they listen in silence. Hence Hugh of Saint Victor relates that Pythagoras kept this custom: that for up to seven years, according to the number of the liberal arts, none of his disciples should dare to ask a reason for the things he said, but should give faith to the master's words until he had studied everything. To this Ecclesiasticus 32: *Hear in silence, and for thy reverence good grace shall come to thee.* Thirdly, if they do not disdain knowledge. Ecclesiasticus 3: *A wise heart and an ear that hears well will desire wisdom with all longing*.

Thirdly, it makes them well-disposed, and so on. Wisdom 1: *For the holy spirit of discipline will flee from the deceitful, and will withdraw himself from thoughts that are without understanding*. To be well-disposed, three things are required for grasping wisdom: fear (Ecclesiasticus 1), modesty, and cleanness. *For the spirit of wisdom is benevolent*. Proverbs 8: *I, wisdom, dwell in counsel, and am present in learned thoughts. The fear of the Lord hateth evil; I hate arrogance and pride, and every wicked way, and a mouth with a double tongue. Counsel and equity is mine, prudence is mine, strength is mine. By me kings reign, and lawgivers decree just things; by me princes rule, and the mighty decree justice. I love them that love me, and they that in the morning early watch for me shall find me. With me are riches and glory.* Therefore, reverend ones, *love wisdom, that you may reign for ever; love the light of wisdom, all ye that bear rule over peoples* (Wisdom 6).

For every good is either honourable, or useful, or delightful, as the Philosopher says (*Topics* 2). But since this wisdom is honourable, useful and delightful, it is all the more to be embraced. That it is honourable appears from *De vita et honestate clericorum* throughout the title; that it is useful for the present appears from *De praebendis et dignitatibus* throughout; and that it is useful as regards the future, the highest good, appears through all the titles treating of the ecclesiastical sacraments. That it is delightful appears in the desire of knowing, which is natural to all, as the Philosopher says (*Metaphysics* 1).

For clerics ought to have a competent knowledge of the sacred Scriptures, so that they may know how to teach rightly those whom they rule (dist. 36, c. 2, § *Ecce*, and c. *Si quis vult*). Malachi 2: *For the lips of the priest shall keep knowledge, and they shall seek the law at his mouth, because he is the angel of the Lord of hosts.* Hosea 4: *Because thou hast rejected knowledge, I will reject thee, that thou shalt not do the office of priesthood to me.* But also of the secular sciences (dist. 37, c. *Legimus*, § *Sed econtra*, and the following chapter), and this so that they may know how to distinguish the true from the false, and through them have access to the sciences of piety (dist. 37, § *Cum ergo*). And understand by the sciences of piety grammar, dialectic and rhetoric (dist. 37, c. *Si quis*). Thirdly, he ought to have knowledge of secular affairs (dist. 39 throughout), and so they will know how to live rightly, rule a household and govern subjects. For this reason great privileges are also conferred on students of the secular sciences, as in Auth. *Habita*, Cod., *Ne filius pro patre*, where the text says of students: "Who would not

pity them, when, made exiles for love of knowledge, from rich men they empty themselves into poor ones, exposing their life to every danger?"

Hence Augustine too says: "Though an old man, I am ready to be taught by a young man, and though a bishop of so many years, by a colleague not yet a year in office" (C. 24 q. 3, c. *Edoceri*; dist. 38, last chapter; and dist. 22, c. *De Constantinopolitano*). And no age is too late for learning, even up to the seventieth year (Dig., *De fideicommissariis libertatibus*, l. *Apud Iulianum*, where the text says: "For even if I had one foot in the grave, I should still wish to learn something"). To this Solomon encourages us, saying (Proverbs 8): *For wisdom is better than all the most precious things, and whatsoever may be desired cannot be compared to it.*

De vita et honestate clericorum (X 3.1)

Chapter Ut laici (c. 1)

Summary. 1. While Mass is being celebrated a layman ought not to stand or sit beside the altar or in the choir, and a transgressor sins venially. 2. It is lawful to pray in any part of the church, provided that laymen do not mingle with clerics. 3–4. Scandal committed in contempt of the neighbour's salvation is mortal. 5. By reason of disturbing the office, laymen and clerics in minor orders are expelled from the church. 6. Custom derogates from preceptive laws. 7. One who goes against an honourable custom does not sin mortally. 8. The words *statuimus*, *ordinamus* and the like, likewise *iubemus* and similar: whether they have the force of a precept. 9. The words *decernimus* and *statuimus* differ. 10. A law does not always have the force of a precept.

Laici. Laymen ought not to stand or sit beside the altar, or in the choir, while Mass is celebrated. This is what it says. It divides into three parts: in the first it forbids; in the second it distinguishes; in the third it grants. The second begins at *sed pars*, the third at *adorandum*. In the text at *secus altare* ("beside the altar"), supply "nor even within the choir," as appears below in the same chapter at *sed pars*. Note that laymen, while solemn Mass is celebrated, ought not to stand or sit beside the great or principal altar, that is, beside that altar at which Mass is being celebrated, or even in the choir or within the choir. Note that the holy of holies, that is, the chapel of the high altar, is open to all who wish to communicate or pray when Mass is finished. But according to another understanding it is lawful to pray in any part of the church, provided that laymen do not mingle with clerics.

I ask whether transgressors sin at least venially. Say that they do, by what is noted in c. *Testimonium*, dist. 6, and as a bishop who does not hear a whole Mass every day (as in the last chapter, *De privilegiis*, in the Sext): although he does not sin mortally, since the chapter concerns propriety, yet he sins venially. To this point *De voto et voti redemptione*, c. *Magnae*, q. 1, where the Archdeacon holds this. Attend diligently, because although the Doctors understand this chapter to speak of propriety, and so not to bind under mortal sin, yet it must be noted that if from such remaining there followed scandal and disturbance of the divine office, not only would it be mortal, but by civil law there is also the penalty of death (Cod., *De episcopis et clericis*, l. *Si quis in hoc genus*; Dig., *Ad legem Iuliam peculatus*, l. *Sacrilegii*; and C. 17 q. 4, c. *Qui autem*). For scandal committed in contempt of the neighbour's salvation is mortal (Matthew 18: *But he that shall scandalize*, and so on); so too Thomas, II-II, q. 43. And by reason of disturbing the office, not only laymen but also clerics in minor orders can be expelled not only from the choir but also from the church (below, *De sententia excommunicationis*, c. *Veniens* and c. *Cum voluntate*; *De appellationibus*, c. *Dilecto*; *De immunitate ecclesiarum*, the penultimate chapter, and c. *Decet*, in the Sext; *De sententia excommunicationis*, last chapter, § *Adiicimus*; *De privilegiis*, c. 2, in the Clementines; *De sententia excommunicationis*, c. *Gravis*, in the Clementines; and *De servis non ordinandis*, c. *Nullus*; and see below, *De regulis iuris*, c. *Qui scandalizaverit*).

In the gloss at the end: the Doctors commonly agree with this gloss. And it cannot be said that this chapter was preceptive from the beginning but was afterwards taken away by disuse or by a contrary custom, which is plain to all everywhere; and Hostiensis holds this here. It is proved by c. *Leges*, dist. 4, last §, and above, *De treuga et pace*, c. 1, where custom derogates from preceptive laws. Hence it can

be said that although the word *statuimus*, or *ordinamus*, or *providemus*, or *censemus*, or *volumus*, or *placet* be understood here, yet this chapter does not have the force of a precept, nor has it ever bound transgressors under mortal sin. And Innocent holds this here, saying that this chapter speaks of propriety and that transgressors do not sin mortally, especially where there is no contrary custom; from which he implies that the same holds, all the more, where there is a contrary custom, because of the word *maxime*. From this, according to the same, note that one who goes against an honourable custom does not sin mortally; and this seems the better reading. To this point what is noted below in this title, last chapter.

From which note also that canon law, speaking through the words mentioned above in a matter of propriety, does not have the force of a precept. The same if it says "let it not be lawful to anyone" (*De consecratione*, dist. 2, c. *Sacerdotum*). The same is held by Lord Antonius de Butrio in c. *Nam concupiscentiam*, above, *De constitutionibus*, who cites Clem. *Exivi de paradiso*, verse *Item praeterea*, *De verborum significatione*. And the same if the law speaks through doubtful words of the imperative mood, as in c. *Clerici*, below in this title, and the said § *Item praeterea*. It is otherwise if it speaks through the words *iubemus*, or *praecipimus*, or *mandamus*, or *prohibemus*, or *interdicimus*, for then one who goes against it is bound under mortal sin (C. 14 q. 1, c. *Quod praecipit*; *De maioritate et obedientia*, c. *Illud*; and what the Doctors note in c. 2 below, *De concessione praebendae*, in the Sext). The same if it says *teneantur*, as in the said § *Item praeterea*, verse *Item ordo communiter*. The same if it says *decernimus*; for this is expounded as "by decreeing or commanding we establish" (dist. 4, last §; dist. 76, c. 1, and the Doctors on both; and in c. 3, above, *De maioritate et obedientia*). So therefore note that there is a difference between the word *decernimus* and the word *statuimus*, which is remarkable; and Lord Antonius holds this too in the said c. *Nam concupiscentiam*. Or it can also be said that here the word "we counsel," or "it is fitting," or "let us say it is honourable," is to be understood; and then all would be plain.

And say, according to the gloss noted in dist. 1, c. *Humanum genus*, that a law is preceptive according to the nature of the subject matter: if the matter does not impose necessity, it is not of precept but of exhortation, however much it speaks through words sounding like a precept, and "I order" or "I command" is expounded as "I ask"; if the matter is of necessity, it is of precept, and "I ask" is expounded as "I command." See the gloss, dist. 1, c. *Humanum genus*, on the word *vult*, at the end; and see the text with the gloss, C. 11 q. 5, c. *Rogo*; and see the excellent text in Clem. *Exivi de paradiso*, § *Nos autem*, *De verborum significatione*. And it is not always true that, however much a law directs its words to a person, it is understood as a law of precept and ensnares the one who goes against it under mortal sin. This is noteworthy because of oaths given to observe what is forbidden by law; on which say as the Doctors note in c. *Cum contingat*, *De iureiurando*; and on the first point say as the Doctors note in c. *Nam concupiscentiam*, above, *De constitutionibus*.

Chapter Clerici arma portantes (c. 2)

Summary. 1. Clerics ought not to carry arms; for this they are excommunicated, and they can be deposed (no. 2). 3. How "arms" is taken here. 4. Why it is not lawful for clerics to carry arms and make war. 5. Monks who take up arms: what penalty they incur.

Clerici. Clerics ought not to carry arms. This is what it says. Note that clerics who carry arms sin mortally. This is clear because they can be excommunicated for it, as here, and no one can be excommunicated except for mortal sin (C. 11 q. 3, c. *Nemo episcoporum*, and so on). On the use of arms see fully Isidore, *Etymologies*, book 18, cc. 5, 6, 7.

It is objected that clerics who carry arms can be deposed (C. 23 q. 8, c. *Quicumque* and c. *Clerici*). Solution: first they ought to be excommunicated, and if they do not desist they can be deposed, as in the gloss; to this point dist. 50 [text unclear], c. *Clericus maleficus*.

I ask how "arms" is taken here. It seems broadly, including clubs and stones (Dig., *De verborum significatione*, l. *Armorum*). Answer: according to the Doctors, although here both offensive and defensive arms are forbidden, such as breastplates and the like, nevertheless they are not taken here so broadly as to include clubs and stones. This use of arms is forbidden by civil law even to laymen (Cod., *De usu armorum*, l. 1, book 11); and so clubs and stones and small knives for cutting bread are excluded, as is noted in Auth. *De armis*, § *Ut autem*.

I ask whether in any case it is lawful for clerics to carry arms and make war. Answer: not generally (C. 23 q. 8 throughout). And a twofold reason can be assigned. The first is that they hinder divine worship and contemplation; hence the arms of clerics are tears and prayer (C. 11 q. 3, c. *Salvator*; C. 23 q. 8, c. *Convenior*). The second reason is that, since they are ordained to the ministry of the altar, they ought always to prepare themselves to undergo death (1 Corinthians 11: *As often as*, and so on).

I ask what penalty monks incur who take up arms. Answer: even if they keep arms within the enclosure of the monastery, they are excommunicated by the law itself (Clem. *Ne in agro*, § *Quia vero*, *De statu regularium*), unless by licence of the abbot for a just and reasonable cause, as is noted there.

Chapter Ut quisque (c. 3)

Summary. 1. A priest having the care of souls ought to have one cleric. 2. A cleric even in minor orders: how he ought to read the epistle while Mass is celebrated, and what is the case by custom (no. 4). 3. A cleric ought to teach the faith to his parishioners.

Ut quisque. Every priest having the care of souls ought to have one cleric. This is what it says. Note that a cleric even in minor orders can read the epistle while Mass is celebrated, yet not with the vesture of an order he does not have; otherwise he becomes irregular (below, *De clerico non ordinato ministrante*, c. 2). Note that a cleric ought to teach the faith to his parishioners. In the third gloss, at *quia videmus*, note according to Hostiensis that whatever be the case in law, by custom it is observed that even laymen read the epistle. But the Doctors here commonly understand this to be without vesture, whether they be clerics or, still more, laymen, as in cc. 1 and 2 below, *De clerico non ordinato ministrante*; otherwise they become irregular, as there.

Chapter Si quis (c. 4)

Summary. 1. Clerics, even married ones, not wearing a fitting tonsure sin mortally and can be excommunicated. 2. How "let him be anathema" and "let him be excommunicated" differ. 3. What anathema is, and that it is taken in several ways. 4. The difference between anathema and excommunication. 5. *Anathema maranatha*: that it is a Syriac word, and how it is interpreted. 6. Clerics

in minor orders: whether and when they are compelled to wear the clerical tonsure; whether they can carry arms (no. 8). 7. Clerics bound by the laws under sin are understood to be beneficed ones.

Si quis. Clerics ought to wear the tonsure. This is what it says. Note that clerics not wearing a fitting tonsure sin mortally. This is plain because they can be excommunicated; see above in this title, c. *Clerici*. Note that a cleric, even a married one, ought to wear the tonsure and enjoys the clerical privilege, as below in this title, c. *Clericus*. Note from this text, joined with the gloss, that through these words, "let him be anathema," excommunication by the law itself is not induced. On the last gloss, at the end: the Doctors commonly agree with this gloss, and a similar gloss is in dist. 23, c. *Si quis ex clericis*. It fails, however, in the case of c. [2] below, *Ne clerici vel monachi*, in the Sext. It is otherwise, however, when the law says "let him be excommunicated," for then it is understood by the law itself, as in c. *Nobis*, the first, below, *De sententia excommunicationis*; to this point c. *Quia in omnibus*, below, *De usuris*.

I ask what anathema is. Answer: it is the same as eternal death and damnation (C. 11 q. 3, c. *Nemo episcoporum*). Likewise anathema is the same as separation, because it makes one a stranger to the Body and Blood of Christ and to entrance into the church (C. 11 q. 3, c. *Ad mensam*, § *Evidenter*, at the verse *Iuxta etymologiam vocabuli*). In the *Historia scholastica*, on the book of Numbers, in the chapter on the victory

after the word *anathematis*, it declares thus: anathema is said from *ana*, that is, "apart," and *thema*, "to place," which is to devote, that is, by vow to separate downward from our use, namely when things vowed and rendered were placed up high in the temples. Likewise anathema is sometimes taken for solemn excommunication (*De officio ordinarii*, c. *Cum ab ecclesiarum*); on which solemnity see C. 11 q. 3, c. *Nemo* and c. *Debent*, and below, *De poenis*, c. *Si quis suadente*, in the Clementines. Sometimes also anathema is taken for suspension (C. 1 q. 1, c. *Reperiuntur* and c. *Quicumque*).

I ask what is the difference between anathema and excommunication. Answer: the principal difference is in this, that, understanding it simply, anathema is taken for the greater excommunication, which is a separation from every lawful communion of the faithful, from the sacraments, from entrance into the church, and from every lawful act, as in the said § *Evidenter*. Otherwise, however, excommunication is taken for the lesser excommunication, which separates from the sacraments only, of which there is mention in c. *Engeltrudam*, C. 3 q. 4. With this word the Apostle threatens, 1 Corinthians, last chapter, saying: *If any man love not our Lord Jesus Christ, let him be anathema, maranatha*. Jerome says it is a Syriac word, and it is interpreted "the coming of the Lord." He refers this in c. *Guilisarius*, C. 23 q. 4. Sylvester spoke thus: "If anyone hereafter shall ever thus deceive any of the bishops, let him be anathema maranatha in the sight of the Lord and of the holy angels." To the matter: *De consecratione*, dist. 2, c. *Ego Berengarius*; C. 24 q. 3, c. *Certum*; C. 26 q. 2, § 1; and below, *De sententia excommunicationis*, c. *Si quem*.

I ask whether clerics established in minor orders can be compelled to wear the clerical tonsure. Answer: according to Hostiensis, yes, if they have a benefice to which they are titled; to which point above, *De postulatione*, c. 1. He thinks otherwise of a cleric not beneficed. From which note that all the laws following on the obligation of clerics under sin are understood of beneficed clerics. To this point what is noted in c. 1, *De celebratione missarum*, that such, namely those not beneficed, are not bound to the office, as there by the Doctors; and what is below, *Ne clerici vel monachi*, c. *Sententiam*; and what the gloss notes in C. 23 q. 1, in the summary, where it holds that such can carry arms and go about as

laymen. But if they wish to enjoy the clerical privilege, they ought to go about in habit and tonsure, as here, with similar places. This is well worth noting for the matter of c. *Si diligenti, De foro competenti*, and for the matter of c. *Si quis suadente diabolo*, C. 17 q. 4.

Chapter Clericus (c. 5)

Summary. 1. Clerics ought not to wear long hair or beard. 2. What the tonsure signifies for clerics. 3. It is the wretchedness and disgrace of a priest to be eager for money, temporal goods and riches.

Clericus. Clerics ought not to wear long hair or beards. I ask what the tonsure signifies for clerics. Answer: it signifies the crown of the heavenly kingdom awaited from Christ the Lord. For these are kings, that is, ruling themselves and others in virtues (C. 12 q. 1, c. *Duo sunt*); note the authority of 1 Peter 2: *But you are a chosen generation*. The shaving of the head, however, is the laying aside of all things, as there. Note concerning Absalom, son of David, that, growing long hair, he was hung by his hair in an oak as his mule ran on, and was pierced by Joab with three lances (2 Kings 18). For nothing is more wretched than to despise God for the sake of money, says the text in the said c. *Duo*. Elsewhere also it is said that no one ought to give himself over to the divine services for the sake of temporal goods (C. 12 q. 1, c. *Habebat Dominus*), and it is a gloss of Augustine on John 13. Elsewhere also it is called the disgrace of a priest to be eager for his own riches (C. 12 q. 2, c. *Gloria episcopi*; it is Jerome's). Elsewhere also it is said: "For what need is there to keep what is of no help?" (C. 12 q. 2, c. *Aurum habet ecclesia*), and it is a text of Ambrose in the book *De officiis*.

Chapter Si clericus (c. 6)

Summary. 1. A cleric not in sacred orders, and a monk, can take a wife. 2. A married cleric, if he wishes to enjoy the clerical privilege, ought to wear an honourable habit and the tonsure.

Si clericus. If a cleric is not in sacred orders, or a monk, he can take a wife. This is what it says. Note that a married cleric ought to wear an honourable habit and the tonsure if he desires to enjoy the clerical privilege concerning excommunication and the court; otherwise he does not enjoy it (below, *De clericis coniugatis*, c. *Clerici*, in the Sext). And understand "married" as married only once, and to a virgin, as there.

Chapter Clerici (c. 7)

Summary. 1. A cleric is compelled to the tonsure. 2. What jurisdiction an archdeacon has.

Clerici. Clerics can be compelled to wear the tonsure. This is what it says. Note that an archdeacon has jurisdiction, and therefore he can compel clerics not to grow long hair. On his jurisdiction see above, *De officio archidiaconi*, c. 1 and c. *Ad hoc*, and through the whole title.

Chapter Monasteria (c. 8)

Summary. 1. One who frequents nuns after being warned, whether layman or cleric: how he is punished; and what such frequenting is and how it is understood (no. 3). 2. Nuns ought not to go out of the monastery, and ought to be visited every year by the ordinaries, unless they are exempt.

Monasteria. One who frequents monasteries of nuns, if after being warned by the bishop he does not desist, is deposed if a cleric and excommunicated if a layman. This is what it says. Note that for a manifest and reasonable cause one can frequent monasteries of nuns. Note that in this case the warning precedes the penalty. Note that nuns ought to stay in the monasteries and not go out of them (below, *De statu regularium*, c. 1, in the Sext), and each year they ought to be visited by the ordinaries, even if they are exempt, as in Clem. *Attendentes*, *De statu regularium*. Understand this soundly of exempt houses that are subject to no one but the Pope. Other monasteries, however, exempt from the jurisdiction of the bishops, ought to be visited annually by those to whom they are subject, as is noted there. There is a fine gloss of Johannes Andreae there, referring what Vegetius writes in *De re militari* concerning the Roman women who cut off their hair to repair the engines against the enemy, and so on. On the second gloss, at the end: say, according to Hostiensis, that frequenting is understood according to common usage, namely when men begin to speak ill (argument from l. 1, at the beginning, Dig., *De luminibus*). This frequenting the good judge will assess (argument from above, *De officio delegati*, c. *De causis*, at the end; and Dig., *De iure deliberandi*, l. 1, § 1), considering the quality of the persons and places and the other circumstances, as below, *De homicidio*, c. *Sicut dignum*, at the beginning; for we weigh deeds from the circumstances (Dig., *De poenis*, l. *Aut facta*). On considering all the circumstances concerning crimes and arbitrary punishments, see fully *De poenitentia*, dist. 5, c. *Nemo*, § *Poena*.

Chapter Quoniam (c. 9)

Summary. 1. A bishop can compel the secular clerics of collegiate churches by statute to live together, and whether and when he can absolve them from excommunication if they strike one another (nos. 3 and 6). 2. Whether and when a bishop can erect particular churches into collegiate ones, and whether and when he can determine a fixed number of canons in a church. 4. If there are ten distinct prebends in a church, but the church is sufficient for eight canons, and someone obtains provision for himself of two vacant prebends, he can be repelled. 5. It is left to the bishop's judgement whether clerics live together or separately. 7. Whether a priest and an archdeacon can absolve from excommunication. 8. One who obtains that he be provided with a prebend, when the resources are not sufficient for a prebend, whether he ought to be received as a canon. 9. A college and a people: of how many men they consist; how many make a household, a congregation and a crowd (no. 11). 10. How many sheep make a flock, how many pigs.

Quoniam. It is in the judgement of bishops to establish that the secular clerics of collegiate churches live and sleep together; and if such, so living in common, strike one another, the bishops can absolve them from excommunication, unless the injury be atrocious. This is what it says. It contains three things, namely a statute, a penalty and a reward. First it sets the statute; the second at *si qui vero*; the third at *indulgemus*. Note that bishops by common law can, in their dioceses, erect particular churches into collegiate ones, the resources being adequate for it; and the Abbot says this has been held. To this point what is noted in c. *Nobis*, below, *De iure patronatus*. Note that bishops can determine a fixed number of canons in a church, even if the prebends are distinct. Note here the certain signs for recognising a collegiate church, on which see also what is noted in the said c. *Nobis*. Note that bishops can absolve from the sentence of the canon *Si quis suadente* (C. 17 q. 4) clerics living in

common who strike one another, unless the offence be atrocious, as in Inst., *De iniuriis*, § *Atrox*; on which see fully in c. *Cum illorum*, below, *De sententia excommunicationis*.

On the gloss at the end: Lord Bonaguida, in c. *Dilectus*, below, *De praebendis*, rejects this gloss where the church has distinct prebends. He alleges nothing, but c. 2, below, *De concessione praebendae*, makes somewhat for him. But this gloss is commonly held, on account of the laws it alleges, which speak without distinction. Hence if in a church there are ten distinct prebends, but in truth the church is sufficient only for eight canons, if two prebends fall vacant and someone obtains provision for himself of them, he can be repelled, because the bishop is bound to unite them and apply them to the others, or to the common table (argument from c. 1 and c. *Auctoritate*, below, *De institutionibus*). Some wish to resolve the saying of Bonaguida as to prebends which by custom do not require residence, because then, they say, the reason of the aforesaid laws ceases. But in truth the laws speak without distinction, and so the contrary arguments do not stand.

On the second gloss, at the end: this gloss is commonly not held, because the text speaks clearly of bishops, as appears in the registers and in the superscription of the old Decretal; and Innocent says so here, whom the Doctors commonly follow on this. Hence the text leaves it to the judgement of the bishop whether they live in common or separately; and this text conveys this at *valeatis* and at *licitum vobis sit*. To this point l. *Non quicquid*, Dig., *De iudiciis*; and see in the *Summa*, this title, § 1, where it is fully distinguished. On the penultimate gloss, at the end: the Doctors commonly hold the contrary, namely that here it speaks of secular clerics who live in common from the goods of the church in the manner of religious; for such enjoy this privilege, because common life is wont to stir up discord. And this is proved here, joined with the superscription: first, because the Pope speaks to all bishops; second, because it is plain that here he does not speak of regulars, from the word *valeatis* and the word *licitum sit*. For this the text in c. *Ex tenore*, below, *De sententia excommunicationis*, makes; and Johannes holds this too in C. 16 q. 1, c. *Decimas*, and C. 17 q. 4, c. *Nullus*. And note that regulars have in some respect more privilege, because they can be absolved by their own superiors, such as abbots or priors, as in c. *Monachi*, below, *De sententia excommunicationis*, and in c. *Canonica*, same title; but these secular clerics only by the bishops, as here. Likewise it must be noted that this text and the said chapter speak of a middling offence, not of a light or very light one, for then even laymen can be absolved by the bishop, as in c. *Pervenit*, below, *De sententia excommunicationis*, and as is fully noted there by Johannes Andreae, and above, *De praesumptionibus*, last chapter.

On the first gloss: I ask whether a priest can absolve from excommunication.

Answer: according to Hostiensis, say that he cannot; but the contrary is commonly held, since even an archdeacon can absolve, as in c. *Dudum*, the second, above, *De electione*, where there is a text; and this matter is fully treated in c. *A nobis*, the long one, below, *De sententia excommunicationis*.

I ask whether one who obtains a rescript that he be provided with a canonry and prebend in some church, if there are not sufficient resources there for his prebend, ought at least to be received as a canon. It seems so, by c. *Pisanis*, *De restitutione spoliatorum*, and c. *Cum dilectus*, *De dolo et contumacia*; on which see c. *Eum cui*, below, *De praebendis*, in the Sext.

I ask how many men make a college. Answer: three by civil law (Dig., *De verborum significatione*, l. *Neratius*); but by canon law two (above, *De electione*, c. 1). Yet the right of the college remains in one (Dig., *Quod cuiuscumque universitatis nomine*, l. *Sicut*). I ask how many men make a people. Answer: ten

men (C. 10 q. 3, c. *Unio*; Dig., *Vi bonorum raptorum*, l. *Praetor*). I ask how many sheep make a flock. Answer: ten (Dig., *De abigeis*, l. *Oves*), although four or five pigs make a herd, as in the same place. I ask how many men make a household. Answer: more than two (Dig., *De verborum significatione*, l. *Detestatio*). I ask how many men make a congregation. Answer: more than two (above, *De electione*, c. 1). I ask how many make a crowd. Answer: twenty (Dig., *Vi bonorum raptorum*, l. [text unclear], last §), or twelve and upward. Indeed the gloss says, noting on these things in c. 1 above, *De electione*, that from ten upward make a crowd; see it, and another gloss on these things, C. 10 q. 1, c. 1, and in the said c. *Unio*.

Chapter Cum ab omni (c. 10)

Summary. 1. Ecclesiastical judges ought to judge without charge; and what of those who have no benefices. 2. Secular judges can demand a tenth or another part of the suit as salary; the custom is valid. 3. Whether an ecclesiastical ordinary ought to have fees (*sportulae*); and no. 7. 4. What *sportulae* are called, and whence. 5. An arbiter can ask for fees. 6. A delegate, but not an ordinary, can compel the parties to deposit a salary for an assessor. 7. Ecclesiastical delegate judges who have no benefices, or insufficient ones, can ask the parties for salaries; and whether a custom is valid that beneficed judges may do the same (and no. 10). 8. Whether a sentence is null when statutes dictate that one stand by the counsel of a wise man, and the wise man is corrupt. 9. Whether a sentence is null if the judge has demanded a salary from both parties. 10. Money given to a judge so that he judge justly: whether and when it is recovered. 11. Ecclesiastical and beneficed judges setting out beyond their domicile: whether and when they ought to have expenses.

Cum ab omni. Ecclesiastical judges ought to judge without charge, and they cannot demand a tenth or another part of the suit, even if custom be otherwise. This is what it says. It does three things: first it rebukes the avarice of judges; second it sets the cause of the rebuke; third it concludes and commands. The second at *non attendentes*; the third at *ideoque*. Note that one must abstain from every appearance of evil (1 Thessalonians 5); the same below, *De simonia*, c. *Audivimus*. Note that the custom of secular judges, that a tenth or other share of the suit be paid them as salary, is valid, by the word of this text at *more saecularium*, and so on; to this point below, *De rescriptis*, c. *Statutum*, § *In nullo*, and the following §, in the Sext. Note that a delegate of the Pope can lawfully demand the expenses of victuals from the parties. Note that a custom is not valid that ecclesiastical judges, competently beneficed, when delegated, receive a salary from the litigants; much less, therefore, if they were not delegated. Note the argument from this text, by contrary sense, that ecclesiastical judges who do not have benefices from which they can live honourably can lawfully receive a salary from the parties, by the words *ecclesiastici redditus*, and so on. Note that ecclesiastical judges cannot demand anything in fraud under the name of assessorship, at the words *in fraudem*, and so on. Note the argument that a sentence given by an ecclesiastical judge who receives a salary in a case where he ought not seems to be venal, and therefore null, at the end of the text, at *legibus reprobentur*.

In the first gloss, at *ius suum*: Hostiensis says that the rule does not then fail, because to redeem one's right is not evil, nor an appearance of evil (C. 23 q. 4, c. *Qui peccat*). At the end of the gloss, say that the intention is regarded: whether he gave with such intention as to corrupt the judge, as the gloss says in C. 14 q. 5, c. *Non sane*. In the second gloss, at *contra legem*, say: indeed it is not against the law, because Auth. *De iudicibus*, § *Ne autem*, coll. 6, speaks of certain judges of the Emperor who received

annually two pounds of gold from the public purse, and therefore the salary from litigants was much moderated. In other secular judges, therefore, one must stand by custom or statute, as here, and C. 3 q. 3, c. *Offeratur*, where the gloss also says so; and there is a gloss in the said § *Ne autem*. In the gloss at *sportulas*, say: it is true of an ordinary judge of the civil court; for an ecclesiastical ordinary ought not to have fees, according to Johannes Andreae and the moderns here; and Lord Johannes Andreae likewise says this above, *De mutuis petitionibus*, c. 2. In the penultimate gloss: *sportulae* are said to be those things which are given to the judge by way of salary, so called because they were given in little baskets (Cod.,

De sportulis, throughout). And these fees even an arbiter can ask for, as the *Speculum* notes in the title *De arbitro*, last §, verse *Sed nunquid arbiter*. At the end of the gloss, say on this as in the said § *Tria*, verse *Arcentur*, C. 3 q. 7, and l. *Sumptus*, Dig., *De pactis*. In the third gloss, at *a sumptibus abstinere*: this gloss, in all that it said above, is approved today in c. *Statutum*, § *Insuper*, below, *De rescriptis*, in the Sext. In the gloss at *de censibus, c. Cum nuper*: Goffredus says that by custom even ordinaries, whenever they set out beyond their house, or beyond their own domicile, ask for expenses; and this seems true by law (C. 1 q. 1, c. *Iudices*, and by the chapters alleged in the gloss); and add what is noted in c. *Proposuisti*, below, *De consecratione ecclesiae vel altaris*. At the end of the gloss, say: see what is noted in the said c. *Statutum*, *De rescriptis*, in the Sext, § *Insuper*. In the penultimate gloss, at the end, say: and the delegate can compel the parties to deposit a salary for an assessor, as in c. *Statutum*, § *Assessorem*, *De rescriptis*, in the Sext; but the ordinary cannot compel (argument from above, *De officio ordinarii*, c. *Inter caetera*, and below, *De consanguinitate et affinitate*, c. 1); and Lord Johannes de Monte Murlo disputed this. In the last gloss, at the end, say: with this gloss Accursius agrees in the said l. *Venales*, and Innocent here. Johannes Andreae holds the contrary in the said § *Venales*, in the gloss alleged. Commonly, however, the first opinion is held as the truer: for if the sentence of an arbiter were wholly null, the penal stipulation would not be incurred by law itself, as in l. *Quid tamen* and in l. *Non distinguemus*, § *Quaesitum*, Dig., *De arbitris*; and yet the text in l. 3, Cod., *De arbitris*, holds that an action arises, but an exception stands in the way.

Outside the gloss, I ask whether ecclesiastical delegate judges who do not have benefices, or have insufficient ones, can ask the parties for a salary. Say, according to Egidius, that they can, by this text by contrary sense; and so the § *Insuper* alleged above can be limited. The *Speculum*, however, in the title *De salariis*, § 1, verse *Quid si alicui*, and the following verse, seems to incline to the contrary. I ask whether a custom is valid that even beneficed judges receive a salary. Answer: according to the *Speculum*, in the title *De salariis*, § 1, verse *Si vero ordinarius*, he holds the contrary, by this text at *pro diversa terrarum consuetudine*; and this seems to be the mind of Johannes Andreae in his *Summa*. Likewise because it generates scandal, which is to be avoided, as below, *De regulis iuris*, c. *Qui scandalizaverit*, and here in the text of the following chapter, and below, *De novi operis nuntiatione*, c. 3.

I ask whether, if it is said by statute that a sentence ought to be given on the counsel of a wise man, and the wise man is corrupt, the sentence is null. It must be said that it is not, because the laws speak of a corrupt judge (C. 2 q. 6, c. *Venales*, at *iudicibus corruptis*, and so on, with similar places); for neither is a sentence given from the sayings of corrupt witnesses null, as in Dig., *De re iudicata*, l. *Divus*. I ask whether, if the judge publicly demanded a salary from both parties, the sentence is null. Answer: it seems so by this text; but the contrary could be said, since it was public and from both parties, for then he cannot be called corrupt. I ask whether one who gives money to a judge so that

he judge justly can recover it. Say that either that money was given by both parties, or by one with the other knowing, and then it can be recovered (C. 14 q. 5, c. *Non sane*, and the said c. *Statutum*); or it was given without the adversary's knowledge, and then either he gave from fear of the judge, and can recover (below, *De simonia*, c. *Dilectus*), and then the sentence would not be null, and so the said l. *Venales* ought to be limited; or he gave the money not led by just fear, but himself offered it, and then he cannot recover, as in l. 1, Dig., *De condictione ob turpem causam*, and in Auth. *Ut litigatores iurent*, at the beginning, coll. 9; the Doctors also hold this in Auth. *Novo iure*, Cod., *De poena iudicis qui male iudicavit*; and then the sentence would be null, as in the said l. *Venales*.

Lastly, Hostiensis says here that ecclesiastical and beneficed judges, even if they set out beyond their domicile, ought not to have expenses or costs if they do not incur more costs than they would have incurred at home. This saying, however, is rejected by the said c. *Statutum*. The authority of the Apostle makes quite strongly against him, 1 Corinthians 9, who says: *Who serveth as a soldier at any time at his own charges?* But such a judge serves as a soldier, because clerics are said to serve God as soldiers (dist. 61, c. *Quid proderit*; C. 1 q. 3, c. *Salvator*, at *quod si praefati milites ecclesiae*; C. 1 q. 7, c. *Qui in qualibet*, at *ad ecclesiasticam militiam*; and there is a notable gloss, C. 23 q. 1, c. *Militare*); for advocates too serve as soldiers (Cod., *De advocatis diversorum iudiciorum*, l. *Advocati*).

Chapter Deus qui (c. 11)

Summary. 1. The habit of different religious orders is to be made uniform. 2. Disparity of habit among preachers gives scandal to neophytes. 3. A monk wearing over his habit another garment not befitting his order is not said to wear the habit. 4. A regular can have the care of souls, dignities with cure, and a secular benefice without cure. 5. A religious can be the vicar of a bishop; and what of mendicants. 6. A religious cannot be a judge or an arbiter, but can be an arbitrator.

Deus qui. Religious of different habit, sent to preach to the newly converted, ought to conform themselves to one habit. This is what it says. Note that disparity

of habit among preachers generates scandal in those newly converted to the faith. Note, by this text by contrary sense, that a monk wearing over his monastic habit another garment not befitting his order is not said to wear the habit as he ought; for if this is lawful for him only for the cause of which it is spoken here, then without this cause it is not lawful. And see what is fully had in the rule *Certum*, *De regulis iuris*, in the Sext, and in Clem. 2 below, this title, in the gloss which begins *Haec littera*.

In the first gloss, at *cum ad monasterium*, at the end: on this say as is fully noted there by Innocent; and it is had in the rule *Semel Deo* and the rule *Actus legitimi*, *De regulis iuris*, in the Sext. In the same gloss, at *in nova*: the gloss here does not resolve the contrary. You say that here these religious were deputed to different churches, but on account of the scandal of those newly converted to the faith the Pope wills that all wear the same habit outwardly. Or say that these religious were not deputed there perpetually but for a time, namely to preach and to convert those people. Hence from this I think that religious of different habit could dwell in the college of the Spaniards in the city of Bologna; Lord Antonius de Butrio holds this. At the end of the gloss, see what is noted in the rule *Quae a iure*, *De regulis iuris*, in the Sext.

And conclude that in a cathedral or other secular church a regular can have a benefice having the care of souls. Hence he could have an archpresbyterate or archdeaconry in a cathedral church, supposing that those dignities have cure (dist. 58, c. 2, and below, *De praebendis*, c. *Praeterea*, where Lord Antonius de Butrio holds this). But a secular benefice without cure he cannot have without dispensation of the Pope, as in c. *Super eo*, *De regularibus*. The foregoing fail in the case of mendicants, as in Clem. 1, *De regularibus*.

I ask whether a religious can be the vicar of a bishop. Say that he can, as Johannes Andreae holds in the last chapter, *De clerico aegrotante*. Paulus de Eleazariis seems to hold the opposite of mendicant religious by the said Clem. 1, *De regularibus*, where the text expressly forbids that mendicants, even those who by apostolic authority pass to non-mendicants, have a voice or place in chapter, even if this be freely granted them by the others, or be able to rise to priorates or to any administrations or offices, even as vicars of their ministers or as holding the place of others, says the text; on which Paulus speaks, for such seem to hold a dignity (Clem. *De rescriptis*, c. *Et si principalis*). But another religious could be a vicar or official, because the Clementine speaks of mendicants; therefore of others it seems permitted (above, *De praesumptionibus*, c. *Nonne*), otherwise it would not be a special provision. To the same, C. 2 q. 7, c. *Cum pastoralis*, and what is noted there; and C. 16 q. 1, c. *Qui vere*, at *nisi forte videatur ab ipsius civitatis episcopo*. Likewise such an office has cure and is ordinary, as in the said c. *Et si principalis*, and *De institutionibus*, c. *Ex frequentibus*, and what is noted *De officio vicarii*, c. *Licet*, in the Sext, and dist. 35, c. *Perlectis*. But to these it seems to stand in the way that religious other than mendicants also ought not to go out of the cloister, as men given to contemplation (C. 16 q. 1, c. *Placuit*, the second). It is said that this does not stand in the way, because the greater utility is regarded (C. 2 q. 7, c. *Sancta quippe rusticitas*; C. 16 q. 1, c. *Cum pro utilitate*; dist. 55, c. *Priscis*; and C. 7 q. 1, throughout, principally). But Hostiensis and Gulielmus Durandus seem to hold even the contrary, saying that religious cannot be judges, by l. *Cum praetor*, Dig., *De iudiciis*; indeed not even by compromise can they receive an arbitration, because they ought not to be disputants of forensic business (C. 16 q. 1, c. *Monachi* and c. *Praesentium*; Cod., *De episcopis et clericis*, l. *Repetita*). But they may well be arbitrators and friendly composers, according to the aforesaid, by Auth. *Ut different iudices*, § *Si vero contigerit*, coll. 8, and C. 11 q. 5, c. *Iniustum*. And understand the foregoing as with the licence of their prelate, as in the said c. *Monachi* and above, *De postulatione*, c. 2. The opinion of Paulus seems more consonant, although it satisfies well enough for Johannes, because Clem. 1, *De regularibus*, seems made in detestation of mendicants passing to non-mendicants.

Chapter Cum decorem (c. 12)

Summary. 1. Theatrical plays and mockeries ought not to be performed by clerics under pretext of custom. 2. To perform plays and dancing in churches is mortal. 3. Actors are infamous and cannot be promoted; and whether they always sin mortally, and whether the Body of Christ is denied them. 4. Clerics are forbidden under pain of mortal sin to make gifts to actors. 5. Masks are called deformities of man, and are reputed something diabolical. 6. Whence theatrical plays are so called.

Cum decorem. Under pretext of custom, mockeries or theatrical plays ought not to be performed in church, especially by clerics. This is what it says. It does three things: first it sets out the reprehensible deed; second it commands that it be corrected; the second at *fraternitati*. Note that to perform plays in churches seems to be mortal, and especially if clerics do it; to this point c. *Decet*, *De*

immunitate ecclesiarum, in the Sext, which is notable against those who dance in churches. On this chapter there is a notable gloss on the representations which are made of

the Crib of the Lord, of the Annunciation, of the Passion and Resurrection, which lead men to compunction and devotion (argument from *De consecratione*, dist. 2, c. *Semel*, and dist. 4, c. *Quaeris*); for every feast is a sign and representation of past things (dist. 3, c. *Quod die dominico*).

I ask whether such actors are infamous and whether they can be promoted. Say that they are, and cannot be promoted, as in C. 4 q. 1, c. 1, and in l. 2, § *Ait praetor*, Dig., *De his qui notantur infamia*. That they are not to be promoted appears better in dist. 33, c. 1 and c. *Praeterea*. And Innocent seems to hold that, although they are infamous (and who are infamous appears also in Dig., *De postulando*, l. 1, and what is noted in l. *Minime*, Cod., *De episcopali audientia*), yet they do not always sin mortally, unless they perform dishonourable acts. It makes strongly against this that the Body of Christ is forbidden them (*De consecratione*, dist. 2, c. *Pro dilectione*). Blessed Thomas Aquinas, II-II, q. 168, says that since their art and office is ordered to providing solace to men, it is not unlawful in itself, provided they do not use any unlawful words or deeds, and do not apply play to undue business, places and times; for then by accident they can sin mortally. For clerics are forbidden to make gifts to such persons, and if they give, they sin mortally (dist. 86, c. *Donare* and c. *Qui venatoribus*), unless something be given simply as alms, as to the poor. For clerics who use and spend their goods badly are robbers and are bound to restitution, because whatever is left over belongs to the poor (C. 16 q. 1, last chapter; C. 12 q. 2, c. *Gloria episcopi* and c. *Et si illi*). Thomas holds the same, II-II, q. 185, where he speaks of the bishop, and so on. If the saying of Innocent be soundly considered, it is true, because he understands it of those who dance and the like for the consolation and recreation of some sick person; for will and purpose distinguish misdeeds, as in c. *Cum voluntate*, below, *De sententia excommunicationis*. Who doubts that actors who do this from cupidity or vainglory, even without the other circumstances mentioned above, sin mortally, since those things are mortal in themselves? (1 Timothy, last chapter: *For the desire of money is the root of all evils*; and in the Psalm it is said: *Thou hast hated them that regard vanities*, and so on.) Hence the same Thomas says, II-II, q. 168, that when someone in play takes up base words or deeds, even those which tend to the harm of the neighbour, such play binds under mortal sin. The same if the play does not befit the place, time, person or business, and one does not care to put it after the salvation of the soul; for according to the Philosopher, [*Ethics*] 9, a little delight suffices for life, as a seasoning, like salt in food, and so on.

In the first gloss, at the beginning: say that the monstrosities of masks are properly called deformities of man, whether by putting on skins or colours, as Innocent says here. Masks are forbidden, and are called demons', and are reputed something diabolical (*De consecratione*, dist. 5, c. *Nullus*, at the end). Theatrical plays, moreover, are so called from the place where men stand to watch the spectacle. This, however, is forbidden on solemn days, and one who does it sins mortally (*De consecratione*, dist. 1, c. *Qui die solemni*): one who, leaving aside the assembly of the church, goes to the spectacles, let him be excommunicated. All this is from the text; but no one can be excommunicated except for a mortal sin (C. 11 q. 3, c. *Nemo episcoporum*). Therefore it is plain that one who seeks spectacles on such days sins mortally.

Chapter Ut clericorum (c. 13)

Summary. 1. Clerics, especially in sacred orders, ought to keep chastity. 2. A cleric who is a notorious fornicator is suspended by the law itself. 3. One suspended who celebrates becomes irregular. 4. A cleric cannot be deposed from office and benefice for fornication alone. 5. A cleric who is a notorious fornicator ought to be avoided in the divine offices; and who is called notorious. 6. A married man sins more in fornicating than one not married. 7. Whether a prelate can impose a pecuniary penalty. 8. A cleric in sacred orders who takes a wife: with what penalty he is punished, and how the woman and the children born thence. 9. The greatest sin of lust is sodomy, and for it a heavier penalty is fixed. Simple fornication is a mortal sin; this is proved by twelve arguments in the same place.

Ut clericorum. Clerics, especially in sacred orders, are bound to keep the chastity of their office. This is what it says. It is divided into five parts: in the first chastity is enjoined on clerics; in the second a penalty is imposed on those not keeping it; in the third it is made heavier; in the fourth it rises up against negligent prelates; in the fifth the incontinence of the Easterners is punished. The second at *ne vero*; the third at *si quis igitur*; the fourth at *praelati vero*; the fifth at *qui autem*. Note that all clerics in minor orders wishing to live in ecclesiastical fashion are bound to keep chastity; for under the name of clerics are comprehended even those in minor orders, even one having only the first tonsure, as in Clem. 2, *De vita et honestate clericorum*, in the gloss, and below, *De praebendis*, c. 2, in the first gloss; see the Archdeacon, dist. 54, c. *Ex antiquis*. Note that easiness of pardon gives an incentive to wrongdoing. Note that those whom the fear of God

does not call back from evil, temporal punishment at least may restrain from sin. Note the argument that a cleric who is a notorious fornicator is suspended by the law itself, at the words *hac de causa suspensus*; and Hostiensis holds this. Note that one suspended by man or by law who celebrates becomes irregular, and therefore is to be perpetually deposed from office and benefice; which say fully, dist. 32, c. *Praeter haec*, and below, the next title, last chapter, and in c. *Si celebrat*, below, *De clerico excommunicato ministrante*, and in c. *Cum aeterni*, *De re iudicata*, in the Sext. Note the argument by contrary sense that for fornication alone a cleric cannot be deposed from office and benefice, from what is said here, *pro duplici culpa*; therefore for a single fault he is not to be perpetually deposed. For in penalties the more benign interpretation is to be made (*De regulis iuris*, rule *In poenis*, in the Sext; Dig., *De regulis iuris*, l. *Factum*, § *In poenalibus*); and odious things are to be restricted, but favours ought to be enlarged, as in the rule *Odia*, *De regulis iuris*, in the Sext; and penalties do not exceed their proper cause (*De poenitentia*, dist. 1, c. *Poena*). For in this the order is such: first the fornicator is to be warned; and if when warned he has not corrected himself, let him be suspended from his benefice; and if even then he has not corrected himself, let him be perpetually deposed, as here, whether he be in sacred orders, as in c. *Sicut*, below, the next title, or in minor orders but beneficed, as in c. *Si autem clerici*, below, the next title. But if such a crime be notorious, he is suspended by the law itself, as in the last chapter, below, the next title, and dist. 32, c. *Praeter haec* and c. *Eos*. And such a one ought also to be avoided in the divine offices, according to the common opinion, by c. *Nullus*, dist. 32, and by c. *Si qui sunt presbyteri*, dist. 81, with similar places. And he is called notorious if he has been condemned, or has confessed in court, or the evidence of the fact is so great that it cannot be concealed by any evasion; for example, because he publicly keeps a suspect woman with him in the house, at table and in the bedroom, or because offspring appear from it, walking upon the earth,

according to what is noted by Lord Antonius de Butrio and commonly by the moderns in c. *Vestra* and in c. *Quaesitum*, below, the next title.

Note at the end of the chapter that, other things being equal, a married man sins more by fornicating than one not married, as Augustine says, *De adulterinis coniugiis*, at *Adulterii malum*, C. 32 q. 7, in the penultimate gloss, at the end. And this has place whether he be suspended by man or by law, as in c. 1, *De re iudicata*, in the Sext, and in c. 1, *De sententia excommunicationis*, same book, although the Abbot said the contrary, and not well, according to the moderns commonly; on which fully in c. *Si celebrat*.

I ask whether a prelate can impose a pecuniary penalty. Answer: yes, if it is more feared, as in c. 2, below, *De clericis male [text unclear]*; on which here Hostiensis, and in c. *Irrefragabili*, above, *De officio ordinarii*, and better in c. *De causis*, at the end, above, *De officio delegati*. Against the Abbot Johannes Andreae holds this here, after Hostiensis.

I ask with what penalty a cleric in sacred orders who takes a wife ought to be punished. Answer: he ought to be deprived of order and ecclesiastical benefice, and the woman, if she was free, is reduced into servitude of the church (dist. 32, c. *Eos*); but if she was a maidservant she ought to be sold (dist. 81, c. *Quidam clerici*); and the children born thence are reduced into servitude of the church (C. 15, last question, c. *Cum multa*). And such a cleric is excommunicated by the law itself (*De consanguinitate et affinitate*, c. *Eos*, in the Clementines). And when such a one is separated from her, he ought to abjure her in form (C. 35 q. 6, c. *Ab isto die*, and below, *Qui clerici vel voventes*, c. *Ex litterarum*). If, however, it were suspected that the cleric would perjure himself, it ought not to be exacted, but he ought to be compelled cautiously in another way (below, the next title, c. *Clericos*).

I ask for which carnal vice a heavier penalty is fixed. Answer: the gravest among all sins of lust is the sin against nature, according to Augustine, *De adulterinis coniugiis*. For even simple fornication is mortal, namely when an unmarried man acts with an unmarried woman. This is proved by the authority of the Apostle, Ephesians 5: *But fornication and all uncleanness*, and so on; he adds: *No fornicator, nor unclean, nor covetous person hath inheritance in the kingdom of Christ and of God*. But no one is deprived of the kingdom except by mortal sin; therefore. The same, Galatians 5: *The works of the flesh are manifest*; he adds: *fornication, uncleanness, immodesty, luxury*, and so on; he adds: *they who do such things shall not obtain the kingdom of God*. The same, 1 Corinthians 6: *Neither fornicators, nor adulterers*, and so on; he adds: *shall possess the kingdom of God*. Therefore, and so on. This the modern Catholics and saints also affirm, as Blessed Thomas, II-II, q. 154. But because the schismatic Greeks hold the contrary, it is useful to demonstrate it more effectively by natural reason, which is proved thus.

First: nature makes nothing in vain (*De caelo et mundo* 1). But nature created woman as a help to man, and willed such to be a wife, as appears in Genesis 2. Therefore it rejected concubinage. Second thus: all things are for the sake of an end, and it is just that all things be named from their end (*De anima* 2 and *Metaphysics* 1). But the end of carnal union is the production of legitimate offspring (Genesis [1]: *Increase*, and so on). But offspring is not legitimate unless there be a legitimate marriage by natural law, as above, from the determination of C. 30 q. 5, c. *Aliter*. Therefore. Third thus: nature gives what is better (*De somno*

et vigilia 1). But it is better to be legitimate than spurious, or even natural, because *the son of the bondwoman shall not be heir with the son of the free woman* (Genesis 21). Therefore. Fourth thus: art imitates nature as far as it can (*Metaphysics* 7). But nature from the beginning ordained matrimony

(Genesis 2). Therefore it rejected concubinage. Fifth thus: what more hinders the virtues is more to be fled (*Topics* 2). But concubinage hinders more than matrimony. Therefore. Sixth thus: if that in which a thing seems less to be present is present, then more strongly in that in which it seems more (*Topics* 2). But concupiscence seems less than fornication, for concupiscence consists in the appetite of the mind alone, and such, with deliberation, is mortal (Exodus 20: *Thou shalt not covet*, and so on). Therefore. Seventh, moreover: it is less to look with concupiscence than to act. But to look with concupiscence is mortal (Matthew 5: *Whosoever shall look on a woman to lust after her hath already committed adultery with her in his heart*). Therefore not a woman absolutely. Eighth, moreover: it is less to think of a virgin, or even of a corrupted woman, than to fornicate. But to think with deliberate consent is mortal (Job 31: *If my heart hath been deceived upon a woman*, and so on, *this is a heinous crime and a most grievous iniquity*; and above in the same place: *I made a covenant with my eyes, that I would not so much as think upon a virgin*; therefore, and so on; it is added: *For what part should God from above have in me?*). Therefore, and so on. Ninth thus: intercourse with a woman is not excused from sin except on account of the goods of matrimony (*Sentences* 4, dist. 31), which are three according to all theologians, namely faith, offspring and sacrament. But these do not intervene in fornication. Therefore. Tenth thus: a remedy is applied to danger, and danger is to be avoided as far as possible. But for avoiding fornication matrimony was secondly confirmed (1 Corinthians 7: *For fear of fornication*, namely to be avoided, *let every man have his own wife*). Therefore not [otherwise], because it says "wife." Eleventh thus: matrimony thirdly was instituted to represent the union of Christ with the Church (Ephesians 5: *This is a great sacrament; but I speak in Christ and in the Church. Nevertheless let every one of you love his wife*, as *Christ also loved the Church*). Therefore not [otherwise], because it says "wives"; therefore it forbids concubines (*De praesumptionibus*, c. *Nonne*). Twelfth thus: the politics of Plato is rejected, who willed all things to be common, even women, by the *Politics* of Aristotle, because great prejudice would be generated to the human race; for no one could know whose son he was, nor would anyone be legitimate. Therefore holy Church also condemned this politics as the heresy of the Nicolaites (C. 2 q. 7, c. *Non omnis*; Acts 6; and Apocalypse 2).

Since therefore it is established that simple fornication is a mortal sin, now, returning to the question proposed, it must be said that a greater penalty is due for *stuprum* than for fornication; greater for adultery than for *stuprum*; greater for incest than for adultery; greater for sacrilege, that is, for carnal sin committed with sacred persons, than for simple incest, because with sacred persons it is more than incest, because it is spiritual incest and the sacrilege of sacred persons; greater for the sin against nature than for sacrilege. Of all these it appears fully in C. 32 q. 7, c. *Adulterii malum*, and through Thomas, as above. And understand "with sacred persons," that is, with all who have vowed continence tacitly or expressly. Of these also see the *Compendium theologiae*, book 3, on lust, and in the *Pisanella*. All the foregoing, moreover, are aggravated by reason of abduction and violence, and so on. See on the foregoing C. 32 q. 5, c. *Nec solo tactu*, c. *Qui viderit* and c. *Non moechaberis*; C. 32 q. 4, c. *Meretrices*, c. *In eo* and c. *Dicat aliquis*; and more fully C. 27 q. 1, c. *Nuptiarum bonum*, near the beginning, at *non canino more*, by the promiscuous use of persons.

Chapter A crapula (c. 14)

Summary. 1. A cleric given to surfeiting or drunkenness is suspended from office and benefice. 2. Pure wine drunk by clerics binds to venial sin. 3. Counsel of necessity and of will. 4. Drunkenness

provokes madness and lust. 5. Whether one suspended from office is also suspended from benefice. 6. Whether a priest who does not drink wine can be promoted. 7. Whether drunkenness is a sin. 8. Whether a drunkard is excused from sin.

A crapula. A cleric given to surfeiting or drunkenness who, when warned, does not desist, is suspended from office or benefice. This is what it says. It does three things: first it forbids drunkenness and surfeiting; second it forbids the abuse of superfluous drink; third it brings a penalty on transgressors. The second at *unde illum ab*; the third at *si quis autem*. Note the argument that clerics drinking pure wine without water seem to sin, by the text at *vinum sibi temperent, et se vino*. For, as Papias says, wine drunk soberly gives health and increases wisdom, but taken immoderately it gives occasions to vices; for without wisdom there is no health. This is clear from Wisdom 7.

God loves no one but him who dwells with wisdom. But the use of wine hinders wisdom, as appears in Ecclesiastes 2: *I thought in my heart to withdraw my flesh from wine, that I might turn my mind to wisdom*. And Paul, 1 Timothy 5: *Use a little wine for thy stomach's sake and thy frequent infirmities*. Say briefly that it is a sin against counsel, not against precept, and so venial, unless by accident it were graver. For no food or drink in itself is unlawful (Matthew 15: *Not that which goeth into the mouth defileth the soul*); but by accident one can drink unlawfully: sometimes from the condition of the drinker, as because he is easily harmed by wine, or because he is bound by a special vow not to drink wine; sometimes from the manner, because he drinks immoderately; sometimes from the company, lest anyone be scandalised. And this the Apostle intends, Romans 14: *It is good not to eat flesh and not to drink wine, nor anything whereby thy brother is scandalised*; on which Blessed Thomas, II-II, q. 149.

And that one acting against counsel is not free from sin is plain: for counsel is considered either as to reverence or as to perfection. If as to reverence, it is binding (dist. 6, c. *Testamentum*); if as to perfection, it binds only one who is willing (C. 14 q. 1, c. *Quisquis*; and the solemn gloss in c. *Ad aures*, above, *De aetate et qualitate*; and the gloss in c. *Matthaeus*, below, *De simonia*, where counsel imports necessity; and in c. *In civitate*, below, *De usuris*, at *saluti suae bene consulerent*, and so on). According to the gloss in c. *Consuluit*, in the same place, such counsel is of necessity, because as to God, and so on; for those who despise the law always sin (dist. 10, c. *Quis autem*), and admonitions too, as the text says there. Say as above, this title, c. 1.

Note that drunkenness brings about the exile of the mind and provokes the incentive of lust. Hence the Apostle, Ephesians 5: *Be not drunk with wine, wherein is luxury*; and Proverbs 20: *Wine is a luxurious thing, and drunkenness riotous; whosoever is delighted therewith shall not be wise*. The same in dist. 25, c. *Ebriosa*. And therefore Jerome says that nuns ought to flee wine as poison (*De consecratione*, dist. 5, c. *Carnem*).

Note the argument that one suspended from office does not seem suspended from benefice; on which Clem. *Cupientes*, *De poenis*, in the long gloss. Paulus de Eleazariis distinguishes thus: either we speak of one suspended from benefice perpetually, or for a time, or simply. In the first case he is also suspended from benefice, because such suspension has the force of deprivation (*De rebus ecclesiae non alienandis*, c. 1, near the end, and there by the same Paulus). In the second case, if we speak of a benefice given on account of the divine office, then he is suspended from that benefice and not from others, unless something else were said in the sentence; to this point *De simonia*, c. [text unclear], *De temporibus ordinationum*, c. *Vel non est*, unless it be commanded that provision be made for such a one suspended; *De censibus*, c. *Exigit*, at the end, that until satisfaction he be suspended from both, as

though the expression of one did not suffice; for negligence or contempt cannot be imputed to such a one, since he cannot be absolved before the time. In the third case I think that by force of the word one suspended from office is not suspended from benefice. But can the benefice be withdrawn from him by sentence? Say that either he is suspended for a light fault or for a grave offence. In the first case the benefice ought not to be withdrawn from him, as the Abbot says, unless from contempt or delay in seeking absolution, as Tancred and Vincentius say. In the second case the benefices can be taken away, as Hostiensis says, unless something else be expressed in the sentence of law or of man, as Johannes Andreae says at the end of the said gloss. See the gloss in c. *Praeter haec*, dist. 32, where it notes the difference between one suspended by man, so that then one suspended from office is not suspended from benefice, but one suspended by the canon, the contrary. What Paulus and Johannes say pleases more.

I ask whether one who does not drink wine can be promoted to the priesthood. Answer: no, because he must, whenever he celebrates, receive the Body and Blood (*De consecratione*, dist. 2, c. *Peracta* and c. *Comperimus*). The gloss holds the same, C. 2 q. 7, c. *Ipsi apostoli*.

I ask whether drunkenness is a mortal sin. Answer: drunkenness can happen in three ways. In the first way, that the drinker does not know the use to be immoderate and able to intoxicate; and so it can be without sin, as is believed of Noah (Genesis 9). Second, that someone perceives the immoderation but does not know that it can intoxicate; and then it is venial. In the third way, that someone knows both, but yet would rather incur drunkenness than abstain from wine; and then it is mortal. The same Thomas, II-II, q. 150. See 1 Corinthians 6; and of this is properly understood that *drunkards shall not possess the kingdom of God*. On *De reliquiis et veneratione sanctorum*, c. 1, see Johannes Andreae in the gloss on prayer, in c. 1, *De reliquiis et veneratione sanctorum*, on mortal and venial sins, and so on.

But whether a drunkard is excused from sin: say as is noted in C. 15 q. 1, c. *Sane*, and *De homicidio*, c. 1, in the Clementines. And say succinctly that if someone fell into drunkenness without his fault, like Noah (Genesis 9), then he is excused from sin, since he is altogether out of his mind; as we believe of Lot, who committed incest, of which he is excused according to Augustine, *Contra Faustum*. For the text says, Genesis 19: *But he perceived not, neither when his daughter lay down,*

nor when she rose up. Hence in this two things are attended to, namely the defect of consent and the preceding act: on the side of the defect of consent it excuses, but on the side of the preceding fault it accuses. Yet the following sin is diminished by reason of the involuntary act, since the drunkard properly lacks right sense and so consent; on which Thomas, II-II, q. 150.

Chapter Clerici officia (c. 15)

Summary. 1. From what things clerics ought to abstain. 2. Secular trades unlawful for clerics: which they are, and whence so called. 3. Whether secular business is forbidden to clerics; one is said to carry it on in three ways. 4. Whether guardianship is lawful for clerics and monks. 5. Clerics may practise some honourable craft. 6. Business which can scarcely be carried on without sin. 7. Nothing is more dangerous than the office of bishop, if it be performed perfunctorily. 8. Whether the office of notary is lawful for clerics. 9. An ecclesiastical notary ought not to draw up instruments in secular matters, and conversely. 10. Whether a religious can be a notary. 11. The game of chance and of dice

is forbidden to clerics and laymen, even those looking on, under pain of mortal sin; and no. 18. 12. Ecclesiastical prelates ought not to keep mimes or jesters. 13. It is not lawful for clerics to wear the tonsure without the clerical garb, or the reverse. 14. The habit is lawfully changed for a cause. 15. Clerics cannot be made soldiers. 16. The ring is forbidden to clerics having no dignity. 17. A religious made bishop does not change his habit, and to what he is bound by his religious rule. 19. Whether what is lost at play can be sought back. 20. One who induces by words or deeds another, otherwise not going to play, to play, is bound to restore. 21. Whether and when custom is valid in lawful games in any amount. 22. Whether what is gained at play ought to be given to the poor, and when it is restored as a fault. 23. Whether the law of a Decretal has the force of precept in all things. 24. Clerics carrying on dishonourable trades sin mortally.

Clerici officia. From dishonourable business, persons, places, games and garments clerics ought by precept to abstain. This is what it says. Note that secular trades, especially dishonourable ones, are not lawful for clerics to carry on. See the *Speculum*, *De clericis coniugatis*, verse *Sed quid dices*. And what secular trades are: say, according to Isidore, *Etymologies* 5, c. 26, at the end: *commercium* is so called from *merces*, by which name we call things for sale; whence also *mercatus* (market) is said of a gathering of many men who are wont to sell or buy things.

I ask whether business is forbidden to clerics. Answer: one is said to carry on secular business in three ways. First, that something be bought in order to be sold dearer; and this is not lawful for clerics (dist. 88, throughout). Second, by conducting secular causes in court; and this too is not lawful for clerics except for certain persons (above, *De postulando*, c. 1), for wretched persons and for their kin (C. 4 q. 6, c. *Omnibus*; dist. 86, c. *Pervenit*). Third, by procuring or administering the affairs of seculars; and this too is not lawful for clerics (below, *Ne clerici vel monachi*, c. *Sed nec*; gloss C. 21 q. 3, in the summary). The same Tancred, Hostiensis and Innocent; and commonly all agree in these three. Yet they can undertake guardianships conferred by the laws, and the care of wards and widows, or of undefended orphans, and also the governance of churches with the licence of their bishop, and also of ecclesiastical goods, as in the said c. *Pervenit*. Yet they cannot be compelled to receive the aforesaid guardianship, and nevertheless they ought to succeed; which is granted as a privilege of clerics, as in the said c. *Pervenit* and the last chapter, same distinction, although among laymen it is otherwise (Cod., *De legitima tutela*, Auth. *Sicut hereditas*). And the same holds of a bishop and a monk by canon law, by that c. *Pervenit*. But by c. *Episcopus gubernationem*, both clerics and monks are bound to the guardianship of wretched persons; which is noteworthy. And understand the foregoing of natural guardianship, not of dative, although Johannes in the gloss said that a bishop or monk cannot receive even legitimate guardianship, by the text in Auth. *De sanctissimis episcopis*, § *Deo amabiles*, which he alleges in the said c. *Pervenit*. But say that civil law cannot bind clerics, because the laws do not disdain to imitate the sacred canons, as in c. *Clerici*, above, *De iudiciis*, with similar places, and better in c. *Ecclesia Sanctae Mariae*, above, *De constitutionibus*.

There is also a fourth mode, and this, according to Raymond and Hostiensis, is lawful for needy clerics, namely to practise some honourable craft from which one can obtain necessities for himself, provided that on account of this he does not fail the divine offices (dist. 91, throughout; *De celebratione missarum*, c. 1; *De consecratione*, dist. 5, c. *Nunquam*; and below, *Ne clerici vel monachi*, c. 1). Likewise he can receive possessions to cultivate for a certain share, for his own and his family's sustenance (argument from dist. 86, c. *Pervenit*, at the words *avaritiae causa*, and dist. 91, c. *Clericus*).

Likewise he can lease animals for a certain return, provided it be by a lawful contract, as Gulielmus says, who also says that he can buy a thing which, if improved,

he can sell more dearly, for example a colt, or a panel which by painting he sells more dearly. But in such things there is not trading but craftsmanship (C. 14 q. 4, c. *Canonum*; *De consecratione*, dist. 5, c. *Nunquam*; below, *Ne clerici vel monachi*, c. 1). Add that there are other kinds of business which can scarcely be done without sin, such as the care of a secular affair, soldiering, merchandising, procuratorship and administration (*De poenitentia*, dist. 5, c. *Negotium*, c. *Qualitas* and c. *Falsas*; and dist. 5, c. *Qualis*; dist. 88, c. *Consequens*). But Hostiensis adds a sixth, which he says is as it were more dangerous than all, namely advocacy; and a seventh too, he says, do not omit, namely the office of bishop, than which nothing is more wretched and dangerous if it be performed perfunctorily (dist. 4, c. *Ante omnia*). Add to the foregoing the authority of Paul, 2 Timothy 2: *No man, being a soldier to God, entangleth himself with secular businesses*; and Jerome, dist. 88: *Flee as a kind of plague a cleric who is a trader, and who from poor has become rich, and from obscure, glorious*.

But whether a cleric can exercise the office of notary: say, according to Raymond, that it is forbidden to clerics in sacred orders, and if they have it they are to be compelled to give it up by the withdrawal of their benefice, appeal set aside (below, *Ne clerici vel monachi*, c. *Sicut*); and the same if they are in minor orders and sufficiently beneficed (argument from above, *De postulando*, c. *Clerici*). But Innocent adds: if those in sacred orders drew up instruments before it was forbidden them, they would be valid; otherwise not. Hostiensis, however, understands this to be true in secular business, as the rubric of the aforesaid c. *Sicut* teaches; but in ecclesiastical business they are well valid. But attend: a cleric established as notary by the Pope can draw up instruments everywhere (C. 5 q. 1, c. *Quidam*); but one established by a bishop can draw them up throughout the diocese and not beyond, unless he has it by special privilege, according to Hostiensis. The reason is that the care of his own diocese is committed to him (C. 10 q. 1, c. *Regenda*; C. 12 q. 1, c. *Episcopus* and c. *Praecipimus*); to this point Dig., *De iurisdictione omnium iudicum*, last law. And if a notary is lacking, two honourable persons ought to be substituted to record the ecclesiastical acts of the court, as in c. *Quoniam contra falsam*, above, *De probationibus*. And note that an ecclesiastical notary ought not to draw up instruments in secular acts, and conversely, because the dealings of these ought not to be mingled (C. 2 q. 7, c. *Laicos*). Hence cleric notaries are forbidden to be scribes in the courts of princes (below, *Ne clerici vel monachi*, c. *Suam*, § *Nec quisquam*).

But whether religious can exercise the office of notary: answer, according to Johannes Andreae, no, except against heretics, as in c. *Ut officium*, *De haereticis*, in the Sext. The same appears in a certain Extravagant of Boniface VIII, *De officio ordinarii*, c. *Debent superioribus*, about the middle, and *De probationibus*, c. *Olim*, by c. *Sicut*, below, *Ne clerici vel monachi*, and C. 16 q. 1, § *Novarum*, and Cod., *De sacrosanctis ecclesiis*, the penultimate law, and Cod., *De episcopis et clericis*, l. *Placet*. Gulielmus, however, in the *Speculum*, says that he will complete old instruments but will not take on new ones; to this point Dig., *Familiae erciscundae*, l. *Alienationes*, and below, *De Iudaeis*, c. *Iudaei*, with similar places.

Note that clerics playing at dice or knucklebones sin, even if they do not play themselves but look on. It is otherwise with the game of chess, as the gloss holds in Auth. *Interdicimus*, Cod., *De episcopis et clericis*, and Vincentius here, and Laurentius, dist. 35, c. 1. And Raymond understands it generally, of laymen as well as clerics, that both players and onlookers sin, because it is against canon and civil law, as here, and dist. 35, c. 1, and below, *De excessibus praelatorum*, c. *Inter dilectos*, and in c. 1, *Ne clerici*

vel monachi; and by civil law Dig., *De aleatoribus*, l. 1 and throughout; Cod., *De aleatoribus*, Auth. *Alearum usus* and throughout; Auth. *Interdicimus*, Cod., *De episcopis et clericis*; and Auth. *De sanctissimis episcopis*, § *Interdicimus*. And Gulielmus says that all such sin mortally, with all participants and onlookers, even if it is not brought into a habit; for commonly one plays only from avarice, as Hostiensis says in the *Summa*, *De excessibus praelatorum*, where he sets out sixteen grave mortal sins which result from play. For since avarice is in itself a mortal sin, because *the desire of money is the root of all evils* (1 Timothy 6), with similar places, therefore, and so on. But with what penalty are clerics who transgress in these things punished? Say as is had in dist. 35, c. 1, where it is said thus: "A bishop, priest or deacon given to dice or drunkenness, let him either desist or certainly be condemned. A subdeacon, lector or cantor, let him either desist or be deprived of communion." But according to Hostiensis the same holds today in a subdeacon as in a deacon, by c. *Miramur*, above, *De servis non ordinandis*.

Note that ecclesiastical prelates ought not to keep mimes or jesters. Note that it is not enough for clerics to wear the tonsure unless they also wear the clerical garb, and conversely. Note that one who changes his habit for a just cause of fear does not sin, even if he is a monk. Note that clerics cannot be made soldiers, because they cannot use gold in spurs and the like expressed here. Note that clerics ought not to wear rings unless they have some dignity. Note that a monk made bishop cannot change his habit,

and so is not totally absolved from the vow of his religion. See what is noted in C. 16 q. 1, c. 3, and C. 18 q. 1, c. 1, and below, *De statu monachorum*, c. *Quod Dei timorem*. And say briefly, according to Thomas, II-II, q. 185, that a religious made bishop remains bound to all things contained in the rule of his profession which do not hinder the pontifical office but rather avail for the guarding of perfection, such as continence, poverty and other things of this kind; and so he is bound to wear the habit in sign of this kind of obligation, as here. But if there are things repugnant to the office of the Pontiff, such as solitude, silence and certain abstinences or heavy vigils, by which he would be rendered unable in body to carry out the office, he is not bound, and so on.

In the first gloss, at *degradentur*: say, according to Johannes Andreae, that is, let him be deposed verbally, not actually; for which see what is noted in c. *Cum non ab homine*, above, *De iudiciis*, and in c. *Degradatio*, *De poenis*, in the Sext, where fully by Johannes Andreae in the *Novella*. At the end of the gloss, at *psalterium*: say that c. *Nunquam*, *De consecratione*, dist. 5, speaks of monks, who are more strictly bound to the contemplative life than secular clerics; and therefore in them such rigour would have to be tempered at the judgement of the superior, as in c. *De causis*, above, *De officio delegati*, and in c. *Omnis* and c. *Deus qui*, below, *De poenitentiis et remissionibus*. In the third gloss, at *repellitur a promotione*: from this gloss it is plain that clerics playing at dice or knucklebones sin mortally, by the text in c. *Inter dilectos*, below, *De excessibus praelatorum*, where the text says *pestes huiusmodi*, and *atque ludos voluptuosos*, and *pravam consuetudinem, quae corruptela dicenda est*, and *in culpis delinquendi auctoritas usurpatur*. The gloss and the Doctors also seem to hold this in the said c. *Inter dilectos* and dist. 35, c. 1; and for this too Auth. *De sanctissimis episcopis*, § *Interdicimus*, makes.

In the same gloss, at *sed nunquid*: say, when it is asked whether what is lost at play can be sought back, that either we speak of law or of custom. If of law: either one plays with such a person as could alienate, or not. If we speak of the first case: then either in places where one lives according to the civil laws, or in places where the canon law prevails. If according to the civil laws, he is bound to give

it back, by the laws alleged in the gloss; for this makes l. *Si quis rem*, last §, Dig., *De praescriptis verbis*; and the gloss holds this, dist. 25, c. 1. Indeed according to the laws, even if the player renounced the right of recovering, then whatever is won ought to be applied to the treasury, as in the last law, Cod., *De religiosis et sumptibus funerum*; for which l. *Lucius*, Dig., *De iure fisci*. But where one does not live according to the imperial laws, or such laws are abrogated, then, because it cannot be lawfully kept, but he who played voluntarily is unworthy to have it back, since in an equal cause of baseness the condition of the possessor is the stronger, as in l. *Ubi autem*, Dig., *De condictione ob turpem causam*, it ought therefore then to be given to the poor, as is proved in C. 14 q. 5, c. *Non sane*. But if he played with a person who could not alienate, as with a ward, a madman, a prodigal, a minor under twenty-five years, one mentally incapable, a deaf man, a mute, a blind man, and one labouring under a perpetual illness to whom the administration of his goods is not given; or with another's slave, a son not having *peculium castrense* or quasi-*castrense*, or with a woman having paraphernal goods, or with a cleric or other administrator of ecclesiastical goods, or with a hospitaller, a religious and the like: then he is bound to restore, not to him with whom he played, but to the guardian, curator and the like. For this Dig., *Si certum petetur*, l. *Si eum servum*, l. *Si me et Titium* and l. *Si curatorem habens*, Cod., *De in integrum restitutione*. And the theologians commonly hold this in *Sentences* 4, dist. 15, and Thomas, II-II, q. 32, and Raymond in the *Summa*. And understand the foregoing when they played without fraud. But where fraud intervened, as with false dice and the like, then he is bound to restore, because fraud and deceit ought not to protect anyone (above, *De rescriptis*, c. *Ex tenore*, with similar places). Whoever also induced someone to play who was not going to play, whether by words or by deeds, whether at the beginning or in the middle of the game, and the like, is bound to restore, as Azo says in the *Summa*, Cod., *De aleatoribus*. And understand the foregoing of unlawful play. But if the game were lawful, such as playing chess, running, or at quoits, and the like, then not only can what is lost not be sought back, but even for what was promised an action is given to the winner, as in l. 2 with the two following, Dig., *De aleatoribus*, and in l. *Si quis rem*, § 1, Dig., *De praescriptis verbis*. But the foregoing can be limited: unless one played for each game one gold solidus, which is worth as much as a gold ducat of just weight, of which seventy-two make one pound of gold, as in the said last law, Dig., *De aleatoribus*, and in l. *Quoties*, Cod., *De susceptoribus et arcariis*, book 10.

In the second principal case, namely what the law is by custom: it must be said that custom is valid in lawful games in any amount (argument from the said l. *Si quis rem*, last §; to this point l. *De quibus*, Dig., *De legibus*). And so there seems to be a custom almost everywhere concerning the game of chess; of which, however, Richard in [*Sentences*] 4, dist. 15, says that by accident it can become unlawful: as because on prescribed feast days, or fast

days, or on days of penance, or if one plays from avarice, or if much time is lost, or if with fraud; and the same of similar games which are not unlawful in themselves but can be unlawful from the things said above. And then the same must be said of the gain from these as is said of unlawful play, as above. A custom would also be valid that one who loses at unlawful games is not given recovery, because a thing easily returns to its nature (above, *De constitutionibus*, c. *Cum accessissent*, at the end). And therefore if the custom is that in an equal cause of baseness the condition of the possessor is the better, as in l. 2, Dig., *De condictione ob turpem causam*, then by such custom there could be recovered not only what is lost, but not even what is lent in such base matters. Likewise a custom would be valid that it can be recovered only when one is drawn in, and in similar cases; and so the sayings of Innocent in c. *Quia plerique*, below, *De immunitate ecclesiarum*, can be saved.

I ask whether one is bound by precept to give to the poor what he has gained at play, when he is not bound to restore it to him from whom he won. Answer: if the game was lawful, he is not bound; but if it was unlawful, it is safer to give to the poor. Yet according to Innocent it seems that he is not bound by precept. For he set down the rule in c. *Quia plerique*, below, *De immunitate ecclesiarum*, in the long gloss, that wherever something is ill gained, whether by trading or by extortion, from which yet one is not bound to restore, he acts prudently if he gives all in alms (C. 14 q. 5, c. *Qui habetis* and the last chapter); and he adds: yet we do not condemn such if they leave it to their heirs. And Lord Matthaeus Mattesilanus of Bologna bases himself here on these sayings of Innocent. But certainly, if the words of Innocent be well weighed (although all the Doctors commonly, as he says, hold Innocent's rule), Innocent speaks well, but not to the point for which he is alleged. For Lord Matthaeus says that Innocent's rule is that wherever something is gained by an unlawful act, where there is baseness on both sides, the counsel is that it be distributed to the poor. But certainly, saving his reverence, Innocent's rule does not say this; rather it says that wherever something is ill gained, whether by trading or by extortion, from which yet one is not bound to restore, he acts prudently if he gives all in alms; and rightly. For it is ill gained by harlotry, yet lawfully retained; it is ill gained by acting, yet one can retain what is given; and so of similar things. This is also the mind of Blessed Thomas, II-II, q. 62, and in the said place, q. 32; and the theologians commonly hold this.

I ask whether this decretal has the force of a precept in all things. Answer: according to Innocent, no; hence the transgressor does not sin mortally in all respects, but as to certain things. Not by this text, but by the other laws alleged above, it appears that one sins mortally; to which Clem. *Exivi*, *De verborum significatione*, § *Item praeterea* and § *Item communiter*, well applies. Hence clerics carrying on dishonourable trades sin mortally (dist. 91, c. *Clericus quilibet*, and below, *Ne clerici vel monachi*, c. 1). But to write is not a sin for the needy, unless they withdrew themselves from the divine offices, as was said above. And note that a custom approved in some places against this decretal does not constrain clerics to observe anything but the customs of the places, as the gloss notes in c. *Si quis vero*, dist. 30, and dist. 4, c. *Erit*. For as far as it can be done without sin, one ought to conform oneself to the customs of those among whom one has to live. Hence from this perhaps priests wearing green colour are excused where such is the common custom. And note the gloss in Clem. 1, *De vita et honestate clericorum*, and in c. *Super hoc*, on when a cleric is said to wear a fitting habit and when not.

Chapter Ex litteris (c. 16)

Summary. 1. A cleric warned three times by the bishop who does not desist from trading loses the clerical privilege as to his goods; nos. 4 and 6. 2. Statutes of laymen do not bind clerics; where it is beautifully and most amply distinguished. 3. Clerics can use secular statutes in their own favour. 5. A toll ought not to be exacted from clerics. 7. Those exacting levies from the church are bound to restore double; and those who, after warning, compel clerics to undue payments are excommunicated; no. 8.

Ex litteris. A cleric warned a third time by the bishop who does not desist from trading loses the clerical privilege as to his goods. This is what it says. It is divided into two parts: first the complaint is set out, second provision is made; the second at *mandamus*. Note that statutes and customs of laymen, even speaking generally, do not bind clerics carrying on secular business in their patrimonial goods before they have been warned three times about it. And so the text here seems to be against

the opinion of Bartolus on Cod., *De summa Trinitate*, l. 1; on which Lord Antonius de Butrio in c. *Quod clericis*, above, *De foro competenti*, where Lord Antonius speaks thus: note that a simple custom of laymen, however indeterminately it speaks, does not bind clerics in the place, even in paternal goods, in so far as the cause is to be treated in the court of the church, whatever Bartolus holds in l. *Cunctos populos*, Cod., *De summa Trinitate*. And in examining this saying, more indistinctly than he does there,

he limits this saying thus. If a cause is brought against a cleric before an ecclesiastical judge, or a cleric brings suit against a layman before an ecclesiastical judge where he can sue, the cause ought to be determined according to canon law, as is the case in the said c. *Quod clericis*. This is true if it is brought by the nature of the regular forum; otherwise if by an accidental one, either of law, as in a counterclaim, or of man, as because the layman prorogued the jurisdiction; and it is judged according to the laws and customs, because the natural cause absorbs the accidental (Dig., *De tutelis*, l. *Qui habet*; Cod., *De adoptionibus*, l. *Cum adoptivus*). And the *Speculum* holds this in the title *De constitutionibus*, § 1, verse *Et nota*. Sometimes the cause of a cleric is brought before a secular judge; and then if it concerns the observance of law about the ordering of the trial, or about the preparatory matters and the instance of the trial, the place of the trial is regarded, as the Archdeacon notes in C. 2 q. 6, c. *Non ita*. And so the saying of the *Speculum*, above, is to be understood; and so the gloss in the said c. *Quod clericis* is commonly understood; and so Johannes Andreae notes in the additions to the *Speculum*, above; provided, however, that the law be reasonable, as Johannes Calderinus holds in the disputation which begins *Statuto cavetur*, and Lord Antonius de Butrio in his disputation which begins *Clericus quidam Florentinus*.

But if it is asked about the laws concerning the decisive matters: then if it is a feudal cause, he will determine it according to the customs of the fief, as in c. *Ex transmissa*, above, *De foro competenti*, and in c. *Verum* and c. *Caeterum*, and as Hostiensis notes in the said c. *Quod clericis*, and Johannes Andreae in the additions, above. But if it is another cause than feudal, and an ecclesiastical cause, even treated in secular form, it ought to be treated according to canon law, as the Doctors say above, *De constitutionibus*, c. 1, where it is the case according to one understanding; and it is the case in Auth. *Clericus*, Cod., *De episcopis et clericis*, and there Cynus; which Authentic is placed upon l. *Omnes*. Understand this of a thing already incorporated into the church, but not if a legacy were sought or held, unless the statute differed from the common and natural law; for then too, as of things disposed for pious causes, it would have to be judged according to canon law, as is the case in c. *Cum esses* and in c. *Relatum*, below, *De testamentis*. And therefore if a statute or custom were that testaments, donations and the like not registered within a time are not valid, and so on, the church ought not to be prejudiced (above, *De constitutionibus*, c. *Ecclesia Sanctae Mariae*; dist. 96, c. *Bene quidem*; below, *De rebus ecclesiae*, last chapter; and in c. 1, below, *De novi operis nuntiatione*, where Hostiensis and Lord Antonius), whatever Bartolus holds in l. *Cunctos populos*, Cod., *De summa Trinitate*. For nothing seems to be owed or left to the church but that it is for pious causes, because it is for the soul (below, *De testamentis*, c. *Requisisti*). The same in a contract, in so far as it can fall into a pious cause, as in a donation made to the church and the like; for then it will be judged according to canon law, as in l. *Illud*, Cod., *De sacrosanctis ecclesiis*.

In other contracts, however, as in sale and the like, then either it concerns the paternal goods of the cleric, or his obligation. And then, if the obligation or right of action arises from the deed of the cleric, or quasi, as from contract or quasi-contract: say that if the law speaks specifically of a cleric, it

does not bind the cleric, because a statute disposing specifically is understood when it formally disposes on a person not subject to it, and so it is not valid, as Bartolus says in l. *Cunctos* and Johannes Andreae in the said additions; and so Johannes de Lignano can be understood in the said c. *Quod clericis*, in so far as he says that a statute constraining the person of a cleric is not valid. But if the law does not speak specially of a cleric, but disposes generally on contracts, crimes and the like, or other acts, and on ordering or conducting lawsuits: then Bartolus says in the said l. 1, Cod., *De summa Trinitate*, that whether suit is brought against a cleric in the civil forum or in the canonical forum, such a general law, if it does not nourish sin, nor specify the cleric, nor derogate from the privileges of the church, as in *De sententia excommunicationis*, c. *Noverint*, or if it is not unreasonable, binds the cleric, and the cleric is to be judged according to it (above, *De re iudicata*, c. *Cum causa*; above, *De restitutione in integrum*, c. *Constitutus*; *De eo qui mittitur in possessionem*, c. 3). It would be otherwise if it were against ecclesiastical liberty, because the unlawful does not come under general words and is always deemed excepted from them (Dig., *De condictione indebiti*, l. *Si procurator*; *De electione*, c. *Si compromissarius*, in the Sext; and in c. *Venientes*, *De iureiurando*, same book; and above, *De iureiurando*, c. *Veniens* and c. *Quintavallis*); which Johannes Andreae disputes most amply in the last chapter, *De immunitate ecclesiarum*, in the Sext, and in c. *Ut animarum*, *De sepulturis*, same book, in the *Novella*.

But if the right of action does not begin from the deed of the cleric, or quasi: then if the obligation for or against the cleric began to have force before his clerical state, it so follows the cleric and binds him that he be judged, even in the ecclesiastical forum, according to the secular customs; and so c. *Constitutus*, above, *De restitutione in integrum*, is to be understood. If no bond is imposed, the canon law is regarded. But if the obligation of the custom took its origin after the clerical state, then it does not bind the cleric, as in c. *Ecclesia Sanctae Mariae*, *De constitutionibus*, and dist. 96, c. *Bene quidem*. Or the cleric brings suit against invaders of the goods of the church in the secular forum; and he ought to be judged according to the canons, even if against heirs, to unburden the conscience of the deceased, although nothing has come

to the heir from the crime, provided that the resources of the inheritance allow, and that what is sought is not merely penal, but the plaintiff pursues his loss and interest, even if suit was not joined against the deceased, as the canon *Super eo*, below, *De raptoribus*, and below, *De sepulturis*, last chapter, provide; and so Lord Antonius de Butrio counselled at Florence against the heirs of Lord Bartholomaeus de Prato. All these things are true unless a custom had been introduced by clerics against canon law, the requisites intervening which are had in *De consuetudine*, last chapter; for then such a custom would have to be observed by clerics, because canon law permits it (Dig., *De verborum significatione*, l. *Lege*). And by this Johannes Andreae, in the last chapter, *De exceptionibus*, in the Sext, determines that a layman made a cleric cannot defend himself by the exception of prescription by which the debtor cannot be compelled to pay; that such prescription, as being in bad faith, ought not to help the cleric in the ecclesiastical forum; indeed it cannot help him even in the secular forum, by the said last chapter, as Johannes Andreae says there. See fully Lord Antonius in the said c. *Quod clericis*, above, *De foro competenti*.

Note also from this text, at *quibus sicut laici se tuentur*, the argument that clerics can use the statutes of seculars in their own favour. Likewise note that clerics lose the clerical privilege as to goods if, warned three times, they do not desist from the exercise of secular business; and so, conversely, they

do not seem to lose the privilege as to the person. Note that a secular cleric is not bound to pay a toll on his merchandise unless, warned three times, he does not desist (argument here; and it is expressed in c. *Quamquam*, *De censibus*, in the Sext). Likewise note from this that clerics enjoy the privilege of immunity as to their own goods, as as to ecclesiastical goods. Likewise note that the deprivation of the clerical privilege arising on account of a dishonourable occupation ceases at once when the cleric abstains from it.

In the first gloss, at *commodum habere*: the gloss speaks well; on which c. *Ecclesia*, above, *De constitutionibus*, the last chapter, below, *De solutionibus*, and the last chapter, *De exceptionibus*, in the Sext. At the end of the gloss, say that in the contrary cases it is special in favour of the faith; for the Church does not admit against itself what it approves for itself; for which matter recur to what Innocent notes in c. *Cum venerabilis*, above, *De exceptionibus*. In the second gloss, at the end: this last opinion is the truer, namely that where a cleric offends only in this, that he involves himself in secular business, he does not lose the privilege as to the person, but only as to goods, as in Clem. 1, below, this title. But if beyond this he offends in another thing, namely because he goes about without the clerical habit and tonsure, and when warned three times does not desist, he loses the privilege also as to the person, as in c. *Contingit*, the second, below, *De sententia excommunicationis*, and in the said Clem. 1, below, this title, and in c. 1, below, *De apostatis*; so Lord Matthaeus Mattesilanus of Bologna. In the last gloss, at *eodem privilegio gaudent*: it agrees with c. *Quamquam*, *De censibus*, in the Sext, and Clem. *Praesenti*, same title. Add that a city or other temporal lords exacting levies from the church are bound to double by the constitution of Frederick, *De pace iuramento firmanda*, § *Hac edictali*, § *Illicitas*; and the Archdeacon notes this in C. 17 q. 4, c. *Attendendum*, and Johannes Andreae after Tancred and Philip in c. *Non minus*, below, *De immunitate ecclesiarum*, where those compelling clerics to undue payments, if when warned they do not desist, are subject to excommunication by the deed itself, as there in the text at the end.

De cohabitatione clericorum et mulierum (X 3.2)

Rubric

Summary. 1. The companionship of women renders the life of clerics suspect of incontinence.

After treating of the life and propriety of clerics, because the companionship of women frequently renders the life of clerics suspect of incontinence (below, c. 1, and dist. 32, c. *Interdixit* and c. *Hospitiolum*), therefore after the treatment, and so on; so Goffredus and Hostiensis. The matter is had in dist. 32, c. *Nullus*, c. *Praeter haec*, c. *Ad haec* and c. *Interdixit*; dist. 33, last chapter; and dist. 81, throughout; and it agrees with the rubric *De bigamis*, c. *Quia circa*; *De restitutione spoliatorum*, c. *Ex parte*; *De accusationibus*, c. *Cum dilectus*; *De sententia excommunicationis*, c. *Si concubinae*.

Chapter Inhibendum (c. 1)

Summary. 1. Clerics ought not to live with suspect women. 2. Kinsfolk ought to be helped by the rector of the church. 3. The household is to be well ruled. 4. Clerics using their goods badly are robbers and are bound to restitution; and those giving even to kinsfolk who are not needy sin mortally. 5. A woman ought not to minister at the altar, nor approach the altar; and of the many things which are not lawful for women. 6. A woman does not receive the character [of order]. 8. A woman is worse off than a man in eighteen cases. 9. How a woman ought to be examined. 10. Bishops blind about their nephews.

Inhibendum. A priest ought not to keep with him women, even those whom the ancient canons permit, if they are suspect. This is what it says. There are two parts: in the first it forbids the suspect cohabitation of clerics and women; in the second it forbids the close attendance of women and their ministry about other things too. The second at *prohibendum*. Hostiensis, however, says that four things are contained in this text. The first is that no cleric keep a stranger suspect of incontinence. The second, that not even a kinswoman of this kind, at *sed neque*. The third, that he provide for a needy kinswoman's affairs outside his little lodging, at *sed si qua*. The fourth, that no woman mingle with clerics as a minister in church, at *prohibendum*.

Note that clerics ought not to keep with them women suspect of incontinence, even a mother or aunt or sister, and so on; and although these were not suspect, yet if they have maidservants there can be suspicion about those. Hence Augustine said: "Not all who are with my sister are my sisters" (dist. 81, c. *Legitur*). Note that the rector of a church can and ought to relieve the need of poor kinsfolk. Hence the Apostle says: *It behoveth a bishop to be blameless*, and so on; he adds: *one that ruleth well his own house, having his children in subjection with all chastity. But if a man know not how to rule his own house, how shall he take care of the church of God?* (1 Timothy 3). And when he says "bishop," it is understood also of a simple priest and of anyone to be ordained, according to Augustine, dist. 34, c. *Cognoscamus*; and so too Ambrose understands it, dist. 81, c. *Apostolus*. And understand that he should rule his household honourably and draw it back from vices and lead it to virtues by word and example (dist. 47, c. *Necesse*); for he has not the face to rebuke others who neglects his own, as in the same place. For the crime of negligence brings deposition (dist. 81, c. *Dictum*). If, however, his household were bad

without his fault, it would not be imputed to him (dist. 47, c. *Sicut hi* and c. *Quantumlibet*). Hence the same Apostle says: *But if any man have not care of his own, and especially of those of his house, he hath denied the faith and is worse than an infidel* (1 Timothy 5; and in the said c. *Necesse*).

It must be noted, however, that if clerics consume their goods badly in unlawful uses, and give even to kinsfolk who are not needy, they sin mortally, according to Raymond. Not only if they bestow on kinsfolk or the powerful, the rich, harlots, actors and the like the goods of the churches owed to the poor: they are, he says, robbers, because whatever is left over belongs to the poor (C. 16 q. 1, last chapter); for it is owed to the poor. Hence such clerics are bound to restitution of all things so spent, and they ought to restore to poor persons or convert it to the use of the church (C. 12 q. 2, c. *Gloria episcopi* and c. *Et si illi*; dist. 47, c. *Sicut hi*, at *et famelici panis*, and so on). Gulielmus understands the same when it is given to kinsfolk not as to the poor, but beyond the state of their condition. The penultimate gloss here, which begins *Et sic patet*, holds the same. Thomas too holds the same, II-II, q. 185; and although he speaks there of bishops, yet the same judgement holds of other clerics, as appears above; and he holds the same in his *Quodlibet*. See above, the preceding title, c. *Cum decorem*, where I touched on this same point.

Note that it is not lawful for women to minister at the altar, nor to approach the altar while Mass is celebrated, as here. Add: even if she were a nun, as in dist. 23, c. *Sacratas*, and *De consecratione*, dist. 1, c. *In sancta*, and here in the last gloss. In the text at *retineat*: say according to Johannes Andreae in the *Novella* here: but neither let him go to their lodging nor admit them to his (dist. 81, c. *Clericis*, and dist. 32, c. *Hospitiolum*). In the text at *nulla*, Johannes Andreae says: therefore not a nun either, by the laws alleged in the gloss and below, *De conversione coniugatorum*, c. *Uxoratus*, at the end; on which above, the first title, c. *Monasteria*, and there also Johannes Andreae; and it is noted also in c. *Ut quisque*, above, the preceding title. In the text at *ministrare*, Johannes Andreae says: since she is not capable of order; on which by the same in c. *Nova*, below, *De poenitentiis et remissionibus*.

Say briefly that a woman cannot receive the character of any clerical order, her sex preventing it, nor even exercise the act of any order, as in the said c. *Sacratas*. Nor can she preach or teach publicly (dist. 23, c. *Mulier*; C. 33 q. 5, c. *Mulierem*). Nor can she judge in spiritual causes, although in temporal ones, where there is a custom, it may be upheld, as in c. *Dilecti*, above, *De arbitris*. Nor ought they to touch the sacred vessels and palls or vestments, however holy they be, nor carry incense about the altar, as in the said c. *Sacratas* and *De consecratione*, dist. 1, c. *Vestimenta*. Nor ought they to be admitted to testimony in a criminal cause (C. 3 q. 33, c. *Mulierem*), except when the crime is proceeded on civilly; for then she is admitted even against clerics (above, *De testibus*, c. *Quoniam* and c. *Tam litteris*). In civil causes, however, she is well admitted (C. 15 q. 3, c. *Ex eo*). In testaments, however, she is not admitted (Inst., *De testamentis*, § *Testis*).

Baldus of Perugia holds in l. *Habeat unusquisque*, Cod., *De sacrosanctis ecclesiis*, that for pious causes a woman is admitted, because it is a favourable cause, as in c. *Cum esses* and in c. *Relatum*, below, *De testamentis*, where only two witnesses are required, although the text there says *tribus aut duobus legitimis testibus*. See Hostiensis in c. *Dilecti*, *De arbitris*, who notes eighteen cases in which a woman is worse off than a man; and more fully the *Speculum*, *De procuratore*, § 1, and Goffredus in the said c. *Nova*, below, *De poenitentiis et remissionibus*. And see above, *De maioritate et obedientia*, c. *Dilecta*, where it is had that she can neither excommunicate nor absolve; and the same in c. *De monialibus*, below, *De sententia excommunicationis*. And add that a woman ought not to be dragged unwillingly to court to give

testimony, but ought to be examined by honourable persons and admitted at the expense of the party producing her; on which fully in c. *Mulieres*, *De iudiciis*, in the Sext.

In the text at *infra cancellos*: say, that is, the choir, which is divided from the altar by the screen, as above, the first title, c. 1. Hostiensis: otherwise *infra* can be put for *intra*. In the second gloss, at *eum qui*: see below, the penultimate chapter. In the same gloss, at *sic solve*: according to Tancred, Innocent and Hostiensis. In the same gloss, at *suspectis*: understand when the suspicion is caused by ill fame, or when the cleric has been seen to do some acts with such women, as because perhaps he slept in the same bed, and so on (dist. 34, c. *Quorundam*, and in c. *Cum in iuventute*, above, *De praesumptionibus*). Or understand, according to Johannes Andreae, of noblewomen, who do not go about without maidservants. At the end of the gloss, say on this as in dist. 81, c. *Nolumus*. In the gloss *Et sic patet*, at *extraneis*: say according to Johannes Andreae that it is contrary to C. 1 q. 3, c. *Pervenit*, where it is said that it is a graver sin to give to kinsfolk. Resolve as in the last gloss there, where the gloss says "graver," because the church feels a graver injury (C. 5 q. 6 [text unclear], c. *Latorem*); or "graver," that is, more common (C. 32 q. 7, c. *Quid in omnibus*). For bishops are blind about their nephews (C. 8 q. 1, c. *Dilectissimi*).

Chapter Si quisquam (c. 2)

Summary. 1. A cleric in sacred orders, warned three times, who does not desist from the company or companionship of a suspect woman, is excommunicated. 2. The word *id est* is taken in different ways. 3. Under the name of priests all sacred orders are comprehended. 4. To chat with women and to talk of their beauty is a sin. 5. The word *et* is taken in many ways. 6. One warned three times before three witnesses: a husband finding him with his wife [may kill him] with impunity. 7. What *suburbana* are. 8. Who are contained under the name of clerics. 9. All the evils of the world have proceeded from clerics. 10. A woman joining herself to a cleric in sacred orders: how she is to be punished. 11. When diversity of opinions excuses, and of diverse opinions which is to be held. 12. The children of clerics are slaves of the church. 13. One in sacred orders who contracts matrimony is excommunicated by the deed itself.

A cleric in sacred orders is to be excommunicated if, warned a third time, he does not desist from conversation or companionship with a suspect woman. This is what it says. Note concerning the word *id est*, that it is explanatory of what precedes; sometimes, however, it is put by way of example (Cod., *Familiae erciscundae*, l. *Familiae erciscundae*). Note that under the name of priests all the sacred orders are comprehended; and rightly, because under the worthier the less worthy is comprehended (C. 13 q. 2, c. *Non aestimemus*; below, *De consecratione ecclesiae*, c. *Quod in dubiis*; Dig., *De rei vindicatione*, l. *Quae religiosis*). Note that chatting with a woman increases and confirms a preceding suspicion of incontinence; indeed not only to chat with women but even to chat with men about women is a sin, as is noted in dist. 40, last chapter, in the gloss *Nota eo solo*, and better in dist. 32, c. *Hospitiolum*, where Jerome says: "Never dispute of the beauty of women; let a woman not know your name," and so on.

Note concerning the word *et*, which sometimes is put disjunctively, as here at *aliquo modo*, and so on, that is, "or in any way," and so on; similarly above, the first title, c. *Clerici*, verse *Cappas*, at *qui sunt in sacerdotio et personatu constituti*, that is, "or in a personate," and so on. Sometimes it is put conjunctively

(below, *De maledicis*, c. 2, with similar places). Sometimes *et si* is put for *quamvis* (*De sepulturis*, c. *Dudum*, after the beginning, in the Clementines).

Note in this text, at *conversari*, that if someone has three times warned one whom he held suspect with his wife, in the presence of trustworthy witnesses, and afterwards has found him meeting his wife in the house, a tavern or suburban places, he kills him without peril. If he has found him elsewhere, having called three witnesses, let him hand him over to the judge; with no other reason sought, he has the sentence of punishment (Cod., *De adulteriis*, Auth. *Si quis ei*); from which this decretal could have been taken, according to Hostiensis and Johannes Andreae; which was taken from the body, in Auth. *Ut liceat matri et aviae*, penultimate §, coll. 8. *Suburbana* are the buildings lying around a city, says Isidore, *Etymologies* 15, c. 2.

In the first gloss, at *inferiores*: say, even in minor

orders (below, this title, c. *Si autem*). Of a deacon specially, that he is contained under the name of priest, you have in C. 15 q. 1, c. 1, at the end. In the first gloss, at the end: the gloss objects by c. *De persona*, at the end, C. 11 q. 1, where under the name of clerics the superiors are contained, for in the whole the part also is contained (Dig., *De regulis iuris*, l. *In toto*). Say that this proceeds from the broad signification; it is otherwise, however, of the strict, as is noted in c. *Litteris*, above, *De [filiis] presbyterorum*; on which see what is noted in c. 2, *De praebendis*, in the second gloss, and see what I said above, the preceding title, c. *Ut clericorum*. Add that sometimes under the name of clerics all of whatever order are comprehended, as in the said c. *De persona*; and to this point above, *De aetate et qualitate*, c. *Cum contingat*. Sometimes under the name of clerics the canons of the cathedral church are comprehended (below, *De verborum significatione*, c. *Cum tibi*). Sometimes under the name of clerics the suffragan bishops of the metropolitan are understood, as is noted in dist. 95, c. *Miratus*, in the gloss.

Add the terrible saying of Jerome, C. 24 q. 3, c. *Transferunt*, where the text of Jerome says: "Searching the old histories I cannot find that any have rent the Church and led the peoples astray from the house of the Lord, except those who had been set by God as priests and prophets, that is, watchmen. These therefore are turned into a crooked snare, setting a stumbling-block in all places." Indeed the gloss says, dist. 50, c. *Et purgabit*, that all the evils of the world have proceeded from clerics. Elsewhere the gloss says that clerics are worse than laymen (*De poenitentia*, dist. 1, c. *Quis aliquando*; and C. 24 q. 3, c. *Transferunt*). Hence it is said: *Begin ye at my sanctuary* (dist. 50, c. *Et purgabit*). And this destroys the Church vehemently (C. 8 q. 1, c. *Qualis*).

In the last gloss, at *fraternitatis*: there the gloss says that elsewhere it is said that she ought to be sold (dist. 81, c. *Quidam*); elsewhere, that she is reduced into servitude (dist. 32, c. *Eos*). But say that the diversity of penalties gives the bishop the option; say as fully there. In the same, at *redigatur*: distinguish. Either the woman is joined to a cleric in sacred orders as a public wife, and then by sentence she is reduced into the servitude of the church, or is sold as a slave (dist. 32, c. *Eos*, and the said c. *Quidam*); or she is joined as a concubine or in another way, and then she is not made a slave, but an arbitrary penance is imposed on her (C. 27 q. 1, c. *Quae Christo* and the following chapter); and see what is noted there in the first gloss, according to Vincentius, Goffredus, Innocent, Hostiensis and Johannes Andreae. And the judge can impose on her as a lawful penance entrance into a monastery (dist. 34, c. *Fraternitatis*); and if she refuses this penance she ought to be excommunicated, as in c. *Si concubinae*, below, *De sententia excommunicationis*. Hostiensis and Johannes Andreae say this; indeed thereafter she is not absolved from excommunication unless she makes satisfaction (below, *De*

verborum significatione, c. *Ex parte*). And she ought to make satisfaction by entering a monastery, as in the said c. *Fraternitatis*; and so she will be reduced into the servitude of the monastery, as in the said c. *Eos*. The aforesaid Hostiensis and Johannes, however, say that since the penalties handed down by the Doctors are diverse and uncertain, all this is committed to the judgement of the one judging, as in c. *De causis*, above, *De officio delegati*; the same is noted in the aforesaid c. *Fraternitatis*.

Add that when the diverse opinions of the Doctors are not repugnant to sacred Scripture and good morals, one can hold which he will without sin. And so the authority of the Apostle ought to be understood, Romans 14: *Let every man abound in his own sense*. Otherwise, however, they are not excused, if against sacred Scripture or the determination of the Church. So Thomas in the *Quodlibet*, and Innocent, Gulielmus [text unclear] and Hostiensis, adding that when there are diverse laws and opinions not against God and good morals, the more humane is to be preferred (above, *De translatione*, last chapter); otherwise one must stand by the opinion which rests on the better reason (above, *De servis non ordinandis*, c. *Capellanus*). See Innocent in c. *Ne innitaris*, above, *De constitutionibus*; dist. 15, last chapter; dist. 9, c. *Noli*, c. *Ego* and c. *Quis nesciat*; dist. 27, cc. 1 and 3; and dist. 32, § 1, at the end.

From the things said above gather a similar distinction as to offspring. Either a cleric in sacred orders begets children from her whom he took as wife after sacred order, and then the children become slaves of the church; or he begot otherwise, and then they do not become slaves of the church. On which C. 15, last question, c. *Cum multae*; and there it is noted that through disuse the church has lost this right, says the gloss there. The like can be said also of the woman, that today she does not become a slave nor is sold, because the church has not used such a right. See what is noted in the preceding title, c. *Ut clericorum*. For today one in sacred orders, if he contracts matrimony, is excommunicated by the deed itself, as in c. *Eos*, *De consanguinitate et affinitate*, in the Clementines.

Chapter Clericos (c. 3)

Summary. 1. Suspect and young clerics are not compelled to abjure their mistresses, but to leave them, by suspension; otherwise they are excommunicated. 2. An oath ought not to be given to one suspect of perjury. 3. Whether a cleric who is a public or notorious fornicator is suspended by the law itself. 4. One excommunicated is excommunicated again. 5. Purgation is not admitted where the crime is established. 6. Those more prompt to evil ought to be punished more. 7. What is called a perpetual lease. 8. Perpetual excommunication is understood until he repents.

Clericos. A prelate ought not to compel clerics to abjure their concubines; but if they will not dismiss them, he ought to suspend and excommunicate them. This is what it says; or thus, according to Hostiensis: suspect and young clerics are not to be compelled to abjure their mistresses; yet they will be compelled to leave them by suspension, and let the disobedient be excommunicated. This is what it says. It does three things: first it forbids abjuration on account of the danger of perjury; second it provides the remedy of suspension and interdict; third it further brings excommunication against those not obeying, and so on. The second at *verum*; the third at *et si qui*.

Note that a judge ought not to tender an oath to one suspect of perjury. Note the order of proceeding against clerics who are fornicators, and public ones: that if, warned, he does not dismiss her, he be suspended; and if he is still disobedient, he be excommunicated. Note here the argument that public

fornicator clerics are not suspended by the law itself, but are to be suspended by the judge. On which say that it is one thing to be public, another to be notorious. Public can be from ill fame alone, as below, this title, c. *Tua nos*; notorious, however, not from fame, but from a confession made in court, or from a sentence, or from such evidence of the matter that it cannot be concealed by any evasion, as in the last chapter below, this title; on which fully in c. *Vestra*, below, this title. Hence if it is public from fame alone, although he were suspended by the law itself, which is proved in dist. 32, c. *Nullus*, yet he can also be suspended anew by the judge, and usefully, because what is specially enjoined is wont to be feared more than what is generally forbidden (*De excessibus praelatorum*, c. *Uno*, at the end, in the Clementines); and what has been once provided for is provided for again, so that ignorance may not be pleaded (c. *Si quis suadente*, *De poenis*, in the Clementines, at the end). So therefore it is useful to add suspension to suspension, as Innocent says below, this title, the next chapter. For the penalty of the judge is graver than that of the law; for unless he be deprived by sentence, his benefices cannot be granted to others (above, *De aetate et qualitate*, c. *Cum bonae*). So too one excommunicated by the canon is usefully excommunicated by the judge. And one once excommunicated can be excommunicated many times in different ways, whether by the same judge or by another, not only for a different cause but even for the same (C. 3 q. 4, c. *Engeltrudam*; C. 11 q. 3, c. *Excellentissimus*; C. 12 q. 2, c. *De viro*; and Raymond in the *Summa*; on which in c. *Cum pro causa*, below, *De sententia excommunicationis*, and in c. *Ex parte*, above, *De officio ordinarii*; and C. 2 q. 5, § *Notandum*, verse *Si de pluribus*; *De poenitentia*, dist. 5, § 1); to which point by argument Dig., *De novi operis nuntiatione*, l. *De pupillo*, § *Si ex pluribus*. But if he is notoriously a fornicator, he is undoubtedly suspended by the law itself, as in the said c. *Nullus* and c. *Praeter haec*, dist. 32, and dist. 81, c. *Si qui sunt presbyteri*, and below, this title, last chapter, with similar places; on which fully there.

In the text at *in sacris*, at the beginning of the chapter: say, namely, especially in sacred orders, because the same holds even if they are not in sacred orders, as below, this title, c. *Si autem*. In the text at *periurii reatum incurrant*: from this text Hostiensis says that a judge ought not to receive the purgation of a defamed man ready to purge himself if in truth he knows him to be guilty; on which C. 15 q. 5, c. *Presbyter*; C. 22 q. 5, c. *Ille*. The gloss here which begins *Argumento colligitur* holds the same, because purgation depends on the will of the one imposing it (*De simonia*, c. *Insinuatum*; *De purgatione*, c. 1). If, however, the case is dispensable by the judge, let him dispense after penance (below, the first title, c. *Sane*, the second); otherwise let him tolerate him, though unwillingly (below, *De simonia*, c. *Tua*, at the end); and let him not betray him, nor tell him to betray himself (*De poenitentia*, dist. 1, c. *Non tibi*). But suppose that the accused, in an inquisition which ought to proceed to purgation, tells the judge his crime in secret, and asks that he not make him swear, because he will forswear: what shall the judge do? Johannes Andreae answers that he ought to consider the quality of the person and whether it is likely that he will forswear or not; and, having made such consideration, compel him or not; on which above, *De praesumptionibus*, c. *Mandata*. Nor ought he to be believed at once, because perhaps he says this to escape the oath (below, *De accusationibus*, c. *Inquisitionis*). But where the judge proceeds not by office but by ordinary law, he can repel neither the plaintiff nor a witness from the oath; rather he must admit them (argument from above, *De testibus*, c. *Ex parte* and c. *Significaverunt*), according to Hostiensis.

In the text at *in aliquos*: that is, against those who have returned to the women they dismissed; for others are first to be suspended, but these, who have not corrected themselves through suspension, are to be excommunicated. Or *in aliquos*, that is, against those who are more prone, or who gave more

cause (below, *De clerico excommunicato ministrante*, c. *Latores*), according to the Abbot and Johannes Andreae. So the Lord commanded Moses, on account of the fornication committed with the daughters of Moab and the imitation of Beelphegor, saying: *Take all the princes of the people, and hang them up on gibbets against the sun; and Moses said to the judges of Israel: Let every man kill his neighbours that have been initiated to Beelphegor,* and so on (Numbers 25). In the second gloss, at *ab isto die*: it is resolved thus in C. 27 q. 1, c. *Si quis sacro*, where on this. In the third gloss, at *Cod., De [indicta viduitate tollenda], l. 2*: on this, *De restitutione spoliatorum*, c. *Ex parte*, by Johannes Andreae on the third gloss. In the fourth gloss, at § *Adeo*: say that a lease is called perpetual so long as the rent is paid, according to Johannes Andreae. In the same, at *id vestimentum*: namely, it is in the *peculium* which the lord gave the slave to enjoy perpetually; it is expounded: that is, so long as the garment lasts.

In the penultimate gloss, which begins *donec resipiscat*: for otherwise it would be contrary to C. 2 q. 1, c. *Multi*, and to c. *Cum medicinalis*, below, *De sententia excommunicationis*. Vincentius reproves those who expound "perpetual," that is, so long as they live, by l. 1, Dig., *Pro socio*. But it is called perpetual, according to Innocent, because it has no time presumed; and so it is called perpetual by aptitude; to this point l. *Sufficit*, Dig., *De condictione indebiti*. Or, according to Innocent and Hostiensis, excommunication is put here for deposition or deprivation of benefice, by which he is put outside communion or fellowship, according to Johannes Andreae; on this below, this title, c. *Si autem*. Or say that here it speaks of the penalty of prison, which the judge can impose at his own judgement, as in c. *Tuae*, *De poenis*, and in c. *Quamvis*, *De poenis*, in the Sext, according to Matthaeus Mattesilanus. In the same gloss, at the end, at *ut caeteri timeant*: as below, *De haereticis*, c. *Ad abolendam*, at the end, first response, and C. 1 q. 1, c. *Reperiuntur*, at the end, where on this; and what is noted in C. 10 q. 2, c. *Perpetua*, in the first gloss, where the gloss says that excommunication is called perpetual, that is, until he repents (C. 10 q. 1, c. *Quia sacerdotes*, and C. 27 q. 1, c. *De viduis*).

Chapter Sicut (c. 4)

Summary. 1. Clerics who, when warned, do not dismiss their concubines are deposed. 2. The practice of proceeding against a cleric suspect of concubinage. 3. A cleric who is a notorious fornicator is suspended from benefice by the law itself. 4. Fitting satisfaction for sin. 5. Hidden sins are punished in hidden fashion, manifest ones manifestly. 6. Whether one suspended or excommunicated for a time is absolved when the time has elapsed. 7. One suspended for a time who celebrates is irregular. 8. Notorious fornicators ought to abstain from all the divine offices. 9. The penalty of the judge is greater than that of the law. 10. One suspended by man and by law. 11. One polluted cannot pollute the divine sacraments. 12. Suspended as to himself and as to others.

Sicut. If clerics, when warned, do not dismiss their concubines, they are deposed from those [offices]. This is what it says. It does three things: first it orders fornicating clerics to be warned to desist; second it establishes that the disobedient ought to be suspended; third, that the rebellious be deposed. The second at *si vero*; the third at *et si eas*. Note the practice of proceeding against a cleric suspect of concubinage: that he be warned, suspended and deposed. Note the argument that a fornicating cleric is not suspended from benefice by the law itself unless he were notorious, as above, this title, the preceding chapter, and below, this title, c. *Quaesitum*; I will speak there. Note the argument that for simple fornication a cleric is not at once to be deposed from benefice; understand,

unless he be contumacious and rebellious after warning and suspension, or unless his crime be notorious, as above.

In the text at *usque ad satisfactionem congruam*: say that fitting satisfaction is that he give up the sin and do penance before God, before whom he had sinned. But if he had sinned against his neighbour, and before him, he would have to do penance before him, that is, make satisfaction by telling him his fault and asking pardon; because manifest sins are not to be chastised by hidden penance, as in c. 1, below, *De poenitentiis et remissionibus*. And the Apostle says: *Them that sin reprove before all, that the rest also may have fear* (1 Timothy 5); and he speaks in particular of priests, because first he says in the same place: *Against a priest receive not an accusation but under two or three witnesses*, and at once adds: *Them that sin*, and so on. And from this the rule is taken that hidden sins be punished in hidden fashion, and manifest ones manifestly, so as to agree with the sentence of the Saviour: *If thy brother shall offend against thee*, and so on (Matthew 18; and C. 2 q. 1, c. *Si peccaverit*); and Thomas more fully, II-II, q. 33; and the Archdeacon fully in the said c. *Si peccaverit*, where he forms many questions similar to the questions of Thomas.

And note that this one, thus suspended until fitting satisfaction, as soon as he has made satisfaction as he ought, at once recovers his office and benefice, unless there be another impediment, as because the sin is manifest, or there is present a just cause requiring dispensation, as is noted above, *De temporibus ordinationum*, c. *Ex tenore* and the last chapter. And if the sin is manifest, dispensation is required with penance and satisfaction, as will be said below. Johannes Andreae says the same of one suspended for a year or for a certain time, at whose end he recovers everything, as above, by what is noted by the same in c. *Cum bonae*, above, *De aetate et qualitate*. There Lord Antonius de Butrio forms the question thus: whether one excommunicated or suspended for a time, or to the limits of the fulfilment of a certain cause, when the time has lapsed or the cause been fulfilled, is absolved. Say briefly that one excommunicated is never deemed absolved by the lapse of time or the fulfilment of the cause unless he be absolved by the judge, as Johannes Andreae notes in c. 2, below, *De matrimonio contracto contra interdictum ecclesiae*. And the reason is that excommunication requires formal absolution, as below, *De sententia excommunicationis*, c. *Cum desideres*, unless the law dictated otherwise. But one suspended for a time is absolved when the time has lapsed, because formal absolution is not required. But if he is suspended to the limits of the fulfilment of a certain cause: if the fulfilment depends on the judgement

to be made in court, as because he was suspended because he would not present his libel or join issue, then when the cause ceases and the fulfilment is given, since this is established, he is absolved. But if the fulfilment is extrajudicial, then, according to Innocent, absolution is awaited, because doubt can arise about such an impediment, whether he has fully satisfied, or in due manner, as is noted in Clem. *Ipsa* [text unclear], 1, *De decimis*. Lord Antonius, however, says that perhaps it would suffice, without other absolution, for the judge to declare that the fulfilment had been sufficiently made; and in this way Innocent here is brought into harmony with the said c. *Cum bonae*, where he seems contrary to himself. The Archdeacon treats this in c. *Quia saepe*, *De electione*, in the Sext; for which the gloss in Clem. *Statuimus*, *De electione*, makes, and Johannes in C. 16 q. 7, c. *Si quis deinceps*. Johannes says the same if one was suspended for contumacy, because when the contumacy is purged he is absolved, as in c. *Ex litteris*, above, *De constitutionibus*.

For this suspended man does not lose his spiritual or temporal rights, nor their possession, although he loses the fruit for a time. This is plain from the fact that he does not have the intention for this, without which possession is not lost (Dig., *De acquirenda possessione*, l. *Possidendi*, § *Quibus*). And therefore his benefices cannot be conferred in the meantime, although the fruits of the intervening time are not restored to him, but are converted to the use of the church (*De appellationibus*, c. *Pastoralis*, at the end; below, *De clericis non residentibus*, the penultimate chapter), according to Innocent; according to whom one suspended for a time who celebrates is irregular, as below, *De clerico excommunicato ministrante*, in the last chapter, in the gloss; the same seems to be held there by Johannes Andreae about the middle of the gloss.

In the text at *et si eas*: say, or otherwise retain them anew, as above, the preceding chapter. In the text at *suspendatis*: the gloss above, this title, c. *Si autem*, says that this is of grace, at the end of the last gloss; the same here Hostiensis and the Abbot. Hostiensis says that by this there is no derogation from the canons marked as contrary, which speak of a priest who is suspended only from Mass; here it speaks of other sacred orders and imposes other penalties. Innocent, however, says that one must abstain from the office, not only of priests but also of other clerics, by the last chapter below, this title; and not only from Mass but also from the other lesser offices (dist. 81, c. *Si qui sunt presbyteri, diaconi vel subdiaconi*, and so on). Indeed he will not even have a benefice, nor sit with the others, and so will not take part in elections (argument from c. *Praeter hoc*, dist. 32). And some understand this not only of those in sacred orders but in minor orders (argument from the said c. *Praeter* and below, this title, c. *Vestra*). Nor does this new [law], which says he is to be suspended, take away the aforesaid old laws which say he is suspended by the law itself, since here it speaks of a hidden case, and before condemnation and confession; or it speaks of when there was only suspicion, as above, c. 2. Or, although anyone can by his own authority withdraw from the offices of a public fornicator, yet one can also proceed against him by the ordinary way, by which other penalties too will be imposed, as here; and I said above, the preceding chapter, that it is useful to add, and so on.

Moreover, according to Innocent the penalty of the judge is graver than that of the law. He says that the penalty of the law ceases if he ceases from the sin, as to this, that others may hear his office; and so dist. 81, c. *Si qui sunt*, and what is noted there, can be understood. Yet he himself ought not to celebrate without dispensation and absolution, since his crime was known (dist. 81, c. *Minister*, and what is noted in dist. 50, c. *Sacerdotes*); and Huguccio agrees with this saying. But Innocent himself seems to say that he does not need absolution, below, *De sententia excommunicationis*; where see Johannes Andreae on the first gloss. Yet the bishop would absolve, since it is not among the reserved cases (below, *De sententia excommunicationis*, c. *Nuper*), according to Laurentius, who notes this in dist. 32, c. *Nullus*; and below, the first title, c. *Sane*, the second, and above, *De iudiciis*, c. *At si clerici*, make well for it. But the sentence of the judge will not cease unless he be restored, and that of great grace. Likewise, unless he be deprived by sentence, his benefices cannot be conferred on others; and therefore a warning ought to precede, as here and in the following chapter, and I said above, the preceding chapter. But if he had been suspended by a prelate, his benefices could be conferred, because they are vacant (above, *De aetate et qualitate*, c. *Cum bonae*); otherwise in the benefices of those suspended by law, as here, according to Innocent. Hostiensis, however, does not hold this; he says, and better, that the benefices of one suspended even by man cannot be conferred. For he who suspends does not deprive; therefore the one suspended still remains a prelate; therefore so long as

he so lives, his benefices cannot be conferred (*De concessione praebendae*, c. 1). Yet he can on account of this be perpetually removed, as follows

here, and even deposed (above, the first title, c. *Ut clericorum*, § *Si quis igitur*, and below, *De clericis non residentibus*, c. *Ex tuae*).

Although Innocent says that there is the aforesaid difference between those suspended by man and by law, yet in the administering of the sacraments there is no difference according to him, as is noted below, *De haereticis*, c. 2. Innocent also says that one suspended by the canon who celebrates is not made irregular (argument from the decretal *Si celebrat*, below, *De clerico excommunicato ministrante*, at the beginning); the Abbot said the same below, this title, c. *Vestra*, at the beginning, and Vincentius below, this title, the penultimate chapter; otherwise in one suspended by the judge (C. 11 q. 3, c. *Si quis presbyter*). But one excommunicated by the canon would indeed become irregular by celebrating (below, *De sententia excommunicationis*, c. *Cum illorum*); and Innocent refers himself to what is noted in c. *Si celebrat* and in c. 1, *De schismaticis*. Hostiensis, however, does not hold this; rather he says that one suspended by the canon who celebrates is made irregular, as he notes in the said c. *Si celebrat*, and *De sententia excommunicationis*, c. *Cum medicinalis*, verse *Si quis autem*, in the Sext. And Gulielmus in the *Speculum*, title 2, § *Iuxta propositionis*, verse *In suspensis*, holds the same as Hostiensis; and Johannes Andreae inclines more to the same.

In the text at *et si eas suspensi praesumpserint detinere*: say, for so long a time that scandal and ill fame against him increase; and this is left to the judgement of a good judge; or they will not be awaited except until they are cited after the suspension, according to Innocent and Johannes Andreae. In the text at *perpetuo*: say, for a double fault (above, the first title, c. *Ut clericorum*, § *Si quis igitur*), according to Hostiensis and Johannes Andreae. In the second gloss, at the end: say that this solution is good according to Tancred, Innocent and Hostiensis. Yet it can be said that although they are suspended by the law itself, they can also be suspended by the judge, as was said above; for which also see c. *Tam litteris*, above, *De testibus*, for the conferring of the benefice of one suspended, and so on, as above in what Innocent says, that a notorious fornicator is suspended by the law itself. Yet so that the penalty be increased by man, a warning is necessary, as here and below, c. 2. Say according to Hostiensis that here it does not speak of suspension from office, but from benefice; and so there is no contrariety, but a diversity of cases.

In the same gloss, at *consulendum*: say better, C. 15, last question, last chapter, where the text says: "No one, however polluted he be, can pollute the divine sacraments," and so on; to which C. 1 q. 1, c. *Dominus declaravit*, c. *Non quales*, c. *Christus*, c. *Isaiam* and c. *Dictum* make well. It is said, however, that all the aforesaid laws speak of those who are tolerated by the Church; because such, however criminal they be, ought not to be avoided. But it is otherwise of the excommunicated, or heretics, or schismatics, or those suspended as to themselves and others, as of simoniacs and notorious fornicators, as in the said c. *Tanta*, *De simonia*, and in the last chapter below, this title, and C. 3 q. 4, c. *Engeltrudam*, with similar places, and C. 1 q. 1, c. *Odit Deus*, and *De consecratione*, dist. 4, c. *Quomodo*, and C. 3 q. 7, c. *Iudicet*.

Chapter Super eo (c. 5)

Summary. 1. An absolution is not valid if a cleric suspended for concubinage is absolved with this kept silent. 2. A rescript obtained with the truth kept silent is not valid. 3. When subreption vitiates a rescript.

Super eo. An absolution is not valid if a cleric suspended on account of concubinage is absolved with this kept silent. This is what it says. Note that letters not making express mention of the series and process of the fact are not valid. Note that a rescript obtained with the truth kept silent is of no moment (above, *De rescriptis*, c. *Dilectus filius* I. *Abbas*). And understand the case of this chapter of letters obtained concerning his restitution, according to Innocent; and rightly, because if he complained of the justice of the sentence or suspension, the letters would be well valid, and one would proceed according to them, not according to the form of the letters but according to the order of law (above, *De rescriptis*, c. *Super litteris*). Or it can be understood as special in this case, that mention of the process ought to be made, by the said c. *Dilectus*; therefore, according to Hostiensis, letters suppressing the series of the matter lack force. Note at the words *et infra*, according to Johannes Andreae, that the priest himself obtained them concerning his absolution, as follows, *porro*, and so on.

And for a clearer understanding of this matter say: when it is asked whether subreption vitiates a rescript, say that either the subreption is made fraudulently, whether by keeping silent the truth or by stating the false, and then it vitiates the whole substance of the rescript, as in c. *Super litteris*; or the subreption is made from ignorance and simplicity, and then, if it is fundamentally inductive of the substance of the rescript, as because if the subreption were absent the Pope would not have granted the whole rescript, then it vitiates it wholly, as in the said c. *Super litteris*. But if it is not inductive of the substance of the rescript but only of its form, as because, that ceasing, the Pope would still have granted

the substance of the rescript, but not under that form, then it vitiates the form of the rescript but not the substance, so that the defect operates in so far as it regards [the form] and not beyond. Hence a defect of form does not prevent proceeding in the common form, when the words of the rescript, both in the narration and in the conclusion, can be proportioned to the common form; otherwise if they were not proportionable, whether with respect to the narration alone, or to the conclusion alone, or to both. Hence if in a rescript I narrate that Peter is a debtor by reason of a loan, and conclude that he be compelled to restore the debt, if he is a debtor by reason of a donation the judge will not be able to proceed by force of that rescript, because it is not proportioned to a debt by reason of donation, neither in the narration nor in the conclusion. Or if I narrate that I have been wronged by Gulielmus concerning the possession of such a thing, [and] wish to sue by reason of sale, that possession be handed over, the judge cannot proceed, because this is not proportioned to the narration nor to the conclusion of the rescript (above, *De rescriptis*, c. *Constitutus*); for which also c. *Gratia*, *De rescriptis*, in the Sext, and c. *Si motu proprio*, *De praebendis*, in the Sext.

In the first gloss, at *suspensum ab episcopo suo*: the short gloss needs supplementing, because the same holds even if he were suspended by law from a notorious fact, by what is noted in c. *Vestra* and in c. *Quaesitum*, below, this title. And so Laurentius, Hostiensis and Johannes hold; for which see what I noted above, the preceding chapter, in the little note on the word *suspendatis*. In the last gloss, at the

end: say that Tancred and Johannes Andreae hold the same; to this point above, *De fide instrumentorum*, c. *Quod super his*, and c. *Ex parte*, above, *De officio ordinarii*.

Chapter Si autem (c. 6)

Summary. 1. A cleric who, when warned, does not dismiss his concubine is deposed from benefice. 2. Clerics even in minor orders are bound to keep chastity. 3. Clerics are to be deposed from office and benefice for simple fornication. 4. Whether a bishop ought always to dispense with those constituted in sacred orders concerning fornication. 5. Which crimes are enormous. 6. A simple fornicator is barred even from the least order. 7. A fornicating cleric commits sacrilege. 8. Whence "fornicatress" and "concubine" are named. 9. What a harlot is, and whence. 10. What a concubine (*pellex*) is, and whence so called. 11. What a *focaria* is, and whence. 12. The manifold description of woman, and of the perils of her deeds and of those imperilled by her.

Si autem. A cleric who, when warned, does not dismiss his concubine ought to be deposed from benefice. This is what it says. Note that clerics established even in minor orders are to be compelled to keep continence, and if they will not keep it, office ought to be forbidden them and benefice taken away. Note that the warning ought to be threefold, which ought to precede deprivation. Note here that despoiling is sometimes taken for deprivation. Note that clerics are not to be deposed from office or benefice for simple fornication unless, warned three times, they persevere in contumacy; which understand, unless he be a notorious fornicator, as in c. *Praeter haec*, c. *Nullus* and c. *Eos*, dist. 32; for in notorious cases there is no place for purgation, nor examination, nor appeal, nor the observance of any order, as the Archdeacon notes in C. 27 q. 1, c. *Si homo*.

It is objected, and it seems, that clerics can be deposed even without a preceding warning (C. 1 q. 7, c. *Si quis omnem*; dist. 81, c. *Maximianus* and c. *Si qui episcopi*). Solution: Lord Matthaeus says it can be said that those texts speak according to the rigour of the ancient canons (dist. 32, c. 1), because they expressly promised chastity; hence, as coming against their vow, they can be deposed, as in c. *A multis*, above, *De aetate et qualitate*, and dist. 32, c. *Erubescant*; to this point above, *De iureiurando*, c. *Querelam*, and above, *De iudiciis*, c. *Cum non ab homine*. Therefore in the same way such fornicators can in rigour be deposed; which Paulus holds in Clem. 1, *De officio ordinarii*. But where they do not come against a vow, as because they are only established in minor orders, they cannot be deposed for simple fornication unless, then warned, they do not desist, as here, according to Matthaeus; who says more, namely that because written equity prevails over rigour, as in l. *Placuit*, Cod., *De iudiciis* (to this point l. *Quod si Ephesi*, Dig., *De eo quod certo loco*, where it is said that the judge ought always to have God before his eyes). Therefore Matthaeus infers that the bishop ought to dispense even with those in sacred orders concerning fornication; he alleges for this the good text c. *Fraternitatis*, dist. 34, and above, this title, c. *Sicut* and c. *Clericos*. And thus, he says, this has been specially introduced out of equity, that the bishop is even bound to dispense with them. And the reason, he says, is because such a vow and precept proceeds concerning a thing too difficult, such as continence (dist. 34, c. *Fraternitatis*, and dist. 40, c. *Quia tua*). Hence, according to him, the rule of c. *Querelam*, above, *De iureiurando*, and c. *Cum

non ab homine*, above, *De iudiciis*, [applies] when one can easily keep his oath, as because he swore to give a certain sum of money, and so on. He limits these to be true unless they are enormous

crimes, as in c. *Clerici*, below, *De excessibus praelatorum*, where there is a text which he says is notable.

You, say that c. *Clerici* speaks of the sodomitic vice only, which, although it is the greatest sin among the species of lust (C. 32 q. 7, c. *Adulterii malum*), yet its gravity does not relieve fornicators from sinning mortally, as I said above, the preceding title, c. *Ut clericorum*, where fully by twelve arguments. Hence the aggravation of sodomy does not compel the bishop to dispense with a cleric who is a simple fornicator; rather they are commonly equated as to suspension, deposition and the like, by this text. Moreover, c. *Fraternitatis* does not make to the point, because there it is treated whether one who had a wife and did not keep matrimonial chastity with her can come to the diaconate, and it is said that he can; what then to the point? Moreover, Innocent, Hostiensis and Johannes Andreae commonly equate all notorious persons in major and minor orders as to avoidance in the divine offices, as I said above, this title, c. *Sicut*, where see what I noted on the word *suspendatis*. Moreover, the same seems contrary to himself when he says "unless they are enormous crimes"; for all crimes from which civil infamy results are called enormous (C. 3 q. 7, § *Porro*; C. 2 q. 5, § *Hinc colligitur*; and better C. 6 q. 1, c. *Omnes* and c. *Infames*). For every notorious mortal sin induces infamy, as in the said c. *Omnes*; but fornication is never lawful (dist. 88, c. *Fornicari*); therefore, and so on.

Moreover, a simple fornicator is barred even from the least order (dist. 81, c. *Apostolus*, and the gloss there; dist. 33, c. 1 and c. *Cognoscamus*; dist. 24, last chapter; *De temporibus ordinationum*, last chapter; C. 2 q. 1, c. *Notum*; C. 2 q. 7, c. *Lator*; dist. 81, c. *Maximianus*, and the gloss there too; and *De officio ordinarii*, c. 1, in the Clementines). The gloss says in the said c. *Maximianus*: it is commonly said that for simple fornication one ought not to be deposed, since few are found without that vice (dist. 50, c. *Quia tua*); but it is to be understood of a hidden simple fornicator; otherwise the contrary, by the laws alleged, and C. 27 q. 1, c. *Ut lex*, and dist. 82, c. *Presbyter*; see above in the little note at the beginning of this chapter. Moreover, one having a concubine ought not to be promoted to clerical order, nor to the acolytate, as appears in dist. 33, in the summary, and c. 1 and the last chapter, and C. 1 q. 7, c. *Si quis omnem*. How then is the bishop bound to dispense with a fornicator in sacred orders, who ought not to promote even a concubinary layman to the acolytate? Moreover, a fornicating cleric commits sacrilege (C. 27 q. 1, c. *Impudicas*, and what the Archdeacon notes in dist. 28, c. *De his*).

In the text at *fornicarias*: say that she is so called as though *forma careat nitida*, lacking a fair form; *concubina*, lying together. Isidore, *Etymologies* 10, under the letter F, says: a *fornicatrix* is one whose body is public and common. These stood for hire under arched places, which places are called *fornices*; whence also *fornicariae*. Virgil: *Atque adversae fornice*. Elsewhere fornication is said to be from *fornix*, that is, the brothel, because they prostrated themselves under the stone arch (Dig., *Ad legem Aquiliam*, l. *Si servus servum*, § *Si fornicarius*). *Meretrix* (harlot), as it were *mere*, that is, truly, *tricans*, or because she earns (*meretur*) if she does not *tricat*, that is, deceive; Hostiensis and Johannes. Add what is noted in *De poenitentia*, dist. 2, c. *Si enim*, verse *Petere quoque*, and dist. 33, c. *Laici*. On the harlot see C. 32 q. 4, c. *Meretrices*, at *quarum publice venalis turpitudo est*; and dist. 34, c. *Si quis de laicis*, § *Quod ergo de pellice aut meretrice*, and c. *Cognoscamus*, § *Similiter*, and c. *Si quis viduam*, and c. *Vidua*, at *meretrix, quae multorum libidini patet*; where the gloss says: who has admitted more than twenty-three thousand men (dist. 45, c. *Disciplina*, where it is said that twenty-three thousand men are few), or who has admitted forty (below, *De clerico excommunicato ministrante*, c. *Latores*). See dist. 86, c. *Qui venatoribus*. Sometimes one's own wife is called a harlot, and the husband an adulterer (C. 32 q. 2, c. *Aliquando*, at *aut illa quodammodo est mariti meretrix, aut ille adulter uxoris*). Isidore, *Etymologies* 10, under the letter M, says:

the harlot is so called because she earns the price of lust; whence also *meritoriae tabernae*; for soldiers, when they receive their pay, are said *mereri*. Of the *pellex*, in the same book, letter P, he says: *pellex* among the Greeks is properly said of a concubine at one's side; but it is called from the deceit of the skin (*pellis*), because she deceives by the skin, that is, by the face; for outwardly she smiles in order to deceive, but bears wickedness within; and so *pellex* from the craft of subtlety or from lying, as it were deceitful and false. The gloss on c. *Laici*, dist. 33, says she is called a *pellex* whom one has for the sake of sating lust. Hence 2 Peter 2: *Feasting luxuriously with you, having eyes full of adultery and of sin that ceaseth not, alluring unstable souls*; and below in the same place: *For, speaking proud words of vanity, they allure by the desires of fleshly riotousness*, and so on. Of the *pellex*, Ecclesiasticus

she is called *multivola*; and of those deceived by her see Jerome on Proverbs 7, according to Johannes Andreae. *Focaria*, so called as it were burning at the hearth (*focus*); of which word it is had above, *De testibus*, c. *Ex parte*.

Note concerning the deceits of women the beautiful words of Solomon, Proverbs 7, saying: *I consider a foolish young man, who passeth through the street by the corner, and goeth nigh the way of her house in the dark, when it grows late, in the darkness and obscurity of the night. And behold a woman meeteth him in harlot's attire, prepared to deceive souls; talkative and wandering, not bearing to be quiet, not able to abide still at home, now abroad, now in the streets, now lying in wait near the corners*, and so on. It follows: *She entangled him with many words, and drew him away with the flattery of her lips. Immediately he followeth her as an ox led to be a victim, and as a lamb playing the wanton, and not knowing that he is drawn like a fool to bonds, till the arrow pierce his liver; as if a bird should make haste to the snare, and knoweth not that his life is in danger*, and so on. Papias, moreover, says: "What is woman? The confusion of man, an insatiable beast, a daily anxiety, an unceasing fight, a daily loss, a house of storm, a vessel of adultery, a daily battle, a most evil animal" (elsewhere "pernicious"), "an incurable sickness." John Chrysostom says: "What else is woman but the enemy of friendship, an inescapable punishment, a necessary evil, a natural temptation, a desirable calamity, a domestic danger, a delightful detriment, a nature of evil painted with the colour of good" (on Matthew, at *It is not expedient to marry*, Matthew 19). Ambrose, *De officiis* 1: "The company of women joined with clerics is by no means permitted: the gate of the devil, the way of iniquity, the stroke of the scorpion; woman is a harmful kind; when she draws near she kindles the fire with a goad, she strikes with flame-bearing fire the conscience of the one dwelling with her, and burns up the foundations of the mountains. If women dwell with men, the birdlime of the devil will not be lacking." Origen: "Woman, the head of sin, the weapon of the devil, the expulsion from paradise, the mother of wrongdoing, the corruption of the ancient law" (on Matthew, at *Behold a woman of Canaan*, and so on, Matthew 15). Valerius, in the letter to Rufinus: "Friend, may the Almighty grant you not to be deceived by the deceit of the almighty woman." The same Valerius Maximus, in book 9, says: "What is fouler than these vices, what more ruinous, by which virtue is worn away, victories languish, glory lulled to sleep is turned into infamy, the strength of mind and body is overcome, so that you do not know whether to be captured by enemies or by these is to be held more pernicious?" Solomon, Proverbs 5: *The lips of a harlot are like a honeycomb dropping, and her throat is smoother than oil. But her end is bitter as wormwood, and sharp as a two-edged sword. Her feet go down into death, and her steps go in as far as hell.*

Note those imperilled through women. First, Adam, seduced by Eve through the food of the forbidden fruit (Genesis 3), for which he was expelled from paradise; the flood came from this vice

(Genesis 6). Second, Lot, made drunk by his daughters, committed incest with them (Genesis 19); and his wife, because she turned back, was changed into a pillar of salt (same place). Third, Dinah, wandering abroad, was violated by Sichem, for which he and the king his father and all of the male sex were slain by Simeon and Levi, Dinah's brothers, and the whole city was laid waste (Genesis 34). Fourth, Judah was deceived by Thamar his daughter-in-law, who showed herself a harlot and conceived by her father-in-law (Genesis 38). Fifth, holy Joseph was imprisoned for three years because he would not lie with the shameless wife of his lord Putiphar (Genesis 39). Sixth, many thousands of men among the people of Israel perished in war because they mingled with the Moabite women sent to the camp at the suggestion of Balaam (Numbers 25); about which see what I said above, this title. Seventh, Balaam was slain for such counsel (Numbers 31). Eighth, Sisara, the famous captain, was deceived and died by Jahel, wife of Haber the Cinite, when Barac was pursuing him; for when he asked for water to drink, that evil woman gave him milk; and when he slept she pierced his temple, and he died (Judges 4). Ninth, Abimelech was slain by a certain woman who threw down a millstone from the roof and killed him (Judges 9). Tenth, Samson was deceived by Dalila, from which he slew himself and many thousands (Judges 16). Eleventh, the whole tribe of Benjamin was destroyed on account of the adultery [committed against] one woman, from which about ninety thousand men were slain (Judges 19 and 20). Likewise Heli and his sons, namely Ophni and Phinees, died because the sons slept with the women who watched at the door of the tabernacle (1 Kings 2), and so on. Twelfth, David, taken with love of Bethsabee,

although a holy prophet, committed adultery, betrayal and homicide (2 Kings 11). Thirteenth, Amnon his son was slain by Absalom his brother because he had violated Thamar his sister (2 Kings 13). Fourteenth, Absalom, because he defiled the concubines of his father David, was slain by Joab with three lances (2 Kings 16 and 18). Fifteenth, Adonias, brother of King Solomon, because he coveted Abisag the Sunamitess as wife, was slain by order of Solomon his brother (3 Kings 2). Sixteenth, Solomon, the wisest in the world, enticed by the love of women, was made an idolater and was deceived and damned (3 Kings 11); Augustine holds this, and Innocent touches on it in c. *Ne innitaris*, above, *De constitutionibus*. Seventeenth, Seba, at the counsel of a woman in the city of Abela and Bethmaacha, was beheaded, and his head was thrown over the walls of the city into the hands of his enemies (2 Kings 20). Eighteenth, Elias the prophet suffered many persecutions from Jezabel, queen of Achab, king of Israel; and Naboth was slain, and the prophets killed by her; and at last her husband was slain in battle, and the dogs ate her in the field of Jezrael (3 Kings 19 and thereafter to the end). Nineteenth, Athalia slew all the royal seed, and she herself was slain (4 Kings 11); for her sons too had destroyed the house of God and were slain (same book, c. 10, and 2 Paralipomenon 22, 23 and 24). Twentieth, Holofernes, the prince of the army of the king of the Assyrians, was beheaded by Judith, having run riot over her ornaments and beauty (Judith 12). Twenty-first, Aman was hanged at the petition of Esther, queen of King Assuerus, on account of Mardochai (Esther). Twenty-second, the two old judges were stoned because they burned with lust against Susanna (Daniel 13). Twenty-third, John the Baptist was beheaded at the instance of Herodias, on account of the incest committed with Herod, her uncle and kinsman (Mark 6). Twenty-fourth, the temple of Judaea under King Antiochus was full of riot and revelling, and of those committing fornication with harlots (2 Maccabees), from which afterwards about three hundred and thirty-five thousand persons were slain (from chapter 8 to the end).

At *liceat*: Johannes Andreae says: therefore it is not necessary; therefore he will be able to grant grace; on which above, the first title, c. *Quoniam*, and above, this title, c. *Sicut*. Hostiensis says the same. In the text at *et ibi*: say, by your authority, according to Innocent and Johannes Andreae. In the second gloss, at the end: say according to Tancred, by c. *Proposuit*, above, *De filiis presbyterorum*. In the third gloss, at *servus*: say as Johannes Andreae says in c. *Ex litteris*, above, *De constitutionibus*, on the third gloss. In the last gloss, at the end: the same Johannes; gloss on dist. 81, c. *Si quis amodo*.

Chapter Vestra (c. 7)

Summary. 1. The divine offices of a notorious fornicator are not to be heard, nor the sacraments received from him; and no. 4. 2. A canon speaking with words of the imperative mood seems to have the force of a precept. 3. What "to know without doubt" means. 5. The concubine and children of the priest, and those however closely joined and of his household, parishioners and non-parishioners, are forbidden to hear divine things from a notorious fornicator. 6. A general allegation is valid; and no. 13. 7. A minister infected [by sin]: the sacrament and its grace are not infected. 8. Whether a polluted man pollutes the sacraments. 9. The difference between the prayer of a holy and of a profane priest. 10. The sacraments are purifiers of the filth, contagions or faults of those approaching. 11. One existing in mortal sin can communicate in three ways. 13. Negligence is never excused by God. 14. The mystery of the Body and Blood of Christ is called a sacrament. 15. Ministry differs from mystery. 16. Who is a minister, and who are called ministers of the Church; and nos. 17, 18. 17. In how many ways "mystery" is taken. 19. Our faith in Christ purges offences. 20. One offence is notorious, another hidden, another almost hidden. 21. How "tolerated by the Church" is understood. 22. What is called notorious by evidence of the fact; and notoriety is threefold. 23. Of which [ministers] "to hear the divine mysteries" is understood. 24. How fame, manifest and notorious differ.

(Summary of c. Vestra, continued.) 25. What esteem, taken for fame and opinion, is. 26. The good fame of one's neighbour is to be preserved, and how it is to be restored. 27. Whether one unjustly defamed sins mortally in denying in court. 28. One accused is bound to set out the truth to the judge. 29. Whether it is lawful for one condemned to death to defend himself or to flee. 30. Whether fame with one witness proves in civil matters. 31. When fame alone proves, and when with supports. 32. When fame has been proved against someone, whether the contrary can be proved. 33. How fame is proved. 34. When it makes full proof, when half-full, and what it is. 35. Who are notorious robbers. 36. The definition of popular fame. 37. Whether to denounce once is enough. 38. In how many ways "manifest" is taken, and what it is called. 39. How a manifest usurer is proved. 40. What is hidden, and in how many ways it is said; and what is secret. 41. How notorious, rumour, fame and common opinion differ. 42. Whether and when hearers of diverse opinions are excused from sin in holding diverse ones. 43. Whether and when one believes an official denouncing a crime. 44. Notorious is taken strictly, broadly and most broadly. 45. Notoriety by evidence of the fact is twofold. 46. Notorious things, properly taken, do not require the order of law; but this fails in many ways, nos. 47, 49, 50, 51, 52, 53. 48. How witnesses ought to depose in a notorious matter. 54. In notorious matters a judge is not recused as suspect. 55. One appealing in notorious matters is not heard. 56. A sentence given against what is notorious is null by the law itself. 57. The privileges of the notorious have place in three kinds of notoriety. 58. The notoriety of proof has four good effects. 59. The infamous and base of every kind, and accomplices in crimes, are admitted as witnesses against

heresy. 60. When the parish priest is a notorious fornicator, whether and when the parishioners may hear [Mass] from another.

Vestra. From a cleric who is not a notorious fornicator the divine offices can lawfully be listened to and the sacraments received. From a notorious one, however, one must abstain, not because they are not sacraments, or because one could be polluted by them, but so that they may be amended by the weariness of being held in contempt. And notorious is said by confession, sentence, or evidence of the fact. This is what it says. It is divided into two parts: in the first a consultation is set out; in the second the decision. The second at *caeterum*; and according to this the beginning is the words of the one consulting. And so Johannes Andreae used to put the case; but afterwards he divides it better thus, according to the old [text]: in the first the consultation is resolved, in the second the answer. The second part is subdivided into four: in the first it is alleged for and against; in the second it distinguishes the qualities of the crime about which it is asked; in the third it distinguishes about the intention of the one abstaining; in the fourth from the distinction it concludes the solution. The second principal at *alicubi*; the second of the second at *caeterum*; the third at *item aliud*; the fourth at *sine dubitatione*. From the superscription it does not appear to whom he writes, neither here nor in the old [collection]. In the text of the old one, however, it was said thus: "Your devotion has thought fit to inquire, that we may counsel your brothers going to parish churches whose clerics are believed to have concubines. On this the sentences of the sacred canons seem diverse: to have come forth somewhere," and so on. And it was the first of the third book in the Second Compilation; and Alanus said "to the Abbot or Prior of Lon."; the same Vincentius.

According to Hostiensis this decretal says five things: first it sets out the contrariety of the canons; second it distinguishes between the notorious and the wholly hidden; third it distinguishes between the notorious and the almost hidden; fourth it distinguishes between the intention of the one avoiding, whether to be removed or to be disapproved; fifth the canon resolves the contrariety. Johannes Andreae holds that where a canon speaks through words of the imperative mood it seems to have the force of a precept, at *ut nullus audiat*; but on this there are clearer texts, dist. 32, c. *Nullus* and c. *Praeter haec*. And supply, according to Johannes: nor can he himself hear from others, as in the said c. *Praeter*; the same Petrus; and dist. 81, c. *Si qui sunt presbyteri*. Note at the word *alicubi* that a general allegation is valid; on which fully here by Lord Antonius de Butrio.

Note at the word *indubitanter* that one is said to know without doubt what is notorious; and say, whom he knows without doubt by knowledge of law or of fact. Although Johannes in the gloss said by knowledge of law and not of fact, this is not held; rather he knows by knowledge of law and fact, or of fact at least, because ignorance of law does not excuse; for *if any man know not, he shall not be known* (1 Corinthians 14); on which in the rules of law, in the Sext, and Dig. and Cod., *De iuris et facti ignorantia*, l. *Iuris ignorantia*. And that it ought to be so understood is proved here and below, this title, last chapter. But perhaps Johannes understood that to be knowledge of law which is founded upon what is notorious either in law or in fact. And a warning will precede, according to Huguccio and Laurentius, above, the preceding chapter; Johannes Andreae and others the contrary, by the last chapter below, this title. And when it says *indubitanter*, understand, that is, notoriously; for if you understood "without doubt" according to conscience, then the following chapter would stand in the way; which yet does not stand in the way, because it speaks of a hidden case and not of a notorious one. So Hostiensis and Johannes Andreae.

Note at *missam* that neither Mass, nor the Gospel, nor the Epistle, nor any other divine office ought to be heard from a notorious fornicating cleric, as here, and more fully in the said c. *Praeter haec*. Note at *concubinam* that the same holds also of any woman brought in under him, as in the aforesaid canons, Huguccio and Johannes Andreae say; perhaps under the name of a lay sister. Note also from this universal *nullus* that parishioners and non-parishioners, the concubine, and also the priest's children, and any persons however closely joined, are forbidden to hear divine things from a notorious fornicator, although some of the household can communicate with one excommunicated (C. 11 q. 3, c. *Quoniam multos*). Note at *alibi vero legitur* an argument also for a general allegation, that it is valid; so below, *De praebendis*, c. 2; dist. 45, c. 2 and § *Hinc etiam*; C. 1 q. 1, c. *Ut evidenter*; C. 35 q. 3, c. *Quaedam*; dist. 18, c. *Quoniam*, at the beginning; below, *De simonia*, c. *Licet Heli*, verse *Nam iuxta*; *De regularibus*, c. *Cum virum*; on which fully in the *Speculum*, *De disputationibus et allegationibus*, § *Porro*, verse *In summa*.

Note at *pollutus* that the infection of the minister does not infect the sacrament, nor even the grace of the sacrament, because grace does not pass through the medium of the minister, but descends from God immediately into the sacrament (C. 1 q. 1, c. *Si fuerit*, c. *Christus*, c. *Dominus declaravit*, c. *Per Isaiam*, and c. *Dictum est a Domino*); which is said in Numbers 6, and the Lord speaks to Moses and Aaron, saying: "Priests, you set" (the gloss says: *invoke*) *my name upon the children of Israel, and I* God *will bless them*; so that he may pour the grace handed on through the ministry of the ordained into men, nor can the will of the priest help or hinder, but the merit of the one asking for the blessing. And Augustine says: God effects the remission of sins either by himself or through the members of the dove (*De consecratione*, dist. 4, c. *Quomodo*); to the same, *De consecratione*, dist. 2, c. *Panis*.

About which things there seem to be contraries, and also C. 1 q. 1, c. *Sic populus*, where it is said that, although the things which are offered seem holy in their own appearance, yet because they are handled by one who is polluted in soul, all things are polluted. Likewise contrary, in the same place, same cause and question, c. *Multi*, where it is said: "So we pollute the Body of the Lord when we approach the altar unworthy, and, being filthy, we drink the clean Blood." Resolve that in truth no one pollutes the sacraments, as is said here. For what is firm and stable if incorrupt holiness be corrupted? (Cod., *De episcopis et clericis*, l. *Si quemquam*). For the wicked who handle the sacraments harm only themselves and not the sacraments themselves. Hence Matthew 23: *Upon the chair of Moses*, and so on. A lighted wax candle brings loss to itself, but provides light to others in darkness; and whence it shows benefit to others, thence it brings expense to itself. Take therefore from every priest, and so on (C. 15, last question, last chapter). Yet the polluted man, as far as in him lies, pollutes them; or better, he is said to pollute himself; and so the contraries are understood (dist. 19, c. *Secundum*; C. 1 q. 1, c. *Si fuerit*), according to the Abbot and Johannes Andreae. In the same way you may answer to c. *Maximianum*, dist. 81, and to c. *Illud*, below, *De clerico excommunicato ministrante*, according to Hostiensis and Johannes Andreae.

Such a one, therefore, suspended as to himself, even if he be not heard by merit of life, is yet of the number of the Church so long as he is tolerated by the Church. For between a holy and a profane priest this is the difference: that the prayer of the holy one is supported by a double merit, that of the profane by one only. Hence 1 Timothy 5: *Let the priests that rule well be esteemed worthy of double honour, especially they who labour in the word and doctrine*. The same in dist. 55, c. *Ecclesiae*, at the beginning. And so too you may understand C. 1 q. 1, c. *Christus*, and c. *Non nocet*, with the preceding and following, and § *Sicut ergo hic sacramenta* and § *Cum ergo*, according to Hostiensis and

Johannes Andreae. Note at *purgatoria* that the sacraments are purifiers of all contagions, that is, faults. For the sacraments profit even the dead (C. 13 q. 2, c. *Animae defunctorum*; and more clearly 2 Maccabees 12, at *It is therefore a holy and wholesome thought to pray for the dead, that they may be loosed from sins*); on which fully the theologians in *Sentences* 4, dist. 45, and the notable gloss on the matter in c. *Cum Marthae*, at the end, above, *De celebratione missarum*. And understand "contagions," at least venial ones, according to Laurentius; according to the Abbot, that is, mortal and venial crimes (*De consecratione*, dist. 2, c. *Cum omne crimen*); understand soundly, lest *De consecratione*, dist. 2, c. *Quotidie*, stand in the way.

You, say better, according to the theologians in *Sentences* 4, dist. 12, where Thomas [says] that of venial sins it is light; of mortal ones, however, it is distinguished, according to Richard in [*Sentences*] 4, dist. 9; for sometimes mortal sin supervenes, sometimes it is purged. For one existing in mortal sin can communicate in three ways. Sometimes one knows himself to be in mortal sin, and then if he communicates or celebrates, he sins mortally again (1 Corinthians 11: *For he that eateth and drinketh unworthily eateth and drinketh judgement to himself, not discerning the body of the Lord*). Sometimes he communicates believing himself to be in mortal sin, when in truth he is not in mortal sin; and it is the same, because one acting against conscience sins mortally, since such a one builds for Gehenna, as in c. *Litteras*, § *Porro*, *De restitutione spoliatorum*, and Romans 14: *All that is not of faith is sin*; and above, *De praescriptionibus*, c. *Quoniam omne*; C. 28 q. 1, § 1; and *De poenitentia*, dist. 3, § *Illud*, beyond the middle, toward the end of the distinction; and Hostiensis in the *Summa*, *De summa Trinitate*, and the gloss there, in how many ways faith is taken, and so on. Sometimes he communicates in mortal sin not knowing himself to be in mortal sin, as because he was bound [to declare it] in confession. And then, Richard says, either he diligently examined his conscience with good preparation and reflection for recollecting his sins, according to that of Ezechias, king of Juda, Isaiah 38: *I will recount to thee all my years in the bitterness of my soul*, and, due diligence having been applied, he could not remember, and one or more mortal sins remained; and then by communicating the mortal sins are blotted out. And so the gloss on *De consecratione*, dist. 2, c. *Ante benedictionem*, ought to be understood, which says that even mortal sins are remitted; and so too c. *Cum omne*, below, same distinction, and c. *Species*, and c. *Si quotiescumque*, and c. *Quotidie*, where this well appears; so too it appears in c. *Et sancta*, *De consecratione*, dist. 2. Or he did not examine himself well, but from his negligence did not recollect; and then by communicating he sins mortally (1 Corinthians 11: *But let a man prove himself, and so let him eat of that bread and drink of the chalice*). For negligence is never excused by God, but rather condemned (Proverbs 1: *I also will laugh in your destruction and will mock*, and so on; Deuteronomy 8: *Take heed lest thou forget the Lord thy God and neglect his commandments*; Hebrews 2: *For if every transgression received a just recompense of reward, how shall we escape if we neglect so great salvation?*; Matthew 25: *Wicked and slothful servant*, and so on; it follows: *the unprofitable servant cast ye out into the exterior darkness*; Proverbs 14: *A wise servant is acceptable to the king; he that is unprofitable shall feel his anger*). You see that the Lord Jesus sets the form of the examination of judgement (Matthew 25) to inform our conscience by his example, so that we may examine our conscience well. For he says, John 13: *For I have given you an example, that as I have done to you, so you do also*. And so it is held in this place.

Note at *quantumcumque enim sacerdos pollutus sit* that one celebrating divine things, whether offices or sacraments which are sound, cannot defile them through himself; and so the last chapter, C. 15, last question, falls in here. Note at *sumite ergo* that from every priest, namely a Catholic one not suspended by law or by a judge, the ecclesiastical sacraments can lawfully be received. Note at *Christi*

mysteria that the sacrament of the Body and Blood of our Lord Jesus Christ is called the mystery of Christ, as here; elsewhere it is called the mystery of the altar, as in c. *Cum Marthae*, § *Sane*, verse *Ex eo autem*, *De celebratione missarum*, where the text says: "for this reason, that sometimes Scripture records that what is received on the altar is a sacrament and a mystery and an example"; and below in the same place it is said: "the mystery of faith, since one thing is believed there than is seen," and so on (dist. 5, c. *Ad eius*). The Apostle says: *Holding the mystery of faith in a pure conscience* (1 Timothy 3). Elsewhere it is said, "of receiving the sacred mystery" (dist. 4, c. *Testamentum*), where the declaration of this word "mystery" is repeated many times. Elsewhere it is said, "the mystery

of redemption," for baptism (dist. 4, c. *Baptizari*). And so the difference between *mysterium* and *ministerium* appears: for *mysterium* is the sacrament of communion; *ministerium* is said of any office. For *ministerium* is said from ministering; whence our Lord said to his Apostles, Matthew 20: *The Son of man is not come to be ministered unto, but to minister, and to give his life a redemption for many*; to the same, Luke 22; C. 9 q. 3, c. *Nullus*; C. 1 q. 1, c. *Multi*, verse *Mysterium*, and there the Archdeacon; and above, *De vita et honestate clericorum*, c. 1, at *ministeria*. There Johannes Andreae notes this difference merely by setting down the verse without any allegation; to the same, *De consecratione*, dist. 2, c. *In Christo pari*, and there the Archdeacon.

Hence a minister is sometimes said of one who serves the priest at Mass, as in c. *Proposuit*, above, *De filiis presbyterorum*. Sometimes the one who ministers is said to be greater than the one ministered to, as appears of Christ (dist. 93, c. *Diaconi quos*, verse *Hinc minister*). And who are called ministers of the church, see Goffredus in the last chapter, above, *De officio delegati*; about which see what is noted in c. *Conquerente*, above, *De filiis presbyterorum*, and c. *Praesentium*, and c. *Veniens*, where "to minister" is taken also for the title of a personate and dignity. Sometimes *mysterium* is taken for the office of preaching, as the Archdeacon notes in dist. 81, c. *Oportet*; for which C. 1 q. 1, c. *Interrogo vos fratres*. This appears better through the Apostle, 1 Corinthians 2, who says: *We speak the wisdom of God in a mystery, a wisdom which is hidden;* and 1 Corinthians 4: *Let a man so account of us as of the ministers of Christ and the dispensers of the mysteries of God;* and 1 Corinthians 14: *The Spirit speaketh mysteries;* and 1 Corinthians 15: *Behold, I tell you a mystery*; Colossians 1: *That I may fulfil the word of God, the mystery which hath been hidden from ages;* and Colossians 4: *To speak the mystery of Christ;* and Matthew 13, Mark 4 and Luke 8: *To you it is given to know the mystery of the kingdom of God*, and so on; to the same, dist. 19, c. *Nulli fas*.

About this too, our Order, namely of the Friars Minor, has prelates called Ministers, as in c. *Nostra* and in Clem. *Exivi*, *De verborum significatione*. And *minister* is said as it were *minor in statione*, or because he carries out the due office with his hands (*manibus*), says Isidore, *Etymologies* 10, c. 1, under the letter M. Sometimes also *ministeria* are put for the vessels of the church, or for the instruments with which ministry is performed in the church (*De constitutionibus*, c. *Ecclesia Sanctae Mariae*, and the Archdeacon, dist. 96, c. *Bene quidem*). Sometimes one who wages war justly is called a minister of God (C. 23 q. 2, c. *Dominus noster*). Sometimes deans, archdeacons and inferiors having the care of souls are called inferior ministers (above, *De electione*, c. *Cum in cunctis*, § *Inferiora*), and such are sometimes called inferior prelates (*De temporibus ordinationum*, c. *Cum nullus*, § *Inferiores*, in the Sext).

Note at *quia omnia in Christi fide purgantur* (Acts 15: *purifying their hearts by faith*). Note that the faith of Christ purges our offences, that is, through faith in Christ (C. 1 q. 1, c. *Omnia* and c. *In ministerio*). For the sacraments are such as is he who receives them (C. 1 q. 1, c. *Per Isaiam*), according to the Abbot

and Johannes Andreae. For it is faith that overcomes the world (1 John 5: *This is the victory which overcometh the world, our faith*); to the same, C. 15, last question, last chapter.

Note at *caeterum aliud est*, and so on, that a threefold species and quality of offence is designated here. For sometimes it is notorious, and this in three ways, as here and below, this title, last chapter. Sometimes it is hidden, namely what is open to God alone, or cannot be fully proved; on which Psalm 50: *To thee only have I sinned, and have done evil before thee*. For it is he who knows the hidden things of the heart, *and will bring to light the hidden things of darkness, and will make manifest the counsels of the hearts* (1 Corinthians 4). *For man seeth those things that appear, but the Lord beholdeth the heart* (1 Kings 16). Sometimes it is almost hidden, that is, because it can be fully proved but has not yet been proved; and then it is said to be tolerated by the Church, but not by God, who says: *There is nothing covered that shall not be revealed, nor hidden that shall not be known* (Luke 12). Note that "not to disavow," that is, not to deny, is the same as to confess; and so one who does not deny confesses (above, *De praesumptionibus*, c. *Nonne*). It is a Gospel rule, when the Jews said to Jesus: *Do not we say well that thou art a Samaritan and hast a devil?* Jesus answered: *I have not a devil*, and so on (John 8). So too sometimes he who is silent accepts (*De regulis iuris*, rule *Qui tacet*, in the Sext; on which fully there, and in c. 1, above, *De postulatione praelatorum*, and in c. 2, above, *De ordine cognitionum*). Note that the same deed can be drawn to good and to evil according to the intention of the agent. Note at *pene occultum* that it is called almost hidden

even if it is notorious by fame; that is, although the priest has been defamed on this, according to Innocent, Hostiensis and Johannes Andreae. Note at *a talium officiis abstinere*: so that licence of sinning may be taken away from the rest, and so on. With this intention it is lawful to abstain, even if the fornication were hidden; or if it were a crime other than fornication, one is not compelled to hear one's own priest in these offices, nor compelled to receive from him in these sacraments; what sort they are, you have below, *De poenitentiis et remissionibus*, c. *Omnis*. And one must abstain from such a one if from such abstaining against such a priest, namely a fornicator tolerated by the Church, scandal is not generated; otherwise it would not be lawful to abstain; for the Lord too gave his Body to Judas (*De consecratione*, dist. 2, c. *Non prohibeat*, and the following chapter; argument C. 6 q. 2, c. *Placuit* and c. *Si tantum*; and C. 8 q. 4, c. *Nonne*), according to Innocent and Johannes Andreae. Hence Hostiensis says it is lawful to abstain in secret, lest it be against *De sententia excommunicationis*, c. *Cum non ab homine*.

Note at *ad fructum poenitentiae trahatur* that because of the confusion which those put to confusion suffer, they are led back to penance, even if such are avoided secretly, according to Hostiensis; say as just above. If, however, the letter were read thus, "It is another thing to abstain from the offices of such men, so that such men may be drawn to the fruit of penance," leaving out the letter "so that licence of sinning may be taken away from the rest," as Petrus and the Abbot understand it, violence seems to be done to the letter. Hence it could be said thus: it is another thing to abstain from the offices of such men whose fornication is notorious and is not tolerated by the Church. Hence it would not determine when a fornicator ought to be avoided, but with what intention he is avoided, according to Petrus and the Abbot. But the gloss here understands: "of such as are almost hidden, or tolerated by the Church, to abstain from the offices of such men with good zeal, so that through this they may return to penance"; and Hostiensis also holds this. But at the end of the chapter it is well determined when they ought to be avoided.

Note at *respuantur* that it is not lawful to avoid any sacrament as though contaminated; that is, in hidden cases it is not lawful, but in notorious ones it is well lawful, by the laws alleged. Note there that those tolerated by the Church ought not to be avoided; understand, with an excusable toleration (C. 23 q. 4, c. *Tu bonus*). For many things are tolerated through patience which, if they were brought into judgement, justice requiring, ought not to be tolerated (below, *De praebendis*, c. *Cum iamdudum*); Tancred and Johannes Andreae.

Note at *operis evidentiam* that, generally, all suspended by law, that is, without the sentence of a man, if the crimes for which the law suspends them from offices or from any act are notorious by evidence of the fact, anyone may avoid them in these things, even if they are tolerated by prelates. The same of irregulars, who can be said to be suspended by law. But if the crimes for which they are suspended by law are hidden, although grave, such as simony, homicide and the like, yet they ought not to be avoided in those things which by law ought to be received from them (argument here, and *De consecratione*, dist. 2, c. *Non prohibeat*). The same in one secretly excommunicated (C. 6 q. 2, c. *Si tantum*; above, *De officio ordinarii*, c. *Si sacerdos*), according to Innocent and Johannes Andreae. Add what Johannes Andreae notes in c. *Tanta*, below, *De simonia*, and in the second c. *Per tuas*, same title. Hostiensis, however, says that in this one must hold what is noted in *De sententia excommunicationis*, c. *Cum non ab homine*, and *De temporibus ordinationum*, c. *Ad aures*.

It will be called notorious by evidence of the fact when he keeps a suspected woman in the house, according to Innocent (C. 32 q. 1, c. 1; and above, this title, c. *Si quisquam*). And according to Innocent, if I should find a cleric lying with a woman, I shall not by this avoid him in public, unless it be otherwise notorious, according to Hostiensis; add what is noted in *De sententia excommunicationis*, c. 3, last §. Similar to what is said here of evidence is what the law says of a surety evidently solvent (Dig., *Qui satisdare cogantur*, l. *Si vero*, § 1).

Note at *licite divina mysteria audiantur* that "to hear the divine mysteries" is to be understood of the Mass and of the other day and night Hours, according to Petrus, the Abbot, Johannes Andreae, and commonly. Note at *sacramenta* that from those not notorious the sacraments can lawfully be received, namely baptism, confirmation, the Eucharist, penance, extreme unction, priestly order and matrimony, according to the order of the Master of the *Sentences* in [book] 4, and Petrus, the Abbot and Johannes Andreae. In the fifth gloss, on the word *notorium*, which begins *Ad intelligentiam*: the gloss first distinguishes between fame, manifest and notorious; and it subdistinguishes notorious as threefold, namely of fact, of law and of presumption. In the same gloss, at § *Existimatio*, the text there follows: "Esteem is the state of unimpaired dignity, approved by life and morals and diminished in nothing"; and so esteem is taken for fame (Dig., *De variis et extraordinariis cognitionibus*, l. *Cognitionum*, § *Existimatio*). Hence it is to be known that fame, esteem and opinion are taken for the same thing,

as is noted in C. 3 q. 7, § *Porro*; see more amply below, *De accusationibus*, c. *Inquisitionis*, at the end, in the gloss which begins *Nota quod*, with its concordances. So too "a good name" is taken for fame (Proverbs 22: *A good name is better than great riches*). And *fama* is said from *for, faris*, that is, to speak, because it spreads by speaking, rising through the channels of tongues and ears. It is a name both of good things and of evil; for sometimes it is the fame of good fortune, as in "illustrious fame," which is praise; [and] of evil things; whence Virgil, *Aeneid* 4: "Rumour, an evil than which nothing else is swifter." But the name fame has no certain place, because it is very often a liar, adding many things or changing [them] from the truth; it lives as long as it does not prove; but where you have proved it, it

ceases to be, and thenceforth it is named a fact, not fame (Isidore, *Etymologies* 5, c. 27, verse *Fama*). Add the beautiful words of the Queen of Saba, who came from the ends of the earth to hear the wisdom of Solomon, and having entered the chamber said: *The report is true which I heard in my own country concerning thy words and thy wisdom. And I did not believe them that told me, till I came myself and saw with my own eyes, and have found that the half hath not been told me: thy wisdom and thy works exceed the fame which I heard. Blessed are thy men, and blessed are thy servants, who stand before thee always and hear thy wisdom. Blessed be the Lord thy God, whom thou hast pleased, and who hath set thee upon the throne*, and so on (3 Kings 10). Add: *A good name is better than precious ointments* (Ecclesiastes 7), where Jerome says: "Make yourself a lasting fame, so that as ointment delights the nostrils by its odour, so all posterity may be delighted at your name"; which Johannes Andreae alleges in the single chapter, on the word *fama*, above, *De sacra unctione*. To the same, Proverbs 15: *The light of the eyes rejoiceth the soul; a good name maketh the bones fat*.

From this note that although care is principally to be taken for a good life, nevertheless, as far as is possible, care is also to be taken for a good name and good fame, lest neighbours be scandalised (C. 11 q. 3, c. *Inter verba*: "for our life is necessary to us, our fame to others"; C. 11 q. 3, c. *Non sunt*). Ecclesiasticus 41: *Take care of a good name, for this shall continue with thee more than a thousand treasures precious and great. A good life hath its number of days, but a good name shall continue for ever*, and so on. For conscience and fame are necessary, and he who neglects his fame is cruel (C. 12 q. 1, c. *Volo*; to the same, C. 2 q. 3, last §).

How fame that has been taken away is restored: say that a detractor can take away someone's fame in three ways. In one way by saying what is true, and justly: for instance, when someone discloses the crime of another while keeping the order of charity (Matthew 18: *If thy brother shall offend against thee*, and so on; and C. 2 q. 1, c. *Si peccaverit*); and then he is not bound to the restitution of fame. In a second way by saying what is false, and unjustly; and then he is bound to restore the fame, confessing that he spoke falsely and unjustly, and in the presence of those before whom he defamed him, as far as can be done: if secretly, secretly; if openly, openly, as in *Sentences* 4, dist. 15, by Richard and Scotus, and C. 5 q. 1, c. *Quidam*. In a third way by saying what is true, but unjustly, as because he discloses another's crime against the order of charity; and then he is bound to restore the fame as far as he can without a lie, as by saying that he spoke badly, that he defamed unjustly; and if he cannot conveniently restore his fame, he ought to make him recompense in another way, as in other injuries, as in c. 1, *De iniuriis et damno dato*. These things are proved in C. 14 q. 6, c. *Si res*, and *De poenitentia*, dist. 5, c. *Falsas*; for sins are not remitted unless what has been taken away is restored, as there and in *De regulis iuris*, rule *Peccatum*, in the Sext. Whether someone is tacitly restored to fame, note dist. 44, § 1, in the gloss, argument that, and there also the Archdeacon.

Add what Richard and Scotus say, in the place above: that if one defamed always denies, although if he denies in court he sins mortally, yet if he was unjustly defamed, because the order was not kept, although in truth he sinned, still he is not bound to confess his crime to relieve [his] fame or the danger of the one who unjustly defamed him. But it is otherwise if he defamed him justly and according to the order of law, because then he is bound to confess, even if danger of death threatened him on succumbing in court, because it is more fitting that the offender die than the innocent. For it is better to acquit the guilty than to condemn the innocent (Dig., *De poenis*, l. *Absentem*, with similar places). See Thomas Aquinas, II-II, q. 72, who says almost the same, though not so clearly. Moreover

the same Thomas says (II-II, q. 69) that the accused is bound to set out to the judge the truth which he demands of him according to the form of law; and therefore if he will not confess, or if he falsely denies,

he sins mortally. But if the judge inquires into what he ought not, the accused is not bound to answer, but may evade by appeal or otherwise; yet it is never lawful to tell a lie, nor is it lawful for the accused to defend himself calumniously. Hence in a criminal case the oath against calumny ought to be taken (*De iuramento calumniae*, c. *Inhaerentes*; and Dig. and Cod., *De iureiurando propter calumniam*, throughout). Yet it is lawful to conceal the truth which he is not bound to confess; and yet he ought to conceal it by some fitting way, for instance by not answering; for this is not to defend oneself calumniously but to escape prudently. Nor yet is it lawful for him to tell a falsehood, or to keep silent that truth which he is bound to confess; nor is it lawful to employ any fraud or deceit, because fraud and deceit have the force of a lie, and so it is to defend oneself calumniously; for fraud and deceit ought not to be the patron of anyone (above, *De rescriptis*, c. *Ex tenore*; C. 30 q. 1, c. *Dictum*; Dig., *De dolo*, l. *Ne ex dolo*; C. 15 q. 6, c. 1; C. 20 q. 3, c. *Constituit*). Nor is it lawful to appeal for the sake of bringing delay, lest a just sentence be pronounced against him (C. 2 q. 6, c. *Quicunque*).

Whether it is lawful for one accused and condemned to death to defend himself or to flee? Say that if he was condemned justly, it is not lawful for him to defend himself; rather he ought to oppose one resisting the judge, so that he may carry out justice (Wisdom 1: *Love justice, you that are the judges of the earth*; Ecclesiasticus 4: *Even unto death fight for justice*). But if he was condemned unjustly, then it is lawful to defend himself, as against the violence of robbers, so that force may be repelled by force; for all laws cry out that force may be repelled by force (above, *De his quae vi metusve causa*, c. *Ad audientiam*; Dig., *De iustitia et iure*, l. *Ut vim*, with similar places). And in this way it is lawful also to resist wicked princes, unless perhaps on account of avoiding scandal, when some grave disturbance would be feared from this. Hence the Lord Jesus willed to pay the tribute to avoid scandal (Matthew 17; and C. 24 q. 1, c. *Est aliud*; and C. 8 q. 1, c. *Audacter*). For *there is no power but from God* (Romans 13). One accused and taken, but not condemned, may well lawfully flee and avoid the danger of death; but if one justly condemned flees, he sins mortally and is bound to return to prison, says Scotus in [*Sentences*] 4, dist. 15, q. 3.

Whether fame with one witness proves in civil matters: say that it does (above, *De appellationibus*, c. 1; and C. 4 q. 3, c. *Item saepe*; and what the Archdeacon notes on C. 2 q. 8, c. 2, and fully on C. 35 q. 6, c. *Si duo*). Sometimes, however, fame alone proves, as in c. *Cum desideres*, § *Secundo*, below, *De sententia excommunicationis*. Sometimes fame with other supports suffices (above, *De praesumptionibus*, c. *Illud quoque*, in the notable gloss). Whether, when fame has been proved against someone, the contrary can be proved: say that it can, as below, *De sponsalibus*, c. *Cum in tua*, at the end. How fame is proved, note C. 2 q. 1, c. *Quod autem*, and the Archdeacon on C. 2 q. 5, c. *Criminibus*, and Innocent in c. *Ex parte*, below, *De verborum significatione*. When fame makes full proof, and when half-full, and what fame is: see the *Speculum*, under the title *De notoriis criminibus*, § *Fama*. Whether fame alone suffices for deposition, and whether something is called manifest through fame, and whether against one defamed the order of law is required: note C. 2 q. 1, c. *Scelus*, and there the Archdeacon. Add also that the fame of one to be promoted ought to waver in nothing (dist. 33, c. *Laici*, and there the Archdeacon, and the modern doctors in c. *Inter*, *De purgatione canonica*).

Add also that some say notorious robbers are those who ought to be hung on the gallows and are killed without penalty and sin (below, *De immunitate ecclesiarum*, c. *Inter alia*; better in l. *Capitalium*, § *Famosos*, Dig., *De poenis*). Note also that fame ought to precede an inquisition, not once but more often; and how this is understood, note Innocent, *De accusationibus*, c. *Cum oportet*, and the Archdeacon on C. 2 q. 8, in the summary. Note also that one's fame is not harmed by the very fact that his testimony is rejected (dist. 9, c. *Nec quorumlibet*; C. 2 q. 7, c. *Hoc etiam*; and Dig., *De his qui notantur infamia*, l. *Lucius*). In the same gloss, at *illaesae dignitatis status*: say that this definition fits the fame of a man according to his state; about which makes what is had in c. *Ut fama*, below, *De sententia excommunicationis*.

But when the definition of popular fame is sought, as when we say "there is public voice and fame about this," then this is a fitting definition, namely: fame is the common opinion about a thing not yet made manifest, proceeding from suspicion, according to Bartolus on l. *De minore*, § *Tormenta*, Dig., *De quaestionibus*. The *Speculum* says: fame is the vehement opinion of the people, or of the greater part of it, agreeing about the thing in question (argument C. 2 q. 5, c. *Presbyter* and c. *Si mala fama*; C. 4 q. 4, c. *Saepe*). And this description includes good and bad fame; for which also C. 1 q. 1, c. *Sacerdos*, near the end, and C. 1 q. 1, c. *Sententiam*, and *De voto*, c. *Magnae*. Add that everyone ought to labour that he may take on the name of an honest man (Dig., *Ad Trebellianum*, l. *Facta*, § *Si in danda*). And note this for inquisitors who wish to inquire into any crime from fame. For if someone asks for an inquisition against someone, the ordinary will not make it unless provident and discreet persons, and not old men who believe every word, denounce his excesses to the ordinary, says Innocent; for which C. 2 q. 5, c. *Mennam* and c. *Omnibus*, and Innocent in c. *Cum oportet*, below, *De accusationibus*.

Moreover, it does not suffice to be denounced once, but many times, whether it be denounced by the same persons or by others; because it could be that they

had reported once from impulse. And how many times it is to be reported is left to the judgement of the judge, as in the Authentic *De testibus*, § 2, and Dig., *De verborum obligationibus*, l. *Continuus*, § 1. And a clamorous, not light nor silent, intimation about the crime charged ought to precede; and the infamy should be so great that it makes the crime as it were manifest, as in c. *Qualiter*, below, *De accusationibus*, at "which the clamour hints and the infamy makes manifest." For which the word of God makes excellently, Genesis 18, at: *And the Lord said to Abraham: The cry of Sodom and Gomorrha is multiplied, and their sin is become exceedingly grievous. I will go down and see whether they have done according to the cry that is come to me; or whether it be not so, that I may know.* Behold, according to the letter, if the form and manner of inquisition be well attended to: that the infamy should have sounded in the ears of the judges. But if this infamy is not with the ordinary, because perhaps he is much absent, and especially with the Pope, to whom all are subject, but yet some report someone as so defamed, then the ordinary himself, or his delegate, or the Pope, may receive proofs of the infamy according to the manner which is below, *De purgatione canonica*, c. 2; or he will receive witnesses deposing who know that he is defamed among upright and discreet men, and they ought to name them, says Innocent, even if they are not asked; because it is not committed to the judgement of the witnesses to discern who are provident and discreet, but to the judgement of the judge, as in the said l. *Continuus*, § 1. And they ought to add in their testimony that they know them to be defamed among provident and discreet men not only once but often, and that good men have many times reputed them defamed and infamous among themselves, and that the infamy is clamorous, not silent, and so great that the

crime is as it were manifest. And these inquiries and proofs have place before the inquisition into the crime is made, but not after, except as a support (C. 4 q. 2, c. *Item saepe*). See on the matter Innocent in the said c. *Cum oportet*, and Johannes Monachus in the last chapter, *De accusationibus*, in the Sext.

In the same gloss, at *manifestum*: say that "manifest" is taken in two ways, according to Johannes Calderinus. In one way for a species of its genus, because everything notorious is manifest. In another way it is taken for a species distinct from the notorious; and so manifest is that which cannot commonly, but can easily, be open (C. 11 q. 3, c. *Eorum*; and below, *De simonia*, c. *De hoc*; and better below, *De verborum significatione*, c. 1, in the Sext). For sometimes "diocese" includes the city and sometimes not, as in c. *Rodulphus*, *De rescriptis*. Johannes Andreae says that manifest ought to be taken for a distinct species, so that it always requires proof. Manifest, properly, according to Isidore, *Etymologies* 10, c. 1, under the letter M, is said of what is ready at hand (*in manu promptum*). Lord Antonius de Butrio defines it thus: manifest is a public or famous intimation proceeding from certain knowledge and certain authors, not yet otherwise examined by the judge. Hence it is necessary that then fame concur with truth; l. *Oves* makes for it, and the gloss there, Cod., *De appellationibus*; and this understanding is more in conformity with the understanding of the gloss. In a third way, then, manifest is taken for notorious; and this in all places where it says that in manifest things the order of law is not required, as in the chapter, *De officio delegati*, in the Sext, and C. 2 q. 1, c. *De manifesta*. So in c. *Cum olim*, below, *De verborum significatione*, "manifest offence" is taken for notorious; and so too it is taken in c. *Manifesta*, C. 2 q. 1, where it is said that manifest things do not need accusation. In a fourth way still it is taken properly as it differs from the hidden; and then it is taken for everything that can be proved, even if with difficulty;

and so it is taken wherever it is said that the Church does not judge of hidden things but of manifest ones, as in c. *Sicut tuis*, below, *De simonia*.

I ask how it is proved that someone is a manifest usurer. Say that those are called manifest usurers of whom it is notorious by law, as because they have confessed or been condemned; or in fact, because they have the evidence of the deed, as because he keeps a table ready for lending at usury to all who come; and the bishop can seize such, whether they have been convicted or have confessed before him, or if proof by witnesses is made against them, or there are certain arguments with fame, as in c. *Cum in dioecesi*, below, *De usuris*. So the gloss of Johannes Andreae holds in c. 1, *De usuris*, in the Sext; which note for the penalties imposed on manifest usurers in c. *Quamquam*, *De usuris*, in the Sext; see Federicus de Senis, *Consilium* 8. For they ought not to be absolved unless restitution has first been made, or suitable security given; their testaments are not valid; nor ought they to be admitted to communion, nor their offerings received, nor [admitted] to ecclesiastical burial, as in c. *Quia in omnibus*, below, *De usuris*, and in the said c. *Quanquam*. And according to canon law every usurer is infamous and sins mortally (C. 6 q. 1, c. *Infames*). According to the civil laws they are not infamous unless they practise wicked usury, as because he exacts usury on usury, or exacts the hundredth, so that at the head of the year the usury equals the principal (Cod., *Ex quibus causis infamia irrogatur*, l. *Improbum*; C. 3 q. 7, c. *Infames*);

at the end. And whoever hands over manifest usurers to ecclesiastical burial is excommunicated by that very fact, as in c. *Eos*, *De sepulturis*, in the Clementines; and the bodies of such ought to be exhumed if they can be distinguished, as in c. *Sacris*, below, *De sepulturis*. And it is to be known that that is called manifest which ten know (argument C. 10 q. 3, c. *Unio*); and the gloss holds this in the

said c. *De manifesta*, C. 2 q. 1, and there the Archdeacon; and there is a gloss there almost similar to this one in c. *Manifesta*, which is the chapter preceding c. *De manifesta*.

In the same gloss, at *occultum dicitur quod probari potest*: say that sometimes also that is called hidden which five know (*De poenitentia*, dist. 1, § *Haec autem secreta*, otherwise *Haec ergo*, and the gloss in the said c. *Manifesta*). So the miracle of Christ is reported of the girl raised up in the house in the presence of the father and mother, Peter, James and John (Luke 8). Hence there it speaks in the court of conscience. So too that is called secret which is known by several, as the Archdeacon notes on C. 15 q. 5, c. 1; on which fully in the last chapter, *De haereticis*, in the Sext, where "secret" is not so taken, namely what is known by several, as appears there at *aliis patefecerint*. And so it is taken also in C. 3 q. 7, c. *Sacerdos*, at the end; and *De poenitentia*, dist. 6, c. *Sacerdos*; and *De electione*, c. *Ubi periculum*, verse *Nulli*, in the Sext; there the Archdeacon; and Johannes Andreae in the said last chapter, *De haereticis*, in the Sext, touches it in some way. Add that secrets are not to be laid open to adversaries (dist. 43, c. *In mandatis*). So it is said: in hidden things the reason of vengeance rests (*De temporibus ordinationum*, c. *Ex tenore*, in the gloss). And so if all things were avenged in this world, the divine judgements would have no place (C. 6 q. 1, c. *Si omnia*). Whether in contracts what is hidden is noted, as because it was done secretly and by night, note the Archdeacon in c. *Ut nostrum*, below, *Ut ecclesiastica beneficia*, in the notable gloss, that it is presumed; and there what [holds] in judgements, in the notable gloss; and what of a hidden donation, and what of a hidden election, and what of a hidden collation of benefices, by Innocent and Johannes Andreae. And note that to conceal the truth is a sin (C. 11 q. 3, c. *Quisquis*), and there in the gloss, when it is not a sin; and the text and gloss in l. *Oves* make excellently for it.

And in how many ways "hidden" is said, see in the *Speculum*, *De notoriis criminibus*, § *Nunc de occulto*. And add that things are hidden for three reasons (C. 27 q. 2, c. *Inventa est*, at the end of the last gloss). For sometimes something is hidden on account of the malice of the one from whom it is hidden; and so Christ willed his divinity to be hidden, lest the devil should hinder the redemption of the human race (Luke 4: *He suffered them not to speak, for they knew that he was Christ*; and in the said c. *Inventa*). Sometimes on account of the excellence of the thing, as the secrets of the faith (Matthew 7: *Give not that which is holy to dogs, neither cast ye your pearls before swine*; and C. 11 q. 3, c. *Nolite*), lest the adversary should assail us the more. Hence Pilate too, asking the Lord Jesus *What is truth?*, did not deserve to hear an answer (John 18); for which dist. 43, c. *In mandatis*. Sometimes because the hearers are not capable (John 16: *I have yet many things to say to you, but you cannot bear them now*; to the same, C. 8 q. 1, c. *Non oportet*).

And that we may have it more clearly, say that hidden is sometimes altogether hidden, which can be proved by no means, as in *Ut ecclesiastica beneficia*, c. *Ut nostrum*; for hidden things are reserved to God alone (C. 2 q. 5, c. *Consuluisti*, verse *Spontanea*; C. 6 q. 1, c. *Si omnia*); and such a hidden thing is called secret (dist. 32, c. *Erubescant*; *De simonia*, c. *Tua nos*, at the end; C. 2 q. 1, c. *Si peccaverit*). Sometimes the hidden is called latent (C. 32 q. 5, c. *Christiana*), and in such a case the judge cannot give sentence (C. 2 q. 1, c. *Quando vero*, and the following chapter, near the end, and c. *Deus omnipotens*). Sometimes something is hidden to the judge which can and ought to be proved (Cod., *De appellationibus*, l. *Eos*, § *Si quis autem*; and here in the great gloss). Sometimes that is called almost hidden which can be proved through few; and the same is called *pene*, that is, as it were hidden, because few know it, for instance two or three, yet so that it can be proved; or even five (*De poenitentia*, dist. 1, § *Haec ergo*).

In the same gloss, at *sed tale manifestum potius dicitur notorium*: note from this gloss a fourth species of the notorious, the notorious of proof, as in c. *Cum olim*, below, *De verborum significatione*; yet this is improperly called notorious, as will appear below. Note also from this gloss that manifest, strictly and properly, is taken for a species different from the notorious; and the gloss on C. 2 q. 1, c. *Manifesta*, and Cod., *De appellationibus*, and Johannes

Andreae in c. 1, *De officio delegati*, in the Sext, in the *Novella*, in the third gloss, note it, for statutes and sentences.

In the same gloss, at *circa notorium*: it is to be known, however, concerning the matter, that there is a difference between notorious, rumour, fame and common opinion. Of the notorious we shall see below. Of rumour it must be said that rumour is a particular assertion proceeding from an uncertain author and from suspicion alone, as in c. *Super eo, Qui cognoverunt consanguineam uxoris suae*, and in c. *Olim*, above, *De electione*. Hence it proves less than fame; for fame is the acclamation of the neighbourhood, as above; but rumour is when a few say something, yet not publicly, as appears in *De regularibus*, c. *Veniens*, at the beginning. Of fame it has been said above. Of common opinion say that common opinion exists only of things long past, and which cannot be proved through eyewitnesses. For although the tongue is easily moved to speak what it will, yet the soul, which God alone searches (above, *De iudiciis*, c. *Novit*), is not easily moved to believe anything, but only with reason going before. Therefore one who deposes of opinion, asked about the cause of his knowledge, answers: "I do not know, because God alone knows; but I believe," namely because it was expressed so in words (C. 22 q. 5, c. *Humanae*); or he may subjoin another cause of belief, as because he heard so from many, and believes that they expressed their will, according to what is noted in c. *Veritatis*, above, *De dolo et contumacia*; on which fully the *Speculum*, under the title *De probationibus*, § 1, verse *Ultimo quaeritur*, and the following verse.

And note that there is a difference also between common opinion and fame; for common opinion makes law (Cod., *De testamentis*, l. 1; Dig., *De officio praetorum*, l. *Barbarius*; C. 3 q. 7, c. *Tria*, at the beginning; Cod., *De sententiis et interlocutionibus*, l. *Si arbiter*; Cod., *Ad Macedonianum*, l. *Si quis*; Dig., *De supellectile legata*, l. *Ipsi*, last §; Dig., *De acquirenda hereditate*, l. *Si quis*, § *Plane*). But fame does not make law; yet fame is stood by until the contrary is proved (Cod., *De officio rectoris provinciae*, l. *Iustissimos*; C. 4 q. 3, c. *Item saepe*; Dig., *De fluminibus*, l. 2, § *Perenne*; above, *De testibus*, c. *Praeterea*; C. 35 [text unclear] q. 6, c. *Si duo*; Dig., *De testibus*, l. 3, verse *Verba*; Dig., *De in litem iurando*, l. *Vulgo*; Dig., *De administratione tutorum*, l. *Vulgo*; Dig., *De fundo instructo*, l. *Cum de lanionis*, § *Asinam*, with similar places). Add that common opinion proves and is accepted for truth, unless such common opinion were that of the basest persons, as in the said l. *Barbarius*, and Dig., *De evictionibus*, l. *Si dictum*; but that of good men proves, as Cod., *De episcopali audientia*, l. *Si praeses*, and in the concordances alleged before; and the *Speculum* holds it under the title *De notoriis criminibus*, § *Sequitur de manifesto*, at the end. And add that common opinion is to be followed unless it notoriously speaks ill, or unless it be reasonably refuted, which a good judge of very sharp wit will estimate (*De feriis*, c. *Capellanus*; and Johannes Andreae in c. 1, *De constitutionibus*, at the end).

Whether hearers of diverse opinions are excused from sin in holding diverse opinions? I answer: if diverse opinions of the Doctors are found within Scripture, either they pertain to faith and good morals, or not. If so, those holding erroneous opinions are not excused, although from ignorance, which does not excuse in such matters (1 Corinthians 14: *He that knoweth not shall not be known*); for he

ought to have consulted those more skilled, as Augustine says in *De doctrina Christiana* 3. If it be not against faith or good morals, it is lawful to follow both opinions, or either; and of such is understood what the Apostle said, Romans 14: *Let every man abound in his own sense*. Hostiensis says that when there are diverse laws and opinions not against faith and good morals, the more humane sentence is to be followed and preferred, other things being equal (*De transactionibus*, last chapter); otherwise one must stand by the opinion which rests on the better reason, as in c. *Capellanus*. See what I wrote above, this title, c. 2, and what Innocent wrote in c. *Ne innitaris*, above, *De constitutionibus*.

In the same gloss, at *4 q. 4, § Aliquando*: say that that text, and l. *Ea quidem*, Cod., *De appellationibus*, from which that § was taken, does not prove this, according to the *Speculum*, under the title *De notoriis criminibus*, § *Iam de notorio*, verse *Si vero sint notoria*. Yet the gloss on the said § *Aliquando* understands it well, as does this one, that that law speaks of a notorious crime, about which the official alone denouncing is believed. But if the official denounces another crime, then he is not believed unless it be lawfully proved (Cod., *De curiosis*, l. *Curiosi* [text unclear], book 12). And so the gloss alleges well, understanding that an official denouncing a notorious crime is heard even without inscription. And the *Speculum* also says there that if anything were done in the presence of the judge sitting on the tribunal, who saw the deed with so many persons that it could be called notorious, then it is sufficiently understood to be proved to him, since he saw it as judge (*De corpore vitiatis*, c. *Cum de tua*; C. 2 q. 2, c. *Quando autem*); and on this also in the *Speculum*, title *De sententia*, § *Qualiter*, verse *Item debet*.

In the same gloss, at *nec requiritur scientia omnium, sed plurium*: say, namely of the greater part of the people or of the neighbourhood; for which c. *Cum dilectus*, below, *De purgatione canonica*, and C. 2 q. 1, c. *De manifesta*, joined with the rule of l. *Quod maior*, Dig., *Ad municipalem*; makes for it at the end c. *Per tuas*, below, *Qui filii sint legitimi*, and what the gloss notes in c. *Inquisitionis*, below, *De accusationibus*, at the end; Matthaeus de Bon[onia]. You, say according to the *Speculum*, under the title *De notoriis criminibus*, § *Iam de notorio*, verse *Et hoc notorium*, that it is left to the judgement of the judge how many men make a thing notorious, because it is not found decided in the law; therefore it resides in the judgement of the judge, as in c. *De causis*, above, *De officio delegati*, and in l. *Continuus*,

Dig., *De verborum obligationibus*, and Inst., *De iniuriis*, § *Atrox*. But some say not fewer than ten, because so many make a parish (C. 10 q. 3, c. *Unio*). On people, college and the like, see what I wrote in c. *Quoniam*, above, *De vita et honestate clericorum*.

For the declaration of the matter of the notorious according to canon law, note these conclusions. The first conclusion is that notorious is taken in three ways, namely strictly, broadly and most broadly. First, strictly it is the notorious by evidence of the fact; for the notorious of sentence and of confession is not strictly notorious, because these could also be false, according to Vincentius, below, the next chapter, and in c. *Evidentia*, below, *De accusationibus*; for which a good text in c. *Romana*, § *Si autem post sententiam*, *De appellationibus*, in the Sext; c. *Dudum*, the second, above, *De electione*, makes for it. Broadly, that is called notorious which is established by sentence, or by judicial confession, or by evidence of the fact; and in this way it is taken here and in the last chapter, below, this title. Most broadly is taken both that which is established in the aforesaid ways and that which is established by proofs made in court; and so it is taken in c. *Cum olim*, below, *De verborum significatione*, and in the last chapter, above, *De temporibus ordinationum*.

The second conclusion is that the notorious by evidence of the fact is twofold: one is the notorious of a clear fact, another of a presumed one, such as the notorious of consanguinity and of filiation, as in c. *Quoniam*, *De filiis presbyterorum*, with similar places. And each of these is divided into three species: for one is the notorious of a momentary fact, another of an interrupted fact, and another of a permanent fact. The notorious by evidence of the fact, according to Lord Antonius de Butrio, is a finished and commonly undoubted proof of a fact or of a continuous thing, or one commonly showing itself to the eyes of men, so that it cannot be concealed by any evasion, as in C. 2 q. 1, c. *De manifesta*, and here, and below, this title, c. *Tua nos*, and the last chapter. The notorious of a continuous or permanent fact is if someone is continuously held in prison, or a common palace is in the square, and the like. The notorious of a presumed fact is when a priest publicly keeps a concubine in his house, because there is a presumption that he has intercourse with her. The notorious of an interrupted fact is when someone keeping a table ready has lent at usury, or when someone performs the acts of an actor in the square. The notorious of a momentary or passing fact is when someone kills a man in the square, as in c. *Cum dilectus*, below, *De purgatione canonica*.

The third conclusion is that in the notorious properly taken there is a principal effect, because the rule is that in them the order of law is not required, as in the next chapter, and in c. *Quoniam*, above, *De filiis presbyterorum*, and in c. *Ad nostram*, above, *De iureiurando*, and in cc. 1 and last, *De officio delegati*, in the Sext. But this effect has place only in crimes, whether one proceeds civilly or criminally, as is the text in the said cc. 1 and last, *De officio delegati*, in the Sext, and the aforesaid c. *Quoniam*; and Innocent holds this in the next chapter, in the first great gloss. Johannes de Montemurlo, as Lord Andreae reports in the last chapter, *De foro competenti*, in the Sext, holds that when one acts civilly for someone's interest in a notorious matter the order of law is required. Johannes Andreae does not contradict him, but simply recites it, though this seems against the said cc. 1 and last, *De officio delegati*, in the Sext; and therefore it is surprising that Johannes Andreae did not contradict. But in matters other than crimes, as in contracts or quasi-contracts, and in last wills, this does not have place, that the order of law is not kept even in notorious matters; but then other laws are to be kept, which will that sometimes the whole order be kept, sometimes a part. Yet if one acts for the execution of a sentence, then it matters whether one proceeds by action *in factum* or by the noble office of the judge; because in the first case the whole order is required, but not in the second, as in l. *A divo Pio*, § *Si super rebus*, Dig., *De re iudicata*. And so in notorious matters the order of law is required. Hence, granted that the suit is contested, so that the debtor confesses the debt, it is necessary that a definitive sentence be given in writing by the judge sitting on the tribunal; otherwise the sentence would not be valid, although it is notorious. But if the judge made a precept

for paying, then it would not be definitive but interlocutory, as in c. *Dudum*, the second, above, *De electione*, and in c. *Ex parte*, below, *De verborum significatione*, and C. 2 q. 1, c. *Nos in quemquam*; otherwise the sentence would not be valid, as in the last chapter, *De re iudicata*, in the Sext. Likewise, if before the contest of suit, no libel having been given, the defendant confesses, a true definitive [sentence] cannot be given, but only a precept for paying, as in the said c. *Dudum*. And so it follows that that rule does not have place in these notorious matters.

This conclusion fails in the cases written below. First, in the citation which is required in notorious matters, about which distinguish thus. Either the judge wishes to declare a penalty imposed by the law itself by the canon, and so introduce nothing new; and then citation is not required, as in c.

Bonae, De electione, and c. *Venerabilem, § Obiectioni* and *§ Si enim,* and what is noted in c. *Cum olim, De re iudicata,* and in c. 1. Or the judge wishes by sentence to do something new; and then either he wishes to impose a sentence of the Church's censure, and he ought not to do this except for contumacy, and so warning or citation is required (C. 12 q. 2, c. *Indigne,* and c. *Sacro,* below, *De sententia excommunicationis;* and there Innocent holds this, and he holds it in c. *Cum sit Romana,* above, *De appellationibus*). It fails in two cases: first, in the case of c. *Reprehensibilis, De appellationibus,* as noted there; second, in the case of c. *Dilecto, De sententia excommunicationis,* in the Sext. If, however, the judge did the contrary, such a sentence holds (C. 11 q. 3, c. 1). Or the judge wishes to give other sentences, and then citation is required (C. 2 q. 1, c. *Deus omnipotens,* and the last chapter, *§ Vices;* c. *Ex parte,* at the

beginning, *De clericis non residentibus,* in the Sext; and the gloss notes it on C. 2 q. 1, c. *Quae Lotharius,* and *De iureiurando,* c. *Ad nostram*). And if a sentence is given against one not cited, it is null; so Innocent notes in c. 1, *De officio delegati,* in the Sext. Or the judge intends to receive proofs upon the notorious in those cases in which proof is required; and then either he proceeds by office, and it is not required that the party be cited to see the witnesses swear, as in the second c. *Qualiter, De accusationibus;* yet the party is to be cited to object to the sayings of the witnesses, if he will, as in the said c. *Qualiter,* at *et debet*. Or the judge proceeds at the petition of another, and then the judge ought to cite [him] to see the witnesses sworn (C. 2 q. 1, c. *In primis,* and in c. 2, above, *De testibus*); and so Innocent seems singularly to hold in c. 1, *De officio delegati,* in the Sext. Likewise citation is required from the beginning when the judge intends to proceed upon the notorious to introduce something new; for which the said c. *Ad nostram* and cc. 1 and last, *De officio delegati,* in the Sext, make. Take heed, however, that although citation is required, a solemn citation is never required, such as a threefold or peremptory one; but one only suffices, as in c. *Cum sit Romana,* at the end, *De appellationibus,* at *irrequisitum,* that is, peremptorily; Clem. *Saepe, De verborum significatione,* makes for it; unless the judge wished to proceed against someone who could not be found, because then an edict made three times is required, and one peremptory would not suffice, as in c. *Ex tuae,* below, *De clericis non residentibus;* and Johannes Andreae notably holds so in the additions to the *Speculum,* under the title *De clericis non residentibus,* in the rubric.

Secondly, it fails in proofs, because in notorious matters they are required in some case. Hence say: either it is asked whether proof is required in order that the sentence be valid; and say that it is not, as in the next chapter below, and in the said c. *Quoniam, De filiis presbyterorum,* and in c. *Super eo,* above, *De testibus cogendis;* and Innocent holds this, below, the next chapter, and Johannes Andreae in the rule *Eum qui certus, De regulis iuris,* in the Sext, and in c. 1, *De officio delegati,* in the Sext. This is true unless the defendant has lawfully appealed because the judge was aggrieving him by proceeding as upon a notorious matter of which it was not established to him as judge; because then all things done afterwards would not be valid, as in c. *Per tuas, De sententia excommunicationis,* and in c. *Licet,* same title, in the Sext, with similar places. Or it is asked whether the notorious ought to be proved in order that the judge be said to proceed justly. And then either we speak of the notorious of law, and it must be established by acts, or by confession, or by witnesses, or the sentence must be established by an instrument, or the confession established by witnesses where the instrument of the sentence has been lost, as in c. *Quoniam, De probationibus,* and in c. *Albericus, De testibus*. But if we speak of the notorious by evidence of the fact: then if it is the notorious of a permanent or continuous act in that province where one is acting, proof is not required, as in the next chapter and c. *Super eo* and c.

Quoniam, alleged above; and so the gloss holds in the said c. *Ad nostram*. And in this case, if this were not notorious to the judge as judge, as because he had never been in that province, it would suffice to send one messenger, from whose report the judge would hold the fact as notorious in that province (argument l. *Ea quidem*, Cod., *De accusationibus*, and what is noted on C. 2 q. 1, c. *De manifesta*, here). And the same seems to hold if it was an act long remaining in the past, but it is a short time since it ceased in that province, by the laws alleged. But if it be the notorious of a continuous act outside that province where one is proceeding, or the notorious of an ancient continuous act which has long ceased, then proof is required, as will be said below, and in the said c. *Ad nostram*. Or we speak of the notorious of an interrupted act; and then the gloss on c. *De manifesta* says that it ought to be half-fully proved, as in c. *Cum in dioecesi*, *De usuris*; but that text does not prove it; and therefore Hostiensis says there "manifest," that is, to be made manifest; and so then it ought to be proved. But if it is the notorious of a momentary act, then it ought to be fully proved to the judge, at least through two witnesses. Understand this when it is notorious to others and not to the judge (C. 2 q. 1, c. *Deus omnipotens*). But if this be notorious to others and to the judge, as because while he was sitting on the tribunal someone killed another, then no other proof is required, as the *Speculum* holds, *De notoriis criminibus*, verse *Ut autem*. And take heed that this whole effect, whether proof is required, has place not only when one acts about a crime but also about any contract whatever. For although the notorious ought to be alleged, yet it is not necessary that it be proved, as the gloss says in Clem. *Appellanti*, *De appellationibus*; which understand as above. Hence if someone's son asks as heir for the debts of his father, it is not necessary for him to prove himself the son, since it is notorious.

But it is asked how witnesses ought to depose in a notorious matter. Say that they ought to depose of the act of the notorious perceived through their own sense, according to Innocent, below, the next chapter. Second, they ought to depose that what was seen by them was seen also by the whole people, or by the greater part, as in c. *Cum dilectus*, below, *De purgatione canonica*; and what is called the greater part of the people resides in the judgement of the judge, as was said above. Yet the Doctors commonly say that at least there ought to be ten who saw, that it may be notorious; and so it is necessary that the witnesses depose of themselves, two, and of eight others who saw what is called notorious, as a man killed. And so the gloss notes on C. 2 q. 1, c. *De manifesta*. Commonly,

however, in deeds not very great it suffices that the greater part of the parish knows it, as in the said c. *Cum dilectus* and in c. *Per tuas*, *Qui filii sint legitimi*. I think also that it is not required that the witnesses be of the neighbourhood, but it suffices that they be strangers; so Innocent seems to hold in the great gloss, verse *Notorium vero deprehenditur*; the example of someone who killed someone in the schools, and so on.

Thirdly, the said rule fails in the oath of witnesses: for in those cases in which the notorious must be proved, the witnesses must swear, unless it be remitted by the party (above, *De testibus*, c. *Tuis* and c. *Nuper*); and Innocent holds it in c. 1, *De officio delegati*, in the Sext, at the word *ad alia*. Fourthly, it fails in the publication of the sayings of witnesses in that case in which the notorious must be proved: for publication ought to be made if the party asks, lest defence be taken from him, as in the said c. *Qualiter*, § *Debet*. Fifthly, it fails in some knowledge of the cause, which is always required in notorious matters: for according to Innocent in the next chapter, in notorious matters after the citation and appearance of the defendant it is necessary to set out to the defendant the fact for which he was cited, and to hear his defence; otherwise the sentence would not be valid; and in this the

notorious does not differ from other causes, as in l. *Prolatam*, Cod., *De sententiis*. But if the judge hears the excuse but will not hear the proofs, then if he gives sentence it is well valid, nor will it be retracted by way of appeal, if the fact was in truth notorious, granted that it was not established to the judge as judge that it was notorious, according to Innocent; but it would be otherwise in other matters, as well noted above. Sixthly and lastly, it fails in the sentence: because although in notorious matters the order of law is not required, a sentence is required, as below, the next chapter, and the gloss notes in the said c. *Ad nostram*; yet a solemn sentence is not required, as in writing, or that the judge sit, by the case in the said c. *Ad nostram*. And so Johannes Andreae notably concludes in the first c. *Ex parte*, *De verborum significatione*. And so it appears that the solemnities of positive law which they require in summary cases, as in Clem. *Saepe*, *De verborum significatione*, are yet not required in notorious matters, unless it be expressed by law; and then a sentence is required when the judge wishes to introduce something new. But where the law imposes a penalty by the law itself, there a sentence is not required, as in c. *Pro humani*, *De homicidio*, in the Sext. And this is the reason why in the case of this chapter and the following a sentence is not required, so that it is lawful for laymen without a sentence to avoid notorious fornicators.

The fourth conclusion is that in notorious matters the judge is not recused as suspect, as in c. *Proposuit* and c. *Novit*, above, *De appellationibus*. And this is true in the notorious of fact, of sentence and of judicial confession, as the Doctors hold in c. 1, *De officio delegati*, in the Sext, where they also say that a conservator is not recused as suspect. The fifth conclusion is that in notorious matters one appealing is not heard, because the judge *a quo* is not bound to defer to him, as in c. *Consuluit* and in c. *Cum speciali*, § *Porro*, above, *De appellationibus*. But the judge *ad quem* ought to hear him, because he could have a good defence, as in the said c. *Romana*, § *Si autem*, *De appellationibus*, in the Sext. The sixth conclusion is that a sentence given against the notorious is null by the law itself, as if it contained an express error, as in c. *Inter caeteras*, above, *De re iudicata*, and in c. *Pastoralis*, *De re iudicata*, in the Clementines; and Johannes Andreae notes it in the said c. *Romana*, § *In universitate*, *De sententia excommunicationis*, in the Sext; and it is noted in c. *Inter monasterium*, above, *De re iudicata*; and understand, when it was notorious to the judge as judge, as in the said c. *Inter monasterium*.

The seventh conclusion is that all the aforesaid privileges of the notorious have place in the three kinds of notorious here, but never have place in the notorious of proof only; because, as I said, that is improperly called notorious. This appears because one convicted by witnesses can appeal (above, *De appellationibus*, throughout; and in c. *Cum Ioannes*, above, *De fide instrumentorum*). Likewise one convicted by witnesses or instruments cannot be condemned except by a solemn sentence and with the judge sitting on the tribunal, as in the last chapter, *De re iudicata*, in the Sext. Likewise a sentence given against the notorious of proof is valid, as given against the right of the litigant, as in c. *Cum inter vos*, above, *De re iudicata*. Indeed, more: even if the judge says "it has been proved by such witnesses, therefore I condemn you," and yet this is not true, still such a sentence is valid, according to Innocent in c. *Quoniam*, above, *De probationibus*.

Take heed, however, that that notorious of proof has other good effects expressed in law. The first in c. *Cum olim*, *De verborum significatione*; the second in c. *Solet* and in c. *Venerabilem*, § *Similiter*, *De sententia excommunicationis*, in the Sext. The third, because where an enormous or middling crime of a cleric is notorious through proofs, he himself on account of scandal ought to abstain from celebrating until he has been dispensed regarding the execution [of his orders], as in the last chapter, *De temporibus*

ordinationum; and Innocent notes it in c. *Ex tenore*, same title. The fourth, because where a crime is notorious

through judicial proofs, it is lawful to avoid the criminal in the sacraments which one is not bound to receive from him, as Innocent notes in the said last chapter, *De temporibus ordinationum*.

Against this, however, the text in c. *Super quibusdam*, below, *De verborum significatione*, seems to make, where the notorious of proof seems to be equated with the other notorious kinds. But some Doctors understand that text at *convicti sunt de haeresi*: supply, "and have been declared heretics by a sentence thereupon following." And so they seem to understand the text in c. *Pro humani*, *De homicidio*, in the Sext, at the end. Nor is the text superfluous there, in c. *Super quibusdam*, when it says "or condemned by them by sentence," because that is true of the notorious of sentence, which is necessarily required; but in the declaration of a penalty imposed by the law itself another sentence is not required, but the simple declaration itself suffices. In a second way it can be understood there, when it says *convicti*, namely through two witnesses deposing of the notorious of a permanent fact; and when it says "condemned by sentence," understand of another notorious where a sentence is required. And so Lord Matthaeus de Bon. affirms. You, say that this is divining, with reverence. But if the intention in both texts be well attended to, that is enacted in hatred of the crime. For in c. *Super quibusdam* the notorious of proof is equated with the other notorious kinds in hatred of heresy and in favour of the faith, which has many other privileges too, as in c. *Si adversus*, below, *De haereticis*, and in c. *Ad abolendam*, and c. *Cum ex iniuncto*, and c. *Excommunicamus*. For even one condemned of heresy is not heard appealing, as in c. *Ut inquisitionis*, *De haereticis*, in the Sext.

Moreover, although in criminal matters the witnesses ought to be above all exception, as in l. *Neque natales*, Cod., *De probationibus*, and above, *De testibus*, the first c. *Veniens*, yet against heresy, in favour of the faith, any infamous persons, base persons, criminals, usurers, harlots, excommunicates, and even other heretics and accomplices of the crime are admitted, as in c. *In fidei*, *De haereticis*, in the Sext. Moreover in the said c. *Super quibusdam* it does not properly speak of the notorious, but of the manifest. For Innocent III speaks thus to the Count of Toulouse: "Concerning certain articles of the mandates," and below: "Your devotion has asked of us who are manifest heretics," and so on. And although the gloss there says that those who publicly preach against the Catholic faith are by evidence of the thing notorious heretics, since their deed cannot be concealed by any evasion, it adds: "for in these ways which are enumerated here, what is manifest, which ought to be proved, is rendered notorious"; to which it alleges c. *Cum olim*, same title, above, *De verborum significatione*, and the last chapter, below, same title. For in the said c. *Cum olim* it is also said: "we call that offence manifest," and so on. And so, as was said above, such a notorious is not properly notorious, but taken most broadly; and so it does not stand in the way, because they are not equated in all respects.

To c. *Pro humani* it is also answered that it is in hatred of the Assassins, who are also infidels and most wicked murderers; and so this is enacted in favour of the faith, so that after it has been established by probable arguments that someone committed so execrable a crime, no other sentence of excommunication, deposition or defiance against him is in any way required, as the text says there at the end. Hence Johannes Andreae says there at *constiterit*: namely to the judge, to whom faith is to be made (above, *De rescriptis*, c. *Inter caeteras*, and c. *Statutum*, § 1, at the end, *De rescriptis*, in the Sext). And Hostiensis says there that a sentence is not required, but it suffices if the judge says this has been proved; and he adds that perhaps on account of the danger witnesses received without contest

of suit, and with the party absent and not cited, will be valid; and for that reason it did not say "by witnesses" but said "by probable arguments"; and this seems to be taken from Dig., *De re iudicata*, l. *Non omnes*, § *A barbaris*. Yet the judge ought to attend to the quality of the person defamed and to the other circumstances (Dig., *Ad legem Iuliam maiestatis*, l. *Famosi*; and above, *De transactionibus*, last chapter). And there also Johannes Andreae says at the last word, namely *requiratur*: another sentence is not required, because the sentence of this council suffices, as Dig., *De conditionibus institutionum*, l. *Quae sub conditione*, last §; dist. 28, c. *De his*, before the end; according to Hostiensis, who says the same as Johannes. And therefore I wonder much that so many and so great Doctors did not resolve this contrariety, since it well appears that understanding it so nothing stands in the way.

In the gloss on the word *a talium*, at the end: say that Hostiensis agrees with the gloss, and it is in itself the true exposition, that one may abstain secretly and without scandal from divine things and from sacraments that are not necessary (C. 6 q. 2, last chapter; and in c. *Cum non ab homine*, below, *De sententia excommunicationis*; and Innocent here; and we shall see in the last chapter below, same title). Or better, and more according to the mind of the letter, that it speaks of those whose fornication was notorious, and determines here with what intention they ought to be avoided, according to Petrus, the Abbot and Johannes, as we said above; for they would sin gravely in

saying that such sacraments are not true, or are imperfect (dist. [text unclear], § *Verum*). Say as above, lest violence be done to this text; nor does Johannes affirm this, but says that Petrus and the Abbot understood it so, whatever Lord Matthaeus may say.

Johannes Calderinus asks, when the priest of the parish is a notorious fornicator, whether it is lawful for the parishioners to hear [Mass] from any other of the priests. And he says that it is not lawful to hear from a stranger; to which c. 1, *De supplenda negligentia praelatorum*, in the Sext; c. *Omnis*, *De poenitentiis et remissionibus*, makes for it. Hence, although they ought not to hear from their own, yet they cannot hear from a stranger. Which limit: unless there were necessity (below, *De regulis iuris*, c. *Quod non est licitum*). Hence the remedy is that they go to the bishop, that he may provide them with a priest (above, *De officio archidiaconi*, last chapter and c. 2). Yet if there is a custom to the contrary, it prevails, by what is noted in c. 1, above, *De treuga et pace*, according to Calderinus. Add that by custom those going to the mendicant religious would not be excused, who are forbidden to confer the sacraments, and so on, as in c. *Religiosi*, *De privilegiis*, in the Clementines; see there.

Chapter Tua nos (c. 8)

Summary. 1. An accuser and a witness are not necessary against notorious fornicators. 2. The judicial order is not required in notorious matters. 3. What a notorious and public crime is. 4. Testimonies alone are not believed; and what testimonies are. 5. Purgation can be imposed from scandalous suspicion alone. 6. One under inquiry is bound to answer the prelate inquiring by his office about a crime, whether he committed it or not. 7. Witnesses are not to be sought or cared for in inquiries against one not defamed. 8. A witness asked whether someone is rich or poor, who says so and for the cause of his knowledge says "because I am his neighbour," proves. 9. What a presumption of law and by law, and of law only, effect. 10. A judge requiring an order not required in notorious matters sins mortally. 11. Whether witnesses are to be received if the defendant denies a crime that is publicly established. 12. What "evident" is; and it is taken for manifest. 13. What is properly called

notorious. 14. A cleric publicly keeping a suspected woman is by that very fact suspected of fornication.

Tua nos. Against notorious fornicators neither an accuser nor a witness is necessary; nor is fornication proved through unsworn witnesses, nor punished by fame alone; yet if the defamed man fails in purgation he will be punished. This is what it says. It makes two [parts]: first the consultation is set out, second the answer. The second at *nos igitur*.

Note at the word *notorium* that in notorious matters the judicial order is not required, nor is judicial solemnity observed, nor proof demanded. Note at the word *celari* that that crime is called notorious which cannot be concealed, as here, and above, the preceding chapter, and below, this title, last chapter. Note that that is called public which is established only by fame; and that is called public which is established by evidence of the fact, as here at *si vero publicum*. And a public and grave crime repels one from order, but not every mortal one (dist. 25, c. *Primum*, in the gloss); on which say as I shall say below in the gloss.

Note at *sola testimonia* that regularly testimonies alone are not believed; and the sayings of unsworn witnesses are called testimonies, as here in the gloss; or when they depose of fame alone, or of the hearsay of others, as when, where deposition by sight is required, the witnesses say "so we have heard it said." When fame proves, see what I wrote above, the preceding chapter.

Note at *si vero de clericis* that from scandalous suspicion alone purgation can be imposed; on which in c. *Ex parte*, above, *De officio ordinarii*. Note at *non apparuit accusator* that the one under inquiry is bound to answer the prelate inquiring by his office about a crime, whether he committed it or not. Note at *purgatio canonica indicenda* that without any judicial order going before the judge can begin a judgement for imposing canonical purgation; on which a good gloss, C. 2 q. 1, c. *De manifesta*. And what canonical purgation is, say as below, *De purgatione canonica*, c. 2 and c. *Inter sollicitudines*. Note at the end, at *canonica animadversione punire*, that one contumacious in undergoing purgation, or failing in it, ought to be punished as though convicted, as here, and in the said c. *Inter*, near the end: "who if perchance he fails in purgation, strike him with the sword of ecclesiastical discipline, and do not omit to thrust him, deposed from office and benefice, into a strict monastery to do penance"; on this below, *De accusationibus*, c. *Accedens*.

In the first gloss, which only expounds the word *conveniuntur*, that is, questioning; nor does the first gloss say more. You, say according to this gloss that that text can be understood in two ways. First, that one proceeds by solemn inquisition to the end of punishing canonically and depriving of benefices; and then the form of c. *Qualiter et quando*, the second, below, *De accusationibus*, and cc. 1 and 2, *De accusationibus*, in the Sext, ought to be kept. Second, it can be understood that one proceeds by extraordinary inquisition for spiritual penance; and then it is not necessary that infamy precede, as the Doctors note in c. *Ad nostram*, above, *De iureiurando*.

In the gloss on the word *testimonio*

the gloss says: simply given without oath; nor does it say more. Say that in inquiries which are made against one not defamed, witnesses are not to be sought nor cared for (C. 3 q. 8, c. *Criminationes*; C. 7 q. 1, c. *Qualiter*; dist. 56, last chapter; C. 8 q. 2, c. *Qualia*; below, *De praebendis*, in the Lateran [council]; and Innocent, and Johannes Andreae after Innocent, in c. 1, above, *De postulatione praelatorum*). And it must be said that when a visitation of some church is made, or when a general

inquisition is made in head and members, it is not necessary that infamy precede (above, *De officio ordinarii*, c. 1; C. 10 q. 1, c. *Decernimus* and c. *Episcopus*; C. 18, last question, c. *Visitandi*, and c. *Non semel*; and below, *De statu monachorum*, c. *In singulis*, and c. *Cum ad monasterium*). And in these cases the witnesses swear to tell the truth about all crimes, except hidden ones (below, *De accusationibus*, the second c. *Qualiter*). And so when an inquisition is made of a certain crime, the witnesses ought not to tell the truth of hidden or manifest things, except of those of which a copy has been made to the defamed man, as in the said c. *Qualiter*, § *Debet autem*; but they swear only to tell the truth about that crime about which inquiry is made (below, *De simonia*, c. *Licet Heli*). He is bound also to tell the truth about all things to be reformed in the church, except hidden ones (below, *De accusationibus*, c. *Olim*). But where infamy precedes, he is bound to answer the questions (*De accusationibus*, c. *Cum dilectus*); and if they say anything of hidden things, it is worth nothing (*De accusationibus*, c. *Inquisitionis*). The same Thomas, II-II, q. 70. And understand that he is bound to tell the truth if he is summoned before his own judge, otherwise not (above, *De foro competenti*, c. *Si diligenti*; C. 11 q. 3, c. *Quisquis*, makes for it; C. 14 q. 2, c. *Quamquam*); or if it be such a crime as does not require the vengeance of blood in that process, if they were clerics, lest they be made irregular (below, *Ne clerici vel monachi*, c. *Sententiam sanguinis*, with similar places).

In the gloss on the word *inter quos*, at "above, *De praesumptionibus*, c. *Quosdam*": say that by reason of this gloss and by the text of that c. *Quosdam*, Bartolus utters a singular saying on l. 1, Dig., *Si certum petatur*: that if a witness, asked whether Titius is rich or poor, or of sound mind, and the like, says that he is, and asked for the cause of his knowledge says, "I know because I am his neighbour," he concludes well; for he sets the minor, omitting the major as known of itself, thus: neighbours know the conditions of neighbours and are presumed to know (this is the major, and known of itself, as in the said c. *Quosdam* and in c. *Quanto*, *De praesumptionibus*); but I am a neighbour; therefore, and so on. Nor does c. *In praesentia*, above, *De probationibus*, stand in the way, where it is said that a witness ought to conclude necessarily; because it suffices that he conclude by such a presumption as is sufficient for condemnation, as appears in the proof of fraud, which is proved from indications, as in l. *Dolo*, Cod., *De dolo*.

For there is a presumption of law and by law, which does not admit proof to the contrary, as in c. *Is qui*, below, *De sponsalibus*, which the *Speculum* calls a necessary presumption, under the title *De praesumptionibus*, § 2. There is a presumption of law only, and this admits proof to the contrary, as in the said c. *Quanto*; and such is called a probable presumption, which sometimes induces full proof (below, *De sententia excommunicationis*, c. *Inquisitioni*; above, *De restitutione spoliatorum*, c. *Sollicite*); sometimes suffices to induce purgation (C. 2 q. 5, c. *Si quis presbyter*); sometimes requires contrary proof, as in the last law, at the beginning, Dig., *Quod metus causa*; sometimes admits no proof against itself unless fame or another circumstance be against it, as in c. *Quia verisimile*, above, *De praesumptionibus*; sometimes transfers the burden of proving onto the defendant, as in l. *Uti possidetis*, Cod., *De probationibus*, and below, *Ut ecclesiastica beneficia*, c. *Ut nostrum*; sometimes brings sentence with it, as in c. *Afferte*, and in c. *Illud*, and in c. *Litteras*, above, *De praesumptionibus*; according to Innocent and Hostiensis. And note that it is never called a presumption of law and by law except when the law says that proof to the contrary is not admitted, as the *Speculum* says, title *De praesumptionibus*, § 2, verse *Necessaria*.

In the fourth gloss, on the word *nec accusator*: say, for things which are manifest and notorious need neither accusation nor proof, as in the laws alleged in the gloss. And when it alleges c. *Ad nostram*, above, *De iureiurando*, say, the third, because all those three chapters begin thus: "Know that it has come to our hearing," and so on; and there is there a quite notable and remarkable case, that a judge who swore to observe the judicial order in every cause is not bound to in notorious matters. Hence in notorious matters, as in extraordinary ones, the order is not to keep the order of law. Indeed, what is more, the Doctors say there that a judge requiring in notorious matters an order not required sins mortally, because in notorious matters he cannot convert a summary process into a plenary one, although he can convert summary causes in non-notorious matters into a plenary process, as in Clem. *Saepe*, *De verborum significatione*, and in c. *Cum dilectus*, below, *De purgatione canonica*; which is quite notable.

Note from this gloss joined with the text that if the defendant denies a crime that is publicly established, witnesses ought not to be received. The contrary of which Innocent and Johannes Andreae seem to will, above, the preceding chapter, who say that if it is denied it ought to be proved. But they ought to be understood of the notorious of a permanent act, of which , according to Petrus de Ancharano;

and Johannes Andreae. For this the gloss here on the word *celari* makes sufficiently.

In the gloss on the word *non ex evidentia facti*, at "above, this title, c. *Si quisquam*": say that that chapter does not prove the saying of the gloss, which says here: "if cohabitation is established, fornication is proved," and so on. For that chapter speaks of a woman with whom someone sometimes chatted or kept company, yet did not keep her in his house. But the understanding of this gloss is well proved by dist. 32, c. *Nullus* and c. *Praeter haec*, where it appears that by the very fact that someone publicly keeps a suspected woman in his house he is presumed to fornicate with her; and so it is called the notorious of presumption, on which above, the preceding chapter, in the great gloss, in the last member, at "the notorious of presumption, as is paternity, filiation." And the same holds in the crime of a defamed man failing in purgation, as here and below, *De simonia*, c. *Insinuatum est nobis*; to which also below, *Qui filii sint legitimi*, c. *Transmissae*, and the gloss on C. 2 q. 1, c. *De manifesta*.

And note from the text and gloss here at the word *non ex evidentia facti* that that is evident which is always open and evidently appears (argument C. 1 q. 3, c. *Ut evidenter*; and below, *De accusationibus*, c. *Evidentia*, where the gloss says: "the evidence of the crime committed," that is, a crime which is notorious through the evidence of the deed, because its very deed shows itself; argument Dig., *De in integrum restitutionibus*, l. 1; Dig., *De contrahenda emptione*, l. *Ea quae*). For what is in evidence can be concealed by no evasion (below, this title, last chapter; and in c. *Ordinarii*, § *Caeterum*, *De officio ordinarii*, in the Sext). Sometimes, however, evident is taken for manifest, as in c. *Constitutionem*, *De verborum significatione*, in the Sext, and in c. *Si forte*, *De electione*, same book, for whose declaration that decretal *Constitutionem* issued, at where it says: "as to the intention of the constitution itself, we declare that manifest and evident presuppose the same thing." The words are of Nicholas III, and he speaks of the manifest or evident defects of one elected to a dignity. But sometimes the manifest needs proof (C. 11 q. 3, c. *Eorum*), on which above, the preceding chapter, and C. 2 q. 1, c. *De manifesta*; above, *De electione*, the first c. *Bonae memoriae*; Cod., *Si minor se maiorem dixerit*, l. 3 [text unclear], at "unless openly and evidently from the proof of instruments," and so on; and the gloss in

the said c. *Constitutionem*. And of this evident thing Macrobius says on the *Dream of Scipio*, book 2: what sight affirms cannot be denied.

And know also that sometimes it is equal for something to be certain or to be able easily to be made certain (Dig., *De damno infecto*, l. *Damni*, § *Sabini*; Cod., *De adulteriis*, l. *Quamvis*; and above, *De deposito*, c. 2, at the end, makes for it, according to Johannes Monachus; and below, *Qui matrimonium accusare possunt*, c. *Insuper*, and what is noted there in the first gloss). And so, according to Monachus, certain is said in two ways: either because it appears of itself what, of what kind and how much, either by its proper name or by another demonstration (Dig., *Si certum petatur*, l. *Certum*); or because it can easily be made certain, as when wine and grain which is in the granary is promised, which will be made certain by the opening of the granary (Dig., *De verborum obligationibus*, l. *Ubi autem non apparet*, § *Sed qui vinum*). So if the one elected shall be examined, it will be known what is in his granary, says Johannes Andreae in the said c. *Constitutionem*, in the *Novella*.

In the same gloss, at "for otherwise it could not be certain except through a presumption of this kind": say that this is properly the notorious of presumption, presumed by the evidence of law, vehement. Bartolus says that according to all the Doctors that is properly called notorious which has a permanent cause, as the text proves in Auth. *Qui semel*, Cod., *Quomodo et quando iudex*, where to set forth edicts can make something pass into the notorious, because it has a permanent cause; but the crier's voice becomes known to few, because it has a momentary cause; for which l. *Si vero*, § *Qui pro rei qualitate*, Dig., *Qui satisdare cogantur*. So Bartolus notes in l. *Ab accusatione*, last §, Dig., *Ad Turpillianum*. Cynus touches it in l. *Ea quidem*, Cod., *De accusationibus*, in the question whether what is done before ten men can be called notorious. According to the canonists it seems not, because they will that what is done before the people or the greater part of the people be called notorious. But perhaps in a village or castle there are fifteen or twelve men; it could then be called notorious among them if the act is established to all or the greater part. For the notorious is discerned by place and time: by place, if before the neighbourhood or the greater part; by time, because by day, not by night, as Johannes Andreae says above, the preceding chapter, in the *Novella*, verse *Et est sciendum quod notorium*, and so on; verse:

What either no one denies, or is proved by people or witness, Or lies open to the eyes, you may call notorious.

In the same [gloss], at *et si publice*: note from this gloss that a cleric publicly keeping a suspected woman is by that very fact convicted of fornication. Hence, although it is said that denial makes a thing doubtful (as l. 3, Cod., *Quibus ad libertatem proclamare non licet*), yet in a fact which cannot probably be denied it has no place, as Innocent says here, and Johannes Andreae above, the preceding chapter, and Petrus de Ancharano here; and it is noted in l. 1, Cod., *De procuratoribus*, and Dig., *De transactionibus*, l. *Post rem*. And note that a public fact from fame only, if it be denied, must be proved, as here, and Johannes Andreae above, the preceding chapter. For fame does not suffice

for condemnation, but for the power of inquiring (Baldus on l. *Ea quidem*, Cod., *De accusationibus*, and there Cynus; on fame enough by Bartolus on l. *De minore*, last §, Dig., *De quaestionibus*). But public offences are to be corrected publicly (below, *De poenitentiis et remissionibus*, c. 1), so that fear may be struck into the rest (dist. 45, c. *Sed illud*, in the second gloss). For when many are running riot, there is need of examples (Dig., *De poenis*, l. *Aut facta*, last §, and the gloss in the said c. *Sed illud*); on which above, this title, c. *Clericos*, in the last gloss, and what I wrote above, this title, c. *Sicut*.

In the last gloss, at *nisi scandalum oriatur*: say that since the clamour of infamy does not rise from the malevolent and enemies, the judge can proceed to inquisition and purgation, as in c. *Cum in iuventute*, below, *De purgatione canonica*, and C. 11 q. 3, c. *In cunis*, and the gloss in the said second c. *Qualiter*, at the beginning, the great gloss. And say that regarding regular persons so great an order is not required, as in the said c. *Qualiter*, at the end. Hence religious too are accustomed to proclaim one another for light sins and to accuse one another in turn out of charity; on which Thomas fully, II-II, q. 33.

Chapter A nobis (c. 9)

Summary. 1. Little women who ought not to dwell with clerics. 2. Clerics ought not to keep housekeepers and old women in the house. 3. It belongs to the prelate to correct clerics, lest they keep suspected little women in the house.

A nobis. Little women ought not to dwell with clerics unless they are so closely joined that suspicion cannot arise. This is what it says. Note that immodest women are to be called *mulierculae*. Note that clerics ought not to keep housekeepers and old women in the house, lest perhaps they act as procuresses of young girls; l. *Si qui adulterium*, Cod., *De adulteriis*, and Dig., *De ritu nuptiarum*, l. *Adoptivus*, make for it. Note that a natural bond takes away suspicion of fornication; on which above, this title, c. 1. Note that it belongs to the prelate to correct clerics, lest they keep suspected little women in their dwellings. And note *mulierculas* as a diminutive, because sin diminishes the soul, life, fame and the whole substance of the sinner; on which dist. 34, c. *Vidua* and c. *Prior*. Hence it is called nothing, because it annihilates a man (Psalm: *In his sight the malignant is brought to nothing*).

Chapter Quaesitum (c. 10)

Summary. 1. Concubinary clerics who are not notorious ought not to be avoided; one existing in mortal sin is bound to abstain from celebration; and no. 18. 2. Communication is considered in three ways. 3. Suspended as to himself, not as to others; as to himself and as to others; as to others, not as to himself. 4. A notorious fornicator is by the law itself suspended as to himself and as to others, as is a heretic and a simoniac, otherwise sentence being awaited. 6. That is not properly called notorious which is established through judicial proofs. 7. One who has confessed outside court is not notorious, nor suspended as to others. 8. A notorious fornicator after penance is not to be avoided. 9. The offence of citizens and of the secular power differ considerably. 10. When a city is interdicted, the clergy is not believed interdicted, and conversely. 11. Whether and when criminous clerics are to be avoided in their offices. 12. Who is called a notorious fornicator. 13. What is called evidence of the thing. 14. Who is a notorious fornicator by evidence of the thing. 15. A notorious fornicator is suspended as to himself and as to others. 17. One hearing divine things from notorious fornicators sins mortally; and why they ought not to hear, nos. 26 and 29. 18. Whether and when one receiving the ecclesiastical sacraments from notorious fornicators sins. 19. Whether the degraded, the deposed, the cut-off and heretics confect true sacraments. 20. A custom against good morals is not valid. 21. Those suspended as to themselves and as to others ought to say the office separately and without apparatus. 22. Not to hear Mass on feast days is better than [to hear it] from notorious fornicators, if it cannot be heard from others. 23. Those suspended from notoriety, unless they desist, are always to

be avoided. 24. It is lawful for laymen publicly to avoid not only notorious fornicators but also any criminous persons, even not notorious, provided it be directed to amendment; more broadly on the matter, no. 42. 25. A notorious fornicator, even if scandal should follow, ought to be avoided. 27. Four kinds of men are forbidden to be heard. 28. The sacrament of the Eucharist raises to a spiritual state, to which fornicators are not raised. 29. Notorious fornicators do not absolve those confessing to them, and those confessing to them sin mortally. 30. The use of the keys is impeded in those suspended as to themselves and as to others; likewise in the degraded and deposed, and excommunicated heretics, and the like. 31. One who has confessed to notorious fornicators is bound to confess the same sins again to a priest who can absolve, as both fall into the penalty of the canon *Omnis utriusque*; no. 34. 32. One is bound to repeat confession in four cases.

(Summary, continued.) 33. A notorious fornicator, however much tolerated, does not excuse. 35. A notorious fornicator not correcting himself after a warning, when he is suspended from his benefice by the law itself, does not make the fruits of the benefices his own, nor are they owed to him; nos. 36, 37, 39, 40. 38. A notorious fornicator who celebrates is made irregular; and with such an irregular only the Pope dispenses; and what of other notorious criminals; no. 40. 41. Whether one is bound to avoid hidden criminals in divine things. 43. Those believing that heretics, schismatics, excommunicates and notorious fornicators do not confect the Body of Christ err gravely. 44. Whether it is lawful to hear divine things and receive the sacraments from other criminals than a notorious fornicator, simoniac and the like. 45. How those are punished who give aid, counsel and favour to notorious fornicators, heretics and the like, so that they may celebrate. 46. A cleric in mortal sin ought not to celebrate before the people, under pain of mortal sin.

[incipit unclear]. Concubinary clerics who are not notorious ought not to be avoided. This is what it says. It is divided into five: first the question is set out; second the answer; third the reason is given; fourth a limitation is set; fifth the declaration of the limitation. The second at *verum*; the third at *quia quantum*; the fourth at *nisi*; the fifth at *per sententiam*.

Note at the word *pro mortali peccato* that for any mortal sin whatever one is suspended as to himself only; that is, because he is bound to abstain from celebration, lest he communicate in mortal sin; because *he that eateth and drinketh unworthily eateth and drinketh judgement to himself, not discerning the body of the Lord* (1 Corinthians 11); Deuteronomy 16: *Thou shalt follow justly after that which is just*. For such a one is called suspended as to himself only, because he is not forbidden [and made] to abstain from office and the like by the sentence of a canon or of a man, but by the simple prohibition of law without a sentence given; and such a one is not necessarily to be avoided, even by those who know his sin secretly; for the Lord also delivered his Body to Judas (*De consecratione*, dist. 2, c. *Sicut Iudas*, and c. *Et sancta malis*).

Hence it is to be known that communication can here be considered in three ways. For some communicate sacramentally and spiritually, as all communicating in the state of grace without mortal sin, as the Apostles; and these are those who abide in Christ and Christ in them (John 6: *He that eateth my flesh and drinketh my blood abideth in me, and I in him*; *De consecratione*, dist. 2, c. *In Christo pater*). Some communicate sacramentally and not spiritually, as all existing in mortal sin; and these communicate with Judas, as in the said c. *Sicut Iudas*, and John 13: *And when supper was done, the devil having now put into the heart of Judas to betray him*, and so on. Hence blessed Thomas in his sequence:

The good receive, the wicked receive, Yet with unequal lot Of life or of destruction. Death to the wicked, life to the good: See how, of a like receiving, Unlike is the outcome.

But some receive spiritually and not sacramentally, as all existing in the state of grace who are not able actually to communicate; and of such Augustine says: "Why do you prepare tooth and belly? It is not food of the tooth and belly, but of the mind; believe, and you have eaten" (*De consecratione*, dist. 2, c. *Ut quid paras*). On all these in *Sentences* 4, dist. 9 [text unclear]. For just as in this sacrament one thing is sacrament and reality, another sacrament and not reality, another reality and not sacrament; hence there is said to be there a twofold reality: one contained and signified, the other signified and not contained, as in *Sentences* 4, dist. 8, and below, *De celebratione missarum*, c. *Cum Marthae*, and *De consecratione*, dist. 2, c. *Sacrificium* and c. *Species*, and so on. In two ways, thus the distinction of those receiving is taken, as above.

Note the text at *quia quantum ad alios* that although for any single mortal sin every criminal is suspended as to himself, yet he is not suspended as to others except when it is expressed in law, as here, and dist. 32, c. *Nullus* and c. *Praeter haec*, and dist. 81, c. *Si qui sunt*. And note well from this word *quia quantum*, and so on, that everyone suspended as to himself and as to others ought to be avoided in divine things, whether he is suspended by a man or by law; about which see what I wrote in c. *Clericos*, above, this title, and in c. *Sicut*. Add also a third species: because sometimes one is suspended as to others and not as to himself, as below in the first gloss, at the end; and so too in a pilgrim cleric, as below, *De clericis peregrinis*, c. 1 and c. *Tuae*, and dist. 98, c. 1.

Note at *nisi peccatum huiusmodi sit notorium* that a notorious fornicator is suspended by the law itself as to himself and as to others; and so in the said c. *Nullus* and *Praeter haec*. And from the word *peccatum huiusmodi* the argument is taken that it is special in the crime of fornication. Yet the same holds in heresy (C. 24 q. 2, c. *Sane*); the same in a schismatic (above, *De electione*, c. *Quia diligentia*); the same in one simoniac in order (dist. 32, c. *Verum*; and C. 1 q. 1, c. *Si quis a simoniacis*,

and in c. *Tanta*, below, *De simonia*; and C. 1 q. 1, c. *Reperiuntur*); and understand one simoniac in order, whether actively or passively, provided it be manifest, as in c. *Accusatum*, below, *De simonia*, and in c. *Quoties*. And the same in one excommunicated by major excommunication, as below, *De sententia excommunicationis*, c. *Si quem*, and C. 3 q. 4, c. *Engeltrudam*, with similar places. But in other crimes, even if they are notorious, sentence is to be awaited (C. 15, last question, last chapter, beginning *Sciscitantibus*; and the gloss in c. *Cum non liceat*, above, *De praescriptionibus*). And what I said of the schismatic, understand of one who says that the Roman Church is not to be obeyed; because then he becomes a heretic against that article, "the holy Catholic Church"; on which C. 24 q. 3, c. *Inter haeresim*. And that schismatics cannot minister nor absolve, and so on, appears in C. 7 q. 1, c. *Novatianus*, and Thomas, II-II, q. 39. On all these there is a good gloss below, *De schismaticis*, c. 1, and it is noted in c. *Tanta*, below, *De excessibus praelatorum*.

Note at "notorious by sentence, or by confession made in court, or by evidence," and so on, that here a threefold species of the notorious is clearly distinguished. Hence from this note that what is established by judicial proofs is not properly called notorious; and so a cleric against whom fornication had been proved, which he himself denies, would not be suspended as to himself and as to others except after sentence given. Note at *seu per confessionem factam in iure* that if he has confessed outside court he is not on that account notorious, nor suspended as to others. But against one who

has confessed in court no order of law is required, as here and in c. *Tua nos*, above, this title; for which Innocent in the second c. *Qualiter et quando*, below, *De accusationibus*, in the second gloss.

Lastly, from the end of this text joined to the beginning, Innocent and his followers gather that even a notorious fornicator after penance is not to be avoided; and so the suspension as to others ceases when the crime ceases, as he notes in c. *Sicut*, above, this title. Yet there he himself says that such a suspended man ought not to celebrate without dispensation and absolution, since his crime was known (dist. 81, c. *Minister*, and what is noted on dist. 50, c. *Sacerdotes*; and Huguccio agrees). But Innocent seems to will that he does not need absolution (below, *De sententia excommunicationis*, c. *Venerabilem*), although Johannes Andreae says otherwise there on the first gloss.

In the first gloss, at *vel saecularis potestatis*: say that the offence of the citizens and the offence of the secular power differ considerably from one another. For from the offence of the secular power or lord, although the city is interdicted, yet the citizens not interdicted can hear divine things outside the city; but when a people is interdicted, the individuals of the people are understood interdicted; hence individuals are interdicted as the whole body, as in c. *Si sententia*, second response, *De sententia excommunicationis*, in the Sext. In the same gloss, at *in alio loco possent celebrare*: say that when a city or people is interdicted the clergy is not understood interdicted, and conversely, as in the said c. *Si sententia*, at the beginning. And say "in another place," namely with loud voice, bells rung and doors open, because in an interdicted place [it is not allowed]; but also in the same place with doors closed, with subdued voice, bells not rung, and the interdicted and excommunicated excluded, as in the last chapter, beginning *Alma mater ecclesia*, *De sententia excommunicationis*, in the Sext.

In the last gloss, on the word *in officiis evitare*, at *quamdiu ab ecclesia solvatur*: say that he is said to be tolerated by the Church so long as the crime is not notorious in one of these three ways, as here, above, this title, c. *Vestra*, and dist. 32, c. *Nullus* and c. *Praeter haec*, and dist. 81, c. *Si qui sunt presbyteri*.

About this, for the full declaration of the whole matter, which is spread out in many places, namely whether criminous clerics are to be avoided in their offices, and when they are to be avoided (on which here and above, this title, c. *Vestra*; and c. *Cum non liceat*, above, *De praescriptionibus*; and c. *Ex tenore* and the last chapter, above, *De temporibus ordinationum*; and in c. 1, *De clericis peregrinis*; and in the second c. *Per tuas*, below, *De simonia*; and in c. 1, below, *De schismaticis*; and in c. *Si celebrat*, below, *De clerico excommunicato ministrante*; and dist. 32, c. *Dictis*, c. *Nullus*, c. *Praeter haec* and c. *Verum*; and dist. 81, c. *Si qui sunt*; and in c. *Cum aeterni*, *De sententia et re iudicata*, in the Sext; and fully by Johannes Andreae after Innocent in c. *Ad haec*, the second [text unclear], above, *De appellationibus*; and C. 10 q. 1, c. *Placuit*; and in c. *Latores*, below, *De clerico excommunicato ministrante*, in the penultimate gloss; and above, *De electione*, c. *Cum dilectus* and c. *Cum inter R.*; and in Clem. *Cupientes*, *De poenis*; and dist. 32, c. *Super hoc*, by the gloss and the Archdeacon; and by Lord Antonius de Butrio in the said c. *Vestra*; and Innocent above, this title, c. *Clericos* and c. *Sicut*; and c. *Cum bonae*, above, *De aetate et qualitate*): for such diffuseness, then, take the thirty conclusions written below, namely.

The first conclusion: that one is called a notorious fornicator who has confessed in court, or been condemned, or been laid open by such evidence of the thing that it cannot be concealed by any evasion, as here and above, this title, c. *Vestra*. And evidence of the thing is sometimes the same as manifest, as in c. *Si forte*, *De electione*, in the Sext, joined with c. *Constitutionem*, *De verborum significatione*, in the Sext; on which I wrote above, this title, c. *Tua nos*. The second conclusion: that that is called evidence of the thing when the act shows itself, that is, when the crime manifests itself

to all, as in c. *Evidentia*, below, *De accusationibus*, and argument Dig., *De in integrum restitutionibus*, l. 1, and Dig., *De adulteriis*, l. 2, § *Si publico*; C. 1 q. 1, c. *Ut evidenter*; and in c. *Ordinarii*, § *Caeterum*, *De officio ordinarii*, in the Sext. The third conclusion: that one is called a notorious fornicator by evidence of the thing which is open to all, because a cleric openly and manifestly keeps a suspected woman in

his house, at table, in his chamber and in bed, just as a husband would keep a wife. For otherwise interior things cannot be proved except through exterior signs (Proverbs 20: *By his inclinations a child is known, if his works be clean and right*), as above, *De praesumptionibus*, c. *Ex studiis* and c. *Litteris*, at "alone with a woman alone, naked with her naked, lying in the same bed, with that intention, as they believed, that he might know her carnally, they saw"; and dist. 32, c. *Nullus* and c. *Praeter haec*, at "has openly taken a concubine, or has not left one taken"; and the gloss in c. *Vestra*, above, in the last member of the great gloss; and the gloss in c. *Tua nos*, above, this title; and C. 2 q. 1, c. *Manifesta* and c. *De manifesta*. And the *Speculum*, under the title *De notoriis criminibus*, § *Iam de notorio*, verse *Notorium facti actu manentis*, gives this example: if someone continuously and publicly keeps a concubine in house, at table and in bed, and children wail in the lap of him carrying them. And Lord Antonius says: or because offspring walk upon the earth, namely sons or daughters; for which also Cod., *De nuptiis*, l. *Vicinus* [text unclear]; and above, *De appellationibus*, the first c. *Consuluit*, and c. *Relatum*; and C. 2 q. 1, c. *Quando autem*; and below, *De divortiis*, c. *Significasti*; dist. 28, c. *Priusquam*; and dist. 82, c. *Proposuisti*.

The fourth conclusion: that such a notorious man is suspended as to himself and as to others, as here and in the said c. *Vestra*, and in the said cc. *Nullus*, *Praeter* and *Si qui*. The fifth conclusion: that for any mortal sin whatever anyone is suspended as to himself, because he ought to abstain from celebration and sacred things, as I wrote here in the first note above. And blessed Thomas says in [*Sentences*] 4, dist. 9, that one existing in mortal sin laudably abstains not only from the touch but from the sight of the Body of Christ. And elsewhere he says that a sinner ought not to look with a long gaze, but when it has been seen to strike his breast, as unworthy of such a sight and gaze. The example of the publican makes sufficiently for this (Luke 18), at: *he would not so much as lift up his eyes towards heaven, but struck his breast, saying: O God, be merciful to me a sinner*. And the same Thomas says in *Sentences* 4, dist. 24, that if a cleric in mortal sin celebrates or communicates, he is as it were a blasphemer and a deceiver and a traitor like Judas. For which the authority of the Apostle suffices, Hebrews 6, at: *crucifying again to themselves the Son of God, and making him a mockery*. And Augustine says that the sinner is not worthy of the bread which he eats. And Job 30 says: *But now the younger in time scorn me, whose fathers I would not have set with the dogs of my flock; the strength of whose hands was to me as nothing, and they were thought unworthy of life itself. Barren with want and hunger, who gnawed in the wilderness, disfigured with calamity and misery; and they ate grass and the barks of trees, and the root of junipers was their food*, and so on; all which Gregory attributes to sinners existing in mortal sin.

But if one existing in mortal sin by some necessity should touch or carry out some deed in a case in which it would be lawful even for a layman, such as to baptise at the point of death, or to gather the Body of Christ from the ground with trembling, and to do the rest or similar things from necessity, then he would not sin mortally. Otherwise, if beyond necessity, even without apparatus, one existing in mortal sin touches [them], he sins mortally again; or if he thrusts himself into divine things, unless he first confesses, or is truly penitent and has no access to a confessor. For if he is truly contrite and penitent, although he has no access to a confessor, yet in a case of necessity he can

celebrate without mortal sin, as because it is a feast day on which the people is bound to hear Mass under pain of mortal sin (*De consecratione*, dist. 1, c. *Nullus*, c. *Missas* and c. *Omnes fideles*); or because someone wishes to communicate or confess on account of sickness, or a similar case, from danger of death and the like; they do not sin by celebrating, as the theologians commonly hold in *Sentences* 4, dist. 24. But otherwise, if without necessity he thrusts himself in or touches, or ministers the sacraments, he sins mortally, as blessed Thomas holds, III, q. 64, art. 6, and Petrus, Albertus, Bonaventure, Richard, and commonly all the theologians in *Sentences* 4, dist. 24; and Innocent and Hostiensis touch it in c. *Omnis*, below, *De poenitentiis et remissionibus*; and on confession, in *Sentences* 4, dist. 17, commonly by all.

The sixth conclusion: that it is forbidden under pain of mortal sin to hear divine things from notorious fornicators (dist. 32, c. *Nullus* and c. *Praeter haec*; dist. 81, c. *Si qui sunt presbyteri*; and here, and in c. *Vestra*, above, this title). The seventh conclusion: that it is forbidden under pain of mortal sin to receive the ecclesiastical sacraments from notorious fornicators, as in the aforesaid laws and dist. 32, c. *Verum*. It fails in two sacraments in a case of necessity, as because of danger of death, namely in baptism and the Eucharist, which are lawfully received at the point of death, as in the said §, verse *Ubi est textus singularis*. But of the other sacraments it is otherwise; although the Collectarius in c. *Omnis*, below, *De poenitentiis et remissionibus*, says that in a case of necessity all the sacraments can be received; and wrongly. And some here say that in a case of necessity the sacrament of penance can be received, as Matthaeus de Bon. says; the contrary of which Innocent expressly holds in c. *Fraternitatis*, below, *De haereticis*, where he says beyond the middle that since God alone confers grace, not the minister, it is not attended

what sort the minister is, except in him who knowingly receives against the constitutions of the Church. And so of all those cut off, as schismatics, excommunicates, simoniacs, and any suspended from the administration of the sacraments, whether they are suspended by law or by a man: for those receiving from such are disobedient, and so they sin mortally (dist. 81, c. *Si qui sunt*, at "therefore whoever, while he asserts himself to be faithful, scorns to obey the Apostolic See incurs the sin of paganism"); and it speaks properly in our case. Innocent says: it fails in a notorious fornicator and simoniac, who at the point of death can baptise and minister the Eucharist. And since it is lawful to receive these sacraments from such in such a case, it is lawful for such also to touch [them], yet not to confect. Nor do we believe it lawful, he himself says, to receive extreme unction or the other sacraments from such; for since they are generally forbidden, and of these two it is specially granted, the consequent understanding appears that of the rest it is denied (dist. 25, c. *Qualis*), as Innocent says there in c. *Fraternitatis*. C. *Nonne*, above, *De praesumptionibus*, with similar places, makes sufficiently for it. C. 1 q. 1, c. *Sacerdotes*, also makes sufficiently, at: "Priests, in whatever stain they may be, let them not approach to offer the oblation to God," which is taken from Leviticus 21. Hence, as a good priest is compared to an angel (Malachi 2: *For the lips of the priest shall keep knowledge, and they shall seek the law at his mouth, because he is the angel of the Lord of hosts*), so a wicked and cut-off one is compared to the devil (John 6: *Have not I chosen you twelve, and one of you is a devil?*). Yet they cannot impede the divine grace. Hence even the degraded, not only the deposed and cut off, confect true sacraments (C. 1 q. 1, c. *Dominus declaravit*). Nor is the Master of the *Sentences* held in this, who said in [book] 4, dist. 13, that heretics and those cut off do not confect; the contrary of which almost all commonly hold, as the Archdeacon and Johannes Andreae in c. *Degradatio*, *De poenis*, in the Sext, and Thomas in [*Sentences*] 4, dist. 13, and Albertus and Bonaventure and the theologians commonly, and

the gloss on *De consecratione*, dist. 4, c. *Non in vobis*, and the Archdeacon on *De consecratione*, dist. 2, c. *Quod sit*; for this C. 1 q. 1, c. *Dictum*, and c. *Non nocet*, and c. *Quod quidam*, and c. *Per Moysen*, with similar places.

Eighth, I conclude that in such matters a contrary custom does not excuse, because it is against good morals (dist. 8, c. *Quae contra mores*; C. 32 q. 7, c. *Flagitia*). For sins are the graver the longer they hold the unhappy soul bound (above, *De consuetudine*, c. *Quanto*, and the last chapter; and below, *De consanguinitate et affinitate*, c. *Non debet*, at the end). The ninth conclusion: that such men so suspended as to themselves and as to others are nevertheless bound to say the office separately and without apparatus, as noted in dist. 50, c. *Presbyterum*, and in c. *Si celebrat*, below, *De clerico excommunicato ministrante*, and dist. 81, c. *Si qui sunt presbyteri*. The tenth conclusion: that it is better on Sundays and feast days not to hear Mass than to hear it from such, if one could not hear it from others. Hence it would be just as if he were in a case in which he could in no way hear, because we are said to be able to do that which we can lawfully do (below, *De clericis non residentibus*, c. *Cum teneamur*; and Innocent, *De concessione praebendae*, c. *Attendentes*; C. 22 q. 2, c. *Faciat homo*; and *De regulis iuris*, rule *Imputari*, in the Sext; and in c. *Quod non est licitum*, below, *De regulis iuris*), by which chapter it is well proved that necessity because of danger of death would well excuse; see above, this title, c. *Vestra*, at the end, where I wrote the question of Johannes Calderinus. Lord Antonius de Butrio also held this conclusion in his repetition of c. *Vestra*, above, this title, saying that it is better to desist from a good than to consent to evil and act against conscience, as in c. *Litteras*, above, *De restitutione spoliatorum*.

The eleventh conclusion: that such men suspended from such notoriety ought to be avoided in the aforesaid things so long as they have not desisted and been absolved, or have been absolved; because since the crime is notorious, by which those seeing it were scandalised, the amendment ought to be established, just as the absolution from excommunication and similar enormities, says Hostiensis in c. *Omnis*, below, *De poenitentiis et remissionibus*, and Thomas in the *Quodlibets*. For such a prohibition seems to last until he has been dispensed and he himself has been absolved; otherwise such notoriety would seem futile. Nor does the gloss in c. *Si qui sunt presbyteri* stand in the way, which says that as they are suspended by the very fact, so by the very fact they are restored; for there it speaks of entry into the church. And although the gloss is commonly held, yet considering more subtly it is safer to say that if after the suspension he did not thrust himself in, it is true that when the crime ceases the suspension ceases, because when the cause ceases the effect ceases, as in c. *Cum infirmitas*, below, *De poenitentiis et remissionibus*, and above, *De iureiurando*, c. *Etsi Christus*, at the end, and in c. *Post translationem*, above, *De rerum permutatione*; but otherwise if he damnably thrust himself in, because he has been made irregular, as in c. *Cum aeterni*, *De sententia et re iudicata*, in the Sext. Innocent, however, above, this title, c. *Sicut*, holds that when the crime ceases he can be heard and the sacraments received; I limited it as above; for which c. *Sane*, below, the next title, makes.

The twelfth conclusion: that it is lawful for laymen publicly to avoid not only notorious fornicators, but also any other criminals, even not notorious, provided the

intention be directed to amendment, and so to the salvation of the criminal himself, and it be not necessary for those avoiding him to hear or receive [from him]. For to accuse publicly and to defame with the order of charity is not reprehensible (Matthew 18: *If thy brother shall offend against thee*, and so on, as far as *tell the church*; and C. 2 q. 1, c. *Si peccaverit*). The same Innocent and Johannes Andreae in the last chapter, *De temporibus ordinationum*; for which see what I wrote in c. *Vestra*, above, this title, in

the apostil on the word *a talium officiis abstinere*. What is noted in c. *Cum non liceat*, above, *De praescriptionibus*, and in c. 2, *De novi operis nuntiatione*, also makes for this conclusion. But where one is bound of necessity to avoid, as in a notorious fornicator, he ought to be avoided even if scandal should follow, because it is more useful that scandal be permitted to arise than that the truth be abandoned (gloss on Ezechiel 2; below, *De regulis iuris*, c. *Qui scandalizaverit*). Indeed, those knowingly hearing [them], or receiving other sacraments than those two of which above in the seventh conclusion, sin mortally, as I said above in the sixth and seventh conclusion; and it appears in dist. 32, c. *Verum*, where it compares the disobedience of those hearing or receiving from such to idolatry, and in c. *Si qui sunt presbyteri* it compares it to idolatry and paganism. For it so far harms those hearing and receiving that, as it is said there, they are made true idolaters. Thomas also says in *Sentences* 4, dist. 13, that the Church forbids receiving the sacraments from them, since they act against the precept and prohibition of the Church which is in the said c. *Nullus* and *Praeter* and *Si qui sunt presbyteri*.

Lord Bonaventure also, in [*Sentences*] 4, dist. 13, says in the fourth question that the Masses of certain men are forbidden to be heard as a penalty of their sin, because they are not worthy to confect; and if they confect, they are not worthy to be heard; and this is the first reason. The second reason is that, being confounded, they may return to the grace of penance. The third reason is that others may be drawn back from imitating them. These reasons are well proved above, this title, c. *Vestra*. And he adds that this is a work of justice, mercy and prudence. And he says in the same place that four kinds of men are forbidden to be heard, namely heretics, schismatics, simoniacs and notorious fornicators; but the same holds also of the excommunicate, as I said above in this chapter, in the apostil on the word *nisi peccatum huiusmodi*. And Bonaventure says in the same place that the sacrament of the Eucharist raises man to a spiritual state, to which fornicators are not raised, who are altogether carnal. Indeed the text says (C. 32 q. 2 [text unclear], c. *Connubia*) that at that time at which conjugal acts are performed the presence of the Holy Spirit is not given, even if he who performs the office of generation seem to be a prophet; where the gloss says: because there is there a certain stupor, and the man becomes wholly flesh.

To strengthen [the point] that it is mortal not knowingly to abstain from such men, 1 Kings 15 makes for it, where on account of disobedience Saul is said to have lost the kingdom, the Lord saying through the prophet: *Because it is like the sin of witchcraft to rebel, and like the crime of idolatry to refuse to obey*. On which passage blessed Thomas, II-II, q. 105, art. 2, says that Samuel's comparison is not of equality but of likeness, because disobedience redounds to contempt of God, just as idolatry, though idolatry more. For all disobedience is of its kind a mortal sin, the same says in the same place, art. 1, whether the disobedience be against the precept of God, or against the precept of the Church or of one's superiors. The example of the punishment of Dathan and Abiron also makes for this, who, refusing to obey Moses, were swallowed alive into hell with their tents and households (Numbers 16); whence David too says in the Psalm: *The earth opened and swallowed up Dathan, and covered the congregation of Abiron*. It makes to the same that no one can be excommunicated except for mortal sin (C. 11 q. 3, c. *Nemo episcoporum*). But parishioners can be excommunicated if they do not obey canonical institutions (dist. 15, c. *Nulli ergo*, and so on).

The thirteenth conclusion: that such men cannot absolve those confessing to them, nor does the absolution profit (dist. 32, c. *Verum*). Moreover, no one can be absolved from sin by sinning (below,

De poenitentiis et remissionibus, c. *Quod quidam*). But those confessing to such sin mortally, as above, because they act against the order of the Church. Moreover, the use of the keys is impeded in those suspended as to themselves and as to others (in *Sentences* 4, dist. 19, where Peter of Tarentaise says that the use of the keys is taken away in the deposed and degraded, but is impeded in the excommunicated and suspended). And [William of] Auxerre in the *Summa*, book 4, in the tract on the keys, q. 5, says that the excommunicated or suspended or heretics and the like cannot bind or loose; therefore, and so on. Lord Bonaventure sets this question in terms in *Sentences* 4, dist. 18 [text unclear], problem 2, q. 2: whether the power of the keys inseparably accompanies the priestly order. And in the answer he says that if jurisdiction is lost, the execution of the key ceases. And this is lost in two ways: either by the taking away of subjects as to the thing, as in schismatics, heretics, those cut off, notorious fornicators, excommunicates and the like; or by the taking away as to the thing and the hope,

as in the degraded. Lord Astesanus says the same in the *Summa*, book 5, title 36, on the ministers of the keys, near the end. Durandus says the same in the *Summa of Confessors*, book 1, part 1, dist. 1, near the end, where he says that one suspended from office is deprived of the authority of absolving, whether he is suspended by a man or by a canon, as a notorious fornicator, who is suspended as to himself and as to others; and therefore, he says, he cannot bind nor loose. He says the same of one simoniac in order, even if he is hidden; but other simoniacs only if notorious. And he says that these two, namely the notorious fornicator and the simoniac, in necessity can confect those two sacraments of which above, conclusion 7; but from others only baptism can be received in necessity, because [it can be received] even from an infidel (*De consecratione*, dist. 4, c. *Quidam Iudaeus* and c. *Romanus*, with similar places). Lord Johannes de Saxonia, Doctor of both Laws and afterwards a Friar Minor, says the same as above in the *Directorium iuris*, in the tract on sacramental absolution.

The fourteenth conclusion: that one who has confessed to such notorious fornicators is bound to confess the same sins, in number, again to such a priest as can absolve him, according to the form of c. *Omnis*, below, *De poenitentiis et remissionibus*; and the same Lord Johannes de Saxonia says it expressly in the aforesaid table of law. Thomas, Petrus, Albertus, Richard, and commonly all in *Sentences* 4, dist. 17, say the same, and there Lord Bonaventure on the letter, and dist. 21, q. 3 [text unclear]: that in four cases one is bound to repeat confession. The first is if the priest could not absolve, as is the case in those suspended as to themselves and as to others, as in a notorious fornicator, and so on. The second case is if the one absolving did not know how to discern. The third, if the confession was not complete, as because he knowingly kept silent some mortal sin. The fourth, if he neglected to make satisfaction and forgot the satisfaction, and so on; on which below, *De poenitentiis et remissionibus*, c. *Omnis*, by Hostiensis and others, and the gloss on *De poenitentia*, dist. [text unclear], § *Iterum*. And understand this conclusion even if the parishioners knowingly and willingly wish to submit themselves to such, because no jurisdiction can be newly acquired for them on account of this, by what is noted at the end of c. *Si diligenti*, above, *De foro competenti*, and C. 16 q. 1, in the summary; because public law cannot be derogated by the pact of private persons. Thomas also holds this in the *Summa contra Gentiles*, near the end, where he says that for a priest to be able to absolve, jurisdiction is required.

The fifteenth conclusion: that however much such men were said to be tolerated by their prelates, this would not excuse, because the notorious by evidence of the thing does not need the order of law,

as above, this title, c. *Vestra*. Hence another sentence is not required, as Innocent notes in c. *Tua*, and I noted in c. *Si autem* and in c. *Sicut*; and Innocent in the second c. *Per tuas*, below, *De simonia*, where he says that from simoniacs and notorious fornicators, even without sentence, it is lawful to withdraw from their obedience, by the aforesaid § *Verum*. He says the same also in c. 1, *De schismaticis*, and there the gloss. He says the same also in c. *Vestra*, above, this title, at the word *nec habent operis evidentiam*, where he says the same holds in all suspended by law, if the crimes are notorious; and Johannes Andreae says the same in the *Novella*. Innocent says the same in c. *Tanta*, below, *De simonia*.

The sixteenth conclusion: that those who have confessed to such, unless they confess again within the year, as above, conclusion 14, after the year fall into the penalties of c. *Omnis utriusque sexus*, below, *De poenitentiis et remissionibus*: namely that living he be barred from entry into the church and dying he lack Christian burial. For what is not lawfully done is not said to be done (C. 16 q. 1, the second c. *Monachi*; above, *De postulatione*, c. 2; Dig., *De re militari*, l. 3, § *In bello*; and *De regulis iuris*, rule *Ea quae fiunt*, in the Sext). Hence things done against law ought by all means to be held as not done (*De regulis iuris*, rule *Quae contra*, in the Sext).

The seventeenth conclusion: that such fornicators, if after warning they have not corrected themselves, are suspended from their benefice by the law itself (dist. 81, c. *Archidiaconum*, and there the gloss; and Johannes de Lignano in c. *Si autem*, above, this title; and what is noted in c. *Si quis amodo*, dist. 81; and dist. 32, c. *Praeter haec*, near the end, at "nor let them receive a portion from the church," that is, that they receive nothing of the benefice; and there the gloss and the Archdeacon expressly note it; and Innocent notes it in c. *Sicut*, above, this title). And what is noted in the last chapter, *De rescriptis*, in the Sext, makes for it, because the benefice is given on account of the office; and what is noted in c. *Cum aeterni*, *De sententia et re iudicata*, in the Sext, makes for it. Innocent also holds this in c. *Pastoralis*, above, *De appellationibus*. But Hostiensis, in c. *Inter sollicitudines*, below, *De purgatione canonica*, says this is to be understood if he is suspended for a grave cause; otherwise if for a light one, for instance on account of the scandal of the people, or if from infamy alone, and he has not persevered long in contumacy. For the order is that a fornicating cleric, first warned, be suspended from his benefices; and if he has not corrected himself, he be perpetually removed from his benefices, whether he be in sacred orders, as in c. *Sicut*, above, this title, or in minor ones, as in the same place, in § *Si autem clerici*. But if it is public from fame only, and so he is suspected of the crime even without an accuser, purgation is to be imposed on him, in which if he fails, or will not purge himself, he will be punished canonically, as in c. *Tua*, above, this title. But [if] it is notorious, the order of law is not required, as noted above, this title, c. *Vestra*.

Hence notorious men are suspended by the law itself, even from the benefice (dist. 81, c. *Hos etiam*, with similar places).

The eighteenth conclusion: that such men, if they receive the fruits of their benefices, do not make them their own (dist. 81, c. *Hos etiam*; and C. 16 q. 6, c. *Illud*). Hence they are bound to restore such fruits to the superior; otherwise they will not obtain the benefit of absolution, because sins are not remitted unless what was taken away is restored (C. 14 q. 6, c. *Si res*; and *De poenitentia*, dist. 5, c. *Falsas*; and in c. *Peccatum*, *De regulis iuris*, in the Sext; and in *Sentences* 4, dist. 15). From which follows the twentieth conclusion: that tithes are not owed to such men, since they are to be counted also among the fruits of benefices, as Johannes Andreae notes in the second c. *Tua nobis*, below, *De decimis*; but then they are owed to the superior, just as the other fruits.

The twenty-first conclusion: that such notorious fornicators, if they celebrate, are made irregular, as Lord Antonius de Butrio notes in c. *Si celebrat*, *De clerico excommunicato ministrante*, and Johannes Andreae in c. 1, *De sententia et re iudicata*, in the Sext, and Johannes Calderinus in the said c. *Si celebrat*. This is proved also in dist. 81, c. *Si qui sunt presbyteri*, and dist. 32, c. *Praeter haec*; and Innocent notes in c. *Vestra* that they are suspended by the law itself as to themselves and as to others, as here; therefore also irregular if afterwards they celebrate, by the rule laid down in the said c. 1, *De re iudicata*, in the Sext, and in c. 1, *De sententia excommunicationis*, in the Sext. And Innocent holds it in the said c. *Cum medicinalis*, *De sententia excommunicationis*, in the Sext, and the Doctors commonly in the said c. *Si celebrat*. But Innocent seems to have varied in the said c. *Si celebrat*, and the Archdeacon in the said c. *Cum aeterni*; but the first is truer and more common. C. 11 q. 3, c. *Si quis episcopus*, and the following chapter, make for it; and c. *Latores*, below, *De clerico excommunicato ministrante*, makes for it; the reason laid down in c. *Is cui*, *De sententia excommunicationis*, in the Sext, makes excellently for it. And the same is in the simoniac, by the laws aforesaid.

The twenty-second conclusion: that with such irregulars the Pope alone dispenses, because they thrust themselves in damnably, as in c. *Cum aeterni*, *De sententia et re iudicata*, in the Sext. The twenty-third conclusion: that other notorious criminals than fornicators or simoniacs, celebrating publicly before they have been dispensed, are not made irregular strictly, so that the Pope alone dispenses; but the bishop suffices, because they are not so expressly said to be suspended as to themselves and others as these are; and this seems to be of the mind of the Doctors in the said c. *Si celebrat*. For this c. *Nuper*, below, *De sententia excommunicationis*, makes sufficiently, and Innocent in c. 1, *De clericis peregrinis*. And in this way all the Doctors holding against the twenty-first and twenty-second conclusion can be reconciled, so that their opinion is true in this twenty-third conclusion.

The twenty-fourth conclusion: that no one is bound to avoid in divine things or sacraments any hidden criminals whatever, as here and above, this title, c. *Vestra*. It fails in the sacrament of order: for one ought not to receive order from excommunicates, or from those to whom the execution of order is interdicted, or from those who by celebrating would be made irregular, as in c. 2, *De ordinatis ab episcopo* [text unclear]; on which fully in c. 1, below, *De schismaticis*; and it is a subtle passage. Second, it fails where one could avoid [him] in secret so that he might be converted sooner, because then by not avoiding he would sin (C. 6 q. 2, last chapter; and c. *Cum non ab homine*, below, *De sententia excommunicationis*, makes for it).

The twenty-fifth conclusion: that although one is not bound to abstain from the divine things and sacraments of a hidden sinner, yet he can lawfully abstain in those things which he is not bound to hear or receive from him, provided he does it with good intention, as was said above in the twelfth conclusion, which I recapitulate here so as to add: unless someone knew this hidden crime as God [knows it], for instance from sacramental confession or under the seal of confession; because then he ought in no way, even in secret, to avoid him, as the Doctors hold in c. *Cum non ab homine*, *De sententia excommunicationis*.

The twenty-sixth conclusion: that to believe that heretics, schismatics, excommunicates, notorious fornicators, simoniacs, and any persons cut off, even the degraded, cannot confect, or, if they celebrate, do not confect the true Body of Christ, is a grave mortal sin. For whatever sort the priest may be, provided he has received the character of order, he always confects true sacraments, although to his own ruin (C. 15, last question, last chapter; and the said c. *Vestra*; c. 1, above, *De summa*

Trinitate, makes for it; and Lord Antonius fully in his repetition of the said c. *Vestra*, who pursues many things about these and many others).

The twenty-seventh conclusion: that it is not forbidden under pain of mortal sin to hear divine things and receive the sacraments from other criminals than from the aforesaid, namely the notorious fornicator and simoniac, as in the said § *Verum*, and here by the contrary sense. And Johannes holds this conclusion in dist. 32, c. *Nullus*, and C. 2 q. 7, c. *Sacerdotes*, and the gloss in c. *Cum non liceat*, *De praescriptionibus*, and Johannes Calderinus above, this title, c. *Vestra*; and it is the common opinion and seems to be of the mind of Innocent in c. *Per tuas*, *De simonia*; although Lord Antonius in c. *Vestra*, in the first objection, seems to hold the contrary, yet the laws alleged by him do not press sufficiently, and the common opinion seems more benign. It fails, however, in heretics or excommunicates, from whom even in necessity divine things are not to be heard nor sacraments received, except baptism in necessity, as in the said § *Verum*; and Innocent notes it in c. *Quanto*, above, *De consuetudine*. Second, it fails in those notoriously suspended from order as to themselves and others, because while such suspension lasts it

is forbidden, as here in the general reason; and the gloss also says this in the said c. *Cum non liceat*. Third, it fails in the sacrament of order, which it is forbidden to receive from bishops interdicted in the execution of order, as in the said cc. 1 and 2, *De ordinatis ab episcopo interdicto* [text unclear]; on which in c. 1, *De schismaticis*.

The twenty-eighth conclusion: that those who give aid, counsel or favour to these notorious men so that they may celebrate sin mortally, because those participating in a crime with criminals fall into the same penalty, as in c. *Si concubinae* and in c. *Significavit*, below, *De sententia excommunicationis*. For those acting and those consenting are punished with equal penalty (Romans 1; C. 11 q. 3, c. *Qui sentit*; C. 2 q. 1, c. *Notum*; and in c. 1, *De officio delegati*, with similar places).

The thirtieth conclusion: that a cleric in mortal sin, if the sin is enormous or middling, ought not to celebrate before the people unless he has first been dispensed by the bishop regarding the execution of order; yet in secret he can celebrate. This is proved in dist. 50, c. *Sacerdotes* and c. *De his*, and it is also of the mind of Innocent in c. *Ex tenore*, above, *De temporibus ordinationum*, and in c. 1, *De clericis peregrinis*, and in c. *Si celebrat*. And this is to avoid the scandal of the common people. And from this the note of Hostiensis is saved in c. *Nisi cum pridem*, § *Propter conscientiam*, above, *De renuntiatione*, and the *Speculum*, *De legato*, § *Iuxta*, verse *Sunt quoque*, who hold that all notorious mortal crimes that are not light make one irregular; understand broadly, that they sin mortally by celebrating. And this conclusion has place whether in crimes notorious in the three ways of which here, or whether they are notorious from proof only, as in the said last chapter, *De temporibus ordinationum*, where [is] the text; and the Doctors hold it in the said c. *Ex tenore*, and there [see] which crimes are enormous or light.

De clericis coniugatis (X 3.3)

Rubric

Summary. 1. Whether this rubric is superfluous, or set out of order with respect to the preceding one; no. 2. And badly formed; no. 5. 3. Pythagoras in his school gave a law to his hearers that the authority of the speaker should suffice. 4. Authority is to be revered. 6. The character of order is not lost through marriage, heresy and degradation. A married man, if he were ordained, would receive the character. Whether an acolyte who is not a bigamist, wishing to be promoted after his wife's death, ought to take the minor orders again.

Rubric. It is continued thus. It has been said above of the unlawful consorting and commerce of clerics and women; it follows to see of the lawful, according to Goffredus and others. On the matter there is had dist. 28, 31 and 32 throughout, and C. 27 q. 1, c. *Ut lex continentiae*; and it is recapitulated in the Sext, and below, *Qui clerici vel voventes*, c. *Veniens*, and above, *De vita et honestate clericorum*, c. *Clericus*, and *De temporibus ordinationum*, last chapter, in the Sext.

I ask whether this rubric is superfluous, since we have *Qui clerici vel voventes*; and it seems that that one is superfluous, not this, just as from a second impetration the church is said to be burdened, not from the first (above, *De rescriptis*, c. *Abbate* and c. *Mandatum*). I answer briefly that it is not superfluous, neither this one nor that one. For in this one it is principally treated whether clerics contracting marriages in the permitted cases can lawfully retain benefices after the marriage has been contracted, and enjoy the clerical privilege; and incidentally it is touched whether marriages with clerics in minor or major orders hold. But that one, *Qui clerici vel voventes*, principally asks who such can lawfully be joined in marriage; and so there is a difference.

I ask secondly from this whether the rubric is set out of order, incongruously, after the preceding one. For it seems that since he was going to treat of lawful and unlawful union, he ought first to have treated of the lawful as of the worthier (dist. 40, last chapter; and above, *De maioritate et obedientia*, c. *Statuimus*). So too Valerius, about to treat of the grateful and ungrateful, first treated of the grateful; whence he says in book 5, c. 3: "since they have distinguished themselves by a contrary purpose, let them also be separated by our style, and let those obtain the prior place who deserve praise rather than those who deserve reproach." I answer that priority and posteriority hang on the judgement of the prince, and so no other reason is to be sought in this, as in c. *Si quando*, above, *De rescriptis*. For we confess that Hippocrates and Pythagoras too gave this law in their schools, that the hearers should not dare to ask about the cause in their sentences, but that the authority of the speaker should suffice them for reason. Authority indeed is to be revered (above, *De officio delegati*, c. *Cum olim*; dist. 20, c. 1; dist. 19, c. *In memoriam*; *De testibus*, c. *Praesentium*, at the beginning, in the Sext). Moreover, the field must be purged before the seeds are sown; and so first the vices ought to be purged out, so that the virtues might be brought in; about which C. 32 q. 1, c. *Cum renuntiatur*. Hence Jesus too willed first to be baptised by John the Baptist before beginning to fast (Matthew 3 and 4). Moreover, in the preceding rubric a certain cohabitation was touched upon in general, here in species; and so they are exceeding and exceeded. I ask also whether this rubric is badly formed; for it seems that it ought to have said "of married persons" rather than "of

clerics," as of certain former counts or kings after taking the monastic habit (C. 20 q. 3, c. *Praesens*; C. 27 q. 2, c. *Scripsit*; and above, *De rescriptis*, c. *Eam te*, at the end). For there are two kinds of Christians, namely clerics and laymen (C. 12 q. 1, c. *Duo sunt*). I answer that it is not badly formed. For order is one of the seven sacraments of the Church, whose character, through the clerical state, is not lost through marriage, just as neither through heresy (below, *De divortiis*, c. *Quanto*), nor even through degradation, as in c. *Degradatio*, *De poenis*, in the Sext; gloss on C. 1 q. 1, c. *Quod quidam*; and Hostiensis and Johannes Andreae in c. 1, § *Scire*, above, *De sacra unctione*. For even if a married man were ordained, he would receive the character (below, *De conversione coniugatorum*, c. *Placet*, at the end, by Johannes Andreae, and by the Archdeacon on dist. 77, c. *Quicunque*); which character secular dignities do not have; and so the contrary arguments do not stand in the way.

I ask whether an acolyte who is not a bigamist, wishing to be promoted after his wife's death, ought to take up the minor orders again? I answer briefly that he ought not, by this rubric; because although he is married, he yet remains a cleric, as in c. *Constitutus*, below, *De conversione coniugatorum*; and what is noted above in the preceding question makes for it.

Chapter Si qui clerici (c. 1)

Summary. 1. Clerics in minor orders contract marriage, but renounce their benefices. 2. In how many ways the word *infra* is taken. 3. Married clerics in minor orders are to be compelled to give up their benefices; and what in betrothals only; no. 4. 5. A wife is called also a spouse. 6. A cleric in sacred orders contracting [marriage] is today excommunicated by the law itself; and whether he is stripped of every clerical privilege; no. 7.

Si qui clerici. Clerics in minor orders can contract marriages, but are bound to renounce their benefices; but in major orders they cannot contract. This is what it says. It makes two [parts], as in the summary; the second at *sed etsi*. Note at *infra subdiaconatum* that a cleric below the subdiaconate lawfully contracts marriage; and there understand *infra* exclusively. For a subdeacon cannot contract, since it is a sacred order, as in c. *A multis*, *De aetate et qualitate*; and add what is noted in c. *Pia consideratione*, *De exceptionibus*, in the Sext, at *infra octo dierum spatium*. Note that this word *infra* is sometimes put exclusively, as here; and so *infra* is put for "on this side of," here and below, this title, c. *Quod a te*, and there Johannes Andreae. Sometimes it is put for "beyond," as Johannes Andreae notes in c. *Plerumque*, *De rescriptis*; and see the gloss in c. *Frequens*, *De restitutione spoliatorum*, in the Sext, in the gloss which begins *Quot dies*; and of this word *infra* it is had in c. 1, above, *De auctoritate et usu pallii*, and in c. *Ne in agro*, § *Quia vero*, *De statu monachorum*, in the Clementines, at *infra septa monasterii*.

Note at *ad relinquenda beneficia* that married clerics are to be compelled to give up their benefices, because they hold them only in fact, since the title is extinguished by the law itself, as the first gloss holds; the same Hostiensis and Aegidius; for which below, this title, c. *Cum decorem*. Otherwise if he were in sacred orders, because then the marriage would not hold, and he is to be deprived and not deprived by the law itself, as in the last gloss. But Johannes Andreae holds the contrary, because the tacit renunciation of the benefice which is induced by marriage ought to have place in the same way if the marriage does not hold as if it holds; for if it is not so, then the offender is of better condition than the non-offender, against c. *Eum qui*, *De praebendis*, in the Sext; l. 3, Dig., *De donationibus inter*

virum et uxorem, makes for it. And so the same can be said in every case in which the marriage is null, for instance contracted with a blood relative, as Bartolus notes in the question *Quidam clericus cum esset*, and so on; c. *Nuper*, *De bigamis*, and l. *Si uxor*, verse *Plane*, Dig., *De adulteriis*, make for it.

Incidentally Johannes Andreae asks whether this text has place in betrothals only. I answer: either she was betrothed *de futuro* or *de praesenti*. In the first case he ought not at once to be deprived of the benefice, just as neither is a cleric entering religion deprived of his benefice within the year of novitiate, as in c. *Beneficium*, *De regularibus*, in the Sext. In the second case what is said here has place; Johannes alleges Dig., *Ad municipalem*, l. *Ea quae*; what was said above of tacit renunciation makes for it, which is induced in the same way from the pure contract of betrothal as from marriage, according to Petrus de Ancharano; which also is noted in c. *Quemadmodum*, above, *De iureiurando*. From which it is inferred that although these betrothals *de praesenti* are dissolved by the entry of the said betrothed into a monastery, or by her death, yet the cleric who contracted does not recover the benefice, as Johannes Andreae also holds here, and the *Speculum* holds under the title *De clericis coniugatis*, at the end; for which C. 7 q. 1, c. *Quam periculosum*. Nor does it stand in the way that a beneficed cleric does not lose his first church unless he is translated to a second, as in c. *Cum in cunctis*, above, *De electione*, with similar places; because they are not equal. Nor does it stand in the way that it speaks of a wife; because a wife is called also a spouse (Apocalypse 21: *I will shew thee the bride, the wife of the Lamb*; Proverbs 19: *House and riches are given by parents, but a prudent wife is properly from the Lord*); for which dist. 26, c. *Deinde*, verse *Si vero*, and C. 34 q. 1, c. *Cum per bellicam*. Hence Bede too, on that of Deuteronomy, *If any man violate the betrothed of another* (Deuteronomy 22), says: he called the betrothed a wife, not as she then was, but as she was going to be a wife.

The authority of Jerome in the homily on Matthew 1 proves this sufficiently, at *And Jacob begot Joseph the husband of Mary*, where he says: "When you hear 'husband,' let no suspicion of nuptials steal in; but remember the custom of the Scriptures, that the betrothed are called husbands and the betrothed women wives." Therefore, and so on. [I would] not be of so great understanding [text unclear], because you will find this authority also in the *Decretum* (C. 27 q. 2, c. *Genuit*).

Note at *sed si in subdiaconatu* that formerly one contracting in sacred orders was not excommunicated by the law itself; today he is, by Clem. *Eos qui*, *De consanguinitate et affinitate*. In the first gloss, at *ipso iure*: say that this opinion is commonly held by the Doctors, by this text and below, this title, c. *Cum decorem*. The reason is because whenever a beneficed cleric is so impeded in his person that by common law he is perpetually incapable of a benefice, then the benefice is vacant by the law itself, for instance if he becomes a monk, as in c. *Beneficium*, *De regularibus*, in the Sext, even if the bishop could dispense regarding such inability, as in the said c. *Beneficium* and c. *Quod Dei timorem*, *De statu monachorum*. And so it is in the matter at hand, because a married cleric is by common law incapable of a benefice; and therefore, although the bishop can dispense regarding this, as in c. *Ioannes*, below, this title, yet the benefice is vacant by the law itself, as here.

Moreover, a cleric, as soon as he takes a wife, is stripped of every clerical privilege, except two, of which below, same title, c. 1, in the Sext. Hence since in all other respects he remains as a pure layman, it appears that he is incapable of a benefice (argument c. 2 [text unclear], below, *De institutionibus*). From which it follows that although [the benefice is vacant] through profession or taking a wife, yet the benefice is not properly said to be vacant through renunciation. For although in taking a wife or in profession he protested that he did not intend to renounce the benefice, yet that

benefice would be vacant; for which the notable gloss in the second c. *Quamvis*, *De praebendis*, in the Sext.

In the same gloss, at *hodie non tenent*: say that this resolution is not good, because, as far as possible, the correction of laws is to be avoided. Hence today too bishops can dispense in a simple benefice, as below, this title, c. *Ioannes*. In the last gloss, at the end, the gloss seems to hint that these are not deprived of their benefices by the law itself. Say as I said above, and we shall see in c. *Ioannes*, below, this title; and the gloss just above says "deprived by the law itself"; say the same whether it holds or does not hold, as above. And note from this gloss joined with the text at *uxores dimittere et poenitentiam agere* that one is compelled against his will to do penance, as here and C. 20 q. 1, c. *Clericos*.

Chapter Sane (c. 2)

Summary. 1. Whether and when a married man is promoted to orders, ecclesiastical administrations or benefices; and no. 6. 2. It belongs to the bishop to provide lest an unworthy man be promoted to benefices. 3. The judge imparts his office even against the will of the party, where public utility is in question. 4. Married men are incapable of obtaining benefices, nor are they promoted to sacred orders, nor even to minor ones; no. 5. 6. Whether those to be promoted ought to vow chastity. 7. Irregularity from bigamy is not taken away by a vow of chastity and entry into religion. 8. Whether a marriage contracted by one vowing chastity is valid. 9. What a solemn vow is. 10. When profession is called express and when tacit. 11. Whether one who corrupted his wife before he betrothed her can be promoted. 12. Two requisites of marriage.

[incipit unclear]. A married man is not promoted to orders, ecclesiastical administrations or benefices unless he promises chastity and is not a bigamist. This is what it says. And so it repels the married man from three things, unless two things concur. The second at *nisi*. Note at *provideas attentius* that it belongs to the bishop to provide lest an unworthy man be promoted to benefices, because he has the care of all the churches (C. 16 q. 7, c. *Omnes basilicae*); l. *Quos prohibet*, Dig., *De postulando*, makes for it, where also, since public utility is in question, the judge imparts his office even against the will of the party, as there; and especially in beneficial matter (above, *De electione*, c. *Cum nobis olim*; and above, *De postulatione*, the first c. *Bonae*; and *De institutionibus*, c. *Cum venissent*).

Note at *clericus coniugatus* that married men are incapable of obtaining benefices: for since they ought to be deprived of those already held, as above, the preceding chapter, all the more ought new acquisition to be impeded in them, because many things impede which do not cast out (C. 15 q. 1, last §; above, *De iureiurando*, c. *Quemadmodum*; and in l. *Patre furioso*, Dig., *De his qui sui vel alieni iuris sunt*). And understand that they ought not to be admitted to benefices with care [of souls]; for by dispensation they can have simple ones (below, this title, c. *Ioannes* and c. *Diversis fallaciis*), according to Hostiensis. Note at *vel sacros ordines* that married men ought not to be promoted to sacred orders, as here; nor to minor ones, because they ought not even to receive the first tonsure, and the one conferring it is suspended for a year from conferring the same tonsure; on which in the last chapter, *De temporibus ordinationum*, in the Sext; see there to whom it is forbidden to confer

the first tonsure; and there it is proved also that a married man ordained to sacred orders receives the character; on which by Johannes Andreae in c. *Placet*, below, *De conversione coniugatorum*, at the end; and I said it above in the rubric.

Note at *nisi forte castitatem voverit* that here there is a special case, that a married cleric is admitted to orders, ecclesiastical cures and benefices if he has vowed chastity and has had one wife, and she a virgin. Otherwise, then, if he has had several, or a corrupted one (dist. 26, c. *Una tantum*). And understand this not only if she is dead, but also if she survives and she herself also wishes to vow chastity [and] profess. And from this text too it appears openly that those to be promoted ought to vow chastity; for which dist. 28, c. *Diaconi*; although Johannes de Lignano says the contrary here, namely that those promoted to sacred orders are not bound to continence by a vow, but by the constitution of the Church. But certainly, although they do not vow expressly, yet they ought to vow, as here; and they vow tacitly by the very fact that they receive a sacred order (argument dist. 28, c. *Quia sunt culpae*, and the two following chapters; and dist. 32, c. *Seriatim*). And note that a husband who has himself ordained otherwise than is granted by the canons, even after the death of his wife, cannot minister in the order received, nor ascend to higher ones, nor obtain any ecclesiastical office or benefice, as in the Extravagant of John XXII which begins *Antiquae*.

Note at *etiam quod unicam et virginem habuerit uxorem* that the irregularity which rises from bigamy is not taken away by a vow of chastity, as here, because the word "and" is put conjunctively, and so both are required; nor is it taken away by entry into religion, as in c. 1, above, *De filiis presbyterorum*.

I ask whether a marriage contracted by one who has vowed to keep chastity is valid? I answer briefly: either the vow was solemn or simple. If it was solemn, it is never valid. If it was simple, it does not dissolve [the marriage], but the one who vowed sins mortally as often as he demands the debt (argument below, *De secundis nuptiis*, c. *Dominus*; *De cognatione spirituali*, c. *Si vir*; and in c. *Discretionem*, *De eo qui cognovit consanguineam uxoris suae*; and Thomas in [*Sentences*] 4, dist. 38). But I ask: what is a solemn vow? I answer: a vow is called solemn by the reception of a sacred order, or by express or tacit profession in any of the approved religions to which chastity is annexed by the religious state, according to what is noted in c. *Cum ad monasterium*, at the end, below, *De statu monachorum*; it is had in c. *Quod votum*, *De voto*, in the Sext. But about this I ask further: when is profession called express and when tacit? I answer: express profession is that which is made in the hands of the prelate or one deputed, as in c. *Ad apostolicam*, below, *De regularibus*. Tacit, however, is that which is induced presumptively from the taking of the habit of the professed, where the habits are distinct; or if he manifestly showed that he wished to change his life; or if he stayed for a year and beyond with the habit of novices, and after the year made no protestation lest it prejudice him, as in c. *Non solum* and in c. *Constitutionem*, *De regularibus*, in the Sext, and in c. *Eos*, *De regularibus*, in the Clementines.

In the last gloss, on the word *virginem*, the gloss gathers an argument for the solemn question whether he who corrupted his wife before he betrothed her can be promoted? And it argues first that he cannot, by this text, because the betrothed ought to have been a virgin (C. 30 q. 5, c. *Qualis*; and below, this title, c. 1, in the Sext, in the fourth gloss; and dist. 32, c. *Nemo*). For this Hostiensis adduces the Authentic *Quomodo oportet episcopos*, § 1, and § *Neque autem secundas*, and the following §, collation 1, where it appears that a married man is not promoted unless he had a wife who was a virgin and not a concubine; as if it would say: if he deflowered her and kept her as a concubine, he is not excused by this unless he also consented to her as a virgin, as in the Authentic *De sanctissimis episcopis*, § *Clericos autem*, collation 6. And the reason, according to Hostiensis, is because in marriage two things are required, namely the consent of minds, signifying the charity of the spirit between God and the just soul, and the union of bodies, designating the conformity of the flesh of Christ and

the Church. And therefore if someone consents to a corrupted woman and afterwards knows her, this conformity is not proper, in which corruption can be noted; the consent is attended to also at the time of the mingling of bodies. For which the authority of the Apostle suffices, 2 Corinthians 11: *For I have espoused you to one husband, that I may present you as a chaste virgin to Christ*. It is necessary, then, that at both times, namely of consent and of intercourse, she be found a virgin (dist. 77, c. *Quicunque*, before the end); for a quality added to a verb is understood according to the time of the verb, and must then be present (l. *In delictis*, § *Si extraneus*, Dig., *De noxalibus actionibus*; and l. *Titius*, Dig., *De militari testamento*). For which C. 27 q. 2, c. *Cum societas*, where he is not impeded who consents to a woman and has not known her, because on account of the defect of conformity the sacrament of the Church is lacking. So conversely he is impeded who consents to a corrupted woman and has known her, because charity is lacking, and so there is not properly conformity. Hence Ambrose says: not virginal defloration makes marriage, but the conjugal pact (C. 27 q. 2, c. *Cum initiatur*). This is proved also by c. *Valentino*, dist. 34, and by c. *Debitum*, *De bigamis*. The sacred authority of Leviticus 21 also makes for the decision of the question, at: *The high priest shall take a virgin unto his wife; but a widow, or one that is divorced, or defiled, or a harlot, he shall not take, but a maid of his own people.*

Hence it is reported that in the Council of Nicaea it was so enacted that he be deposed; if this statute were found, the question would be laid to rest. But c. *Tanta*, below, *Qui filii sint legitimi*, seems to stand in the way, because the marriage is drawn back in favour of the children, so that they are reckoned legitimate. But it does not stand in the way, because that and similar places feign the marriage contracted in favour of the offspring, which is more to be favoured than this fornicator; what Innocent notes in c. *Illud*, above, *De praesumptionibus*, and in c. *Veniens*, below, *De verborum significatione*, makes for it. Some hold the opposite, and the gloss at the end so inclines, because he did not divide his flesh among several, nor did she. Goffredus in the *Summa*, *De bigamis*, says that this opinion is the more celebrated. And Johannes de Lignano says that the opinion of the gloss is commonly held, for the aforesaid reason. Johannes Andreae, in reciting, seems to agree with Hostiensis; the same Huguccio holds. Lord Petrus de Ancharano says that the opinion of Hostiensis and his followers rests on better reasons and laws, to which one could not rightly answer. Moreover he himself says: although this man contracts marriage with her whom he previously deflowered, yet the fault contracted from such defloration is not taken away by the following marriage unless he does penance, as I believe. And the reason is, because in these spiritual matters the truth, not a fiction having retroactive effect, is considered; but since here we are treating of a spiritual act, namely marriage, therefore not fiction but truth is to be considered, which is that this man contracts with a corrupted woman; for which what is noted in c. *Innotuit*, above, *De electione*, makes.

Lord Matthaeus de Bon[onia] says that he believes both opinions can be saved: for either it is asked, he says, whether he is impeded from being promoted on account of the defect of bigamy, and it must be said that he is not; or on account of the crime of fornication, and by the rigour of law he is impeded (C. 1 q. 7, c. *Si quis omnem;* dist. 81, c. 1). And therefore this text and many similar require that he have contracted marriage with a virgin; yet the bishop can then dispense (dist. 34, c. *Fraternitatis*), but not against the defect of bigamy, as above, *De bigamis*, c. 2. You, say that since the opinion of Hostiensis is helped by the authority of Sacred Scripture, as above, it is safer to hold with him. The gloss also holds this, by argument of dist. 33, c. *Nemo ad sacrum*, and dist. 33, c. *Maritum*. Johannes the Glossator also disputed this in the question which begins *Aliquis cognovit virginem*. And the gloss seems to will the same in the single chapter, *De bigamis*, in the Sext, which says that

bigamists are so truly or interpretatively: as because he had two wives, or contracted with a corrupted woman (above, *De bigamis*, c. *De bigamis*; and dist. 26, c. *Deinde*). Another sacred authority also suffices, Ezechiel 44, at: *And no priest shall drink wine when he is to go into the inner court; and they shall not take for their wives a widow, nor one that is put away, but they shall take virgins of the seed of the house of Israel*. But what follows there seems to stand in the way, when it says: *but a widow also that is the widow of a priest they may take*. Hence if he could take a widow left by a dead priest, much more it seems he can take a virgin corrupted by himself and afterwards betrothed. Hence this altercation seems greater than was the first, whether a bigamist enjoyed the clerical privilege, from which issued that c. *Altercationis*, *De bigamis*, in the Sext. But certainly this stands in the way, that it was required that the priest be a virgin, who joined himself to a virgin and even to such a widow; which the said c. *Nemo*, dist. 32, also hints. Hence, although today it passes under dissimulation, yet it stands that he contract with a virgin, as above.

Moreover, in the divine law, if a woman given in marriage was not found a virgin, the men of that city overwhelmed her with stones; if a virgin had not been violated, but she herself kept silent, and was not betrothed, he who knew her was bound to take her and give the father of the girl fifty sicles of silver (Deuteronomy 22). Indeed the canon says: he who once after his ordination has fallen into a lapse shall thenceforth be deposed, and shall be able to attain no grade of the priesthood (dist. 50, c. *Qui semel*, and the following chapter). Nor is he admitted to the priesthood or a sacred order who has violated promised chastity, as a bigamist (C. 27 q. 1, c. *Quotquot*). The gloss also seems to will this in c. *Super eo*, above, *De bigamis*, when it says in c. *Debitum*, same title, on the word *cognitam*, where it says that the wife of one to be ordained ought to have been a virgin in order that he could be promoted; it alleges c. *A nobis*, same title; although the same gloss says below that he who had a concubine after his wife or before can be promoted (dist. 34, c. *Fraternitatis*). The passage is quite doubtful; whatever it be, the first opinion is safer, and what is more cautious is to be held, by what is noted in c. *Ubi periculum*, *De electione*, in the Sext.

Chapter Quod a te (c. 3)

Summary. 1. A cleric in minor orders who contracts [marriage] is deprived of his benefice. 2. Chastity can be counselled from the beginning, but not commanded. 3. Why continence is commanded to clerics: sixteen reasons are set out. 4. Few are found free of the natural vice of the flesh, against which there are chiefly three remedies. 5. Whether married men are deprived of ecclesiastical benefices by the law itself, and yet are unworthy of the administration of the sacraments.

When a donation made to a church is revoked through the donor's lawful withdrawal, ownership reverts by the law itself to the donor.

One who offers his goods to churches at the time of his entry: for how long a time he offers them.

A wife left mistress and usufructuary "so long as she lives honourably and chastely": whether by passing to a second marriage she has prejudiced herself.

A donation made to a church: whether, and when, it is revocable.

Quod a te. A cleric beneficed in minor orders who contracts marriage ought to be deprived of his benefice; but if he has given anything to the church, it ought to be restored to him. This is the

principal point. The chapter divides into the consultation and the response; the second part begins at *id volumus*. This second part is subdivided into the response and a reservation; the second begins at *Sane*.

Note the words *continere carnis devicti vitio non valentes* ("overcome by the vice of the flesh and unable to be continent"): because of the frailty of the flesh, chastity can be counselled but not commanded. Understand: at the beginning, for a vow is a matter of counsel, not of precept; but if it pleases one to vow, then after the vow it is a matter of precept to keep it. Psalm [75]: *Vow ye* (here he counsels) *and pay to the Lord your God* (here he commands). For what is voluntary at the beginning becomes necessary after the fact (Cod., *De actionibus et obligationibus*, l. *Sicut ab initio*; and *Quod semel placuit, De regulis iuris* in the Sext). Hence, when the Apostles said to the Lord Jesus, *If the case of a man with his wife be so, it is not expedient to marry*, Jesus said to them: *Not all take this word, but they to whom it is given. For there are eunuchs who were born so from their mother's womb; and there are eunuchs who were made so by men; and there are eunuchs who have made themselves eunuchs for the kingdom of heaven. He that can take it, let him take it* (Matthew 19). And from this the Apostle says (1 Corinthians 7): *Now concerning virgins, I have no commandment of the Lord; but I give counsel, as having obtained mercy of the Lord to be faithful*; and he adds: *Art thou bound to a wife? seek not to be loosed. Art thou loosed from a wife? seek not a wife. But if thou take a wife, thou hast not sinned; and if a virgin marry, she hath not sinned*, and so on. See, he does not command chastity but counsels it. To this point C. 28 q. 1 c. *Sic enim*.

And note that it is called a vice if one cannot be continent, as here. Yet because he cannot be continent he is not spared removal from his benefice, although he is spared in that he may remain with his wife. Hence the Apostle (1 Corinthians 7): *It is good for a man not to touch a woman. But for fear of fornication let every man have his own wife, and let every woman have her own husband. Let the husband render the debt to his wife, and the wife also in like manner to the husband.* And from this it is properly and rightly said that a natural vice is to be spared (as in Dig., *Si quis cautionibus*, l. 2, and Cod., *De indicta viduitate tollenda*, l. *Cui relictum*, and the last law). And understand that the natural vice is spared because marriage is granted him, as below; yet whoever subjects himself to such a vice outside the order of marriage is not excused from mortal sin. On this fully in c. *Ut clericorum mores*, above, *De vita et honestate clericorum*, and in c. *Origo*, C. 131 q. 4; and see below in this title, c. 3, § *Iterum nota*.

Note the words *quod cum simul* ("since they cannot at once"): the reason why continence is enjoined on clerics, namely that one cannot at the same time give oneself to pleasures and carnal desires and to divine and ecclesiastical services and ministries. But to one who looks more closely there are many reasons beyond the one just given.

The first is that of reconciliation: for they ought to appease God for the people (Ecclesiasticus 44: *and in the time of wrath he was made a reconciliation*); but *they that are in the flesh*, that is, who live carnally, *cannot please God* (Romans 8).

The second is that clerics hold the place of God on earth (Matthew 18: *Whatsoever you shall bind upon earth shall be bound also in heaven, and whatsoever you shall loose upon earth shall be loosed also in heaven*); but *God is a spirit, and they that adore him must adore him in spirit and in truth* (John 4).

The third is that they exercise an angelic office (Malachi 2: *For the lips of the priest shall keep knowledge, and they shall seek the law at his mouth, because he is the angel of the Lord of hosts*); but angels are spirits (Psalm [103]: *Who makest thy angels spirits, and thy ministers a burning fire*, that is, of divine love).

Matthew 22: *For in the resurrection they shall neither marry nor be married, but shall be as the angels of God in heaven.* And the Apostle (1 Corinthians 11): *Therefore ought the woman to have a covering over her head, because of the angels*; the gloss says, that is, because of the clerics, for clerics are called angels, and so on.

The fourth is that God is holy and wills to have holy ministers (Leviticus 19 and 20: *Be ye holy, because I am holy*; Exodus 19: *The priests also that come to the Lord, let them be sanctified, lest he strike them*). And although lawful marriages are without sin, nevertheless in the time when conjugal acts are performed the presence of the Holy Spirit will not be given, even if he who serves the office of generation should seem to be a prophet, as Jerome says on Matthew; and C. 32 q. 2 c. *Connubia*.

The fifth is that clerics ought to attend to spiritual generation, which ought to be chaste and holy (1 Timothy 3: *having his children in subjection with all chastity*). And although it says "a bishop must," yet it is understood of anyone to be ordained or already ordained, not only in sacred orders but also in minor orders, who wishes to live as a cleric, as Augustine would have it, and as is found in dist. 34, c. *Cognoscamus*; and so Ambrose, on whom dist. 81, c. *Apostolus*. The Apostle, 3 John 1: *I have no greater grace than this, to hear that my children walk in truth*; he speaks of spiritual children, not carnal.

The sixth is that the things which they handle, the sacraments, are clean (C. 15 q. last, last chapter; and above, in the next preceding title, c. *Vestra*); therefore the ministers too ought to be clean. Isaiah 52: *Be ye clean, you that carry the vessels of the Lord.* Isaiah 1: *Wash yourselves, be clean*, and so on. Leviticus 22: *Every man of your race that approacheth to those things that are consecrated, in whom there is uncleanness, shall perish before the Lord.*

The seventh is that, since they have to cleanse others, if they themselves are unclean they will not be able, being unclean, to cleanse the unclean well. Ecclesiasticus 34: *What can be made clean by the unclean?* Nehemiah 12: *And the priests and the Levites were purified, and they purified the people.*

The eighth is that clerics have a most noble bride, namely divine wisdom, which is disparaged by a carnal bride. Hence Wisdom 8: *Her have I loved and have sought her out from my youth, and have desired to take her for my spouse, and I became a lover of her beauty.*

The ninth is that, since clerics are ministers of the Most High, they ought not to be carnal ministers nor subject to the flesh of another, which follows from incontinence; for *the husband hath not power of his own body, but the wife* (1 Corinthians 7).

The tenth is that lordship does not admit division (Matthew 6: *No man can serve two masters*); but clerics are properly servants of God (as in the last chapter below, *De clericis venatoribus*), whereas the married are divided. 1 Corinthians 7: *He that is without a wife is solicitous for the things that belong to the Lord, how he may please God; but he that is with a wife is solicitous for the things of the world, how he may please his wife, and he is divided.*

The eleventh is that the Apostle, to one who looks rightly, commands it. 1 Timothy 5: *Keep thyself chaste.* 1 Timothy 3: *It behoveth a bishop*, and so on; and he adds, *chaste*, and so on. And to Titus 1 he says a bishop must be continent, and so on; and he says the same of deacons, 1 Timothy 3.

The twelfth is that even the Gentile priests who served idols kept chastity. Hence Plato in the *Timaeus* says that those endowed with priesthoods among the Athenians [*apud Ethnas*] remained separated from the rest of the people, lest their chastity be polluted by any contagion.

The thirteenth is that clerics are the eyes of the Church militant (Psalm [87]: *My eyes languished through poverty*; the gloss understands this of the Apostles, who were the eyes of Christ, and so of priests); but the uncleanness of the flesh harms the eyes. Leviticus 21: *Whosoever hath a blemish shall not offer bread to his God, nor approach to minister to him.* Hence neither law nor custom admits to orders one who is blind or has a blemish in the eye that produces deformity, as in c. *Cum de tua*, above, *De corpore vitiatis*; and Leviticus 21: *If he be blind*, and so on.

The fourteenth is that clerics are, as it were, the mirror of the Church militant (Matthew 5: *You are the light of the world*, and so on; 1 Corinthians 4: *We are made a spectacle to the world, and to angels, and to men*); but a mirror ought to be without stain. Hence of Wisdom it is said (Wisdom 7): *For she is the brightness of eternal light, and the unspotted mirror of God's majesty.*

The fifteenth is that clerics ought to be imitators of Christ and of his companions the Apostles. 1 Corinthians 4 [11]: *Be ye followers of me, as I also am of Christ.* But we do not read that any of them was permitted to take a wife after his calling; therefore, and so on. The Apostle, Philippians 3: *Be ye followers of me*, and so on. Ephesians 5: *Be ye therefore followers of God, as most dear children*, and so on; and he adds: *But fornication, and all uncleanness, or covetousness, let it not so much as be named among you, as becometh saints.*

The sixteenth is that clerics are spiritually the chosen pages [*domicelli*] of God, as shining vessels (Acts 9: *This man is to me a vessel of election, to carry my name before the Gentiles and kings and the children of Israel*, said of the Apostle Paul), which clerics also have to do; therefore, and so on. Ephesians 1: *He chose us, that we should be holy and unspotted in his sight in charity.* Psalm [100]: *The man that walked in the perfect way, he served me.*

Note again the words *continere carnis devicti vitio non valentes*, together with the first gloss on the word *non valentes*: that few are found without the vice of the flesh (dist. 50, c. *Quia sanctitas tua*). For it is difficult to keep continence (dist. 28, c. *De his*; and C. 33 q. 5, c. *Quod Deo*, otherwise beginning *Tunc salva, § Iste*; and there [it speaks] of eunuchs). Yet they burn no less on that account, for with many they burn (Augustine, in the homily on penance; and C. 2 q. 1, c. *Multi*, at the end). For otherwise the Sodomites and the Gentiles would hold themselves under the guilt of the same crime against the divine law (C. 32 q. 7, c. *Flagitia*). Hence, although the vice be natural, it is not therefore excusable (as in Dig., *Ad legem Aquiliam*, l. *Si servus, § Si fornicarius*); and so too the gloss concludes, dist. 50, c. *Quia sanctitas tua*. Hence where the text says *non valentes* ("not able"), it would have done well to say *non volentes* ("not willing"), since nothing is difficult to one who is willing, as regards resisting vices, with God's grace always assisting. *For God is faithful, who will not suffer you to be tempted above that which you are able, but will make also with temptation issue, that you may be able to bear it* (1 Corinthians 10). Here he speaks as of the lazy who are "not able" to rise for Matins or for study; for which Proverbs 6: *How long wilt thou sleep, O sluggard? when wilt thou rise out of thy sleep?* And Proverbs 22: *The slothful man saith: There is a lion without, I shall be slain in the midst of the streets*, and so on.

And know that there are principally three remedies against this natural vice. The first is the affliction of the body, whether with cold water, or with the discipline, or with fire, so that material fire may put to flight and cast out mental fire; for which Proverbs 20: *The pain of a wound cleanseth evil.* Or at least let him think again on the pains of hell, because *the fear of the Lord driveth out sin* (Ecclesiasticus 1). Hence it is said in Ecclesiasticus 11: the warfare of one hour brings forgetfulness of the greatest lust. Note that holy father who burned his fingers in the flame of a lamp; likewise our blessed father Francis,

who threw himself into fire and into snow; and blessed Benedict, who threw himself among brambles and thorns. For this Gregory says in the *Moralia*, book [19], part 4, c. [55]: "All lovers of this world are strong in earthly things, weak in heavenly ones," and so on; it is found in dist. 47, c. *Omnis*. Hence the Apostle (Romans 6): *For as you have yielded your members to serve uncleanness and iniquity, unto iniquity; so now yield your members to serve justice, unto sanctification*; and 1 Thessalonians 4, the Apostle: *For God hath not called us unto uncleanness, but unto sanctification*, and so on.

The second is the withdrawal of food and drink, that is, fasting. Ezekiel 16: *Behold this was the iniquity of Sodom thy sister: pride, fulness of bread, and abundance, and idleness*. Note, then, four remedies by argument from the contrary sense. Hence Aristotle said: "Assiduity made me clever, and abstinence chaste."

The third is flight from contrary company. 1 Corinthians 6: *he who is joined to a harlot*, and so on; and the Apostle adds: *Fly fornication.* Hence the verse:

If you flee, she flees; if you follow, she follows you.

The example of Joseph, who, leaving his cloak in his mistress's hand, fled and went out (Genesis 39).

Note the words *immunditiam suam* ("their uncleanness"): that even the marriage act is called uncleanness in respect of the ministers of divine things; otherwise the act with one's own wife is called conjugal chastity (dist. 31, c. *Nicaena*).

Note the words *sacramentis indigni tractandis* ("unworthy to handle the sacraments"): that no one can serve two masters (Matthew 6). Hence, by choosing one of two contrary ways, he is deservedly repelled from the other (as in Cod., *De codicillis*, last law; Cod., *De inofficioso testamento*, l. *Contra maiorem*; and c. *Ut quis duas*, *De electione*, in the Sext).

Note the words *ecclesiasticis procul dubio beneficiis sunt privandi* ("are without doubt to be deprived of ecclesiastical benefices"): that married clerics are to be deprived of ecclesiastical benefices, and so they do not seem to be deprived by the law itself in contracting marriage. But the contrary is the case, as the gloss and the Doctors note above in this title, c. 1, and it is well proved in a like case in c. *Licet episcopus*, *De praebendis*, in the Sext. And from such unworthiness of theirs, note that married clerics are unworthy of the ministration of the sacraments, and so ought not to remain in choir with the clerics, nor to read the Gospel or the Epistle; on which see above, *De vita et honestate clericorum*, c. 1. And it is an argument that a married cleric cannot excommunicate; the Abbot [Panormitanus] cites dist. 96, c. *Bene quidem*; below, *De decimis*, c. *Dudum*, near the end; on which see what Johannes Andreae notes in c. *Ioannes*, C. 35 q. [text unclear].

Note at the word *Sane*: that when a donation made to a church is revoked through the donor's lawfully made withdrawal, ownership reverts by the law itself to the donor, as is proved here when it says *recta via* ("by a straight way"); to this point Dig., *De furtis*, l. *A Titio*. And so hold here Johannes Andreae, Lord Antonius de Butrio and Lord Petrus de Ancharano: just as the ownership of a bequeathed thing passes to the legatee by a straight way, as in the said l. *A Titio*. As a rule, however, it is otherwise, as in Cod., *De pactis*, l. *Traditionibus*, and what is noted there, and in Cod., *De sacrosanctis ecclesiis*, l. *Ut inter divinum*; and there [it is] in favour of the church, and so on.

Note the words *intitulati fuerant* ("to which they had been titled"): those who offer their goods to churches at the time when they enter them are understood to offer them tacitly on this condition,

that they should remain with the churches as long as they themselves stay in them, and no longer. But understand this, as the text says, of the churches in which they are titled; it is otherwise for those entering monasteries, as in Auth. *Ingressi*, Cod., *De sacrosanctis ecclesiis*. And the reason is that secular clerics retain temporal goods, but monks do not (C. 12 q. 1, c. *Non dicatis*; and c. *Cum ad monasterium*, below, *De statu monachorum*). From this it is clear that this text should be understood of a conferral made expressly, as is proved here when it says *contulisse noscuntur* ("are known to have conferred"), and so on; and yet when they withdraw restitution is made. And so the distinction between tacit and express conferral, made in the last gloss here, is rejected.

In the gloss on the word *immunditiam*, at the beginning, which says "which, however, is chastity with one's own wife" (dist. 31, c. *Nicaena*), I ask: a testator in his will left his wife mistress, housekeeper and usufructuary "so long as she lives honourably and chastely." The woman passed to a second marriage, which she could do honourably and lawfully (1 Corinthians 7: *if her husband die, let her marry to whom she will, only in the Lord*; and below, *De secundis nuptiis*, c. *Dominus*). It seems that she has not prejudiced herself as to the legacy, by the said c. *Nicaena*, since even with a husband she is said to live chastely. May she therefore claim the legacy? I answer briefly: so it is; for "to live chastely" must be understood according to the common understanding, namely that she marry no one; and so common usage of speech has it, which must be followed regarding the proper meaning (as in Dig., *De fundo instructo*, l. *Cum de laniariis*, § *Asinam*; and Bartolus touches on it in Dig., *Ad Trebellianum*, l. *Mulier*, § *Cum proponeretur*). For by a second marriage an injury seems to be done to the first husband, as noted in Cod., *De secundis nuptiis*, l. 1 and 2. This question seems well enough decided by the laws I have cited and by what I wrote in c. *Relatum*, below, in the next title; and by what has been said a similar question is decided below, in the next title, c. *Quia nonnulli*; see what I wrote there.

In the last gloss, which gives four solutions: since neither of these solutions seems complete, I therefore ask whether a donation made to a church is revocable. It seems not, because what has once been dedicated to God is not to be transferred further to human uses (as in the rule *Semel Deo*, *De regulis iuris*, in the Sext; and C. 12 q. 2, c. *Nulli liceat*).

I answer that we must distinguish: either we are speaking of a secular cleric or of a regular. In the first case, either the goods followed him tacitly (according to Auth. *Ingressi*, Cod., *De sacrosanctis ecclesiis*), and then they ought tacitly to follow him (argument from Cod., *De rei uxoriae actione*, l. *Unica*; and below, *De donationibus inter virum et uxorem*, c. [text unclear]); or he had conferred the goods expressly, and then either he is poor and has nothing else to live on, and the goods are returned to him out of canonical equity, as here and C. 17 q. 4, last chapter; or he was rich, and then he does not recover them (C. 17 q. 4, c. *Sunt qui opes*), unless by force of a pact attached (below, *De conditionibus appositis*, c. *Verum*).

In the second case, when we speak of regulars, either the question concerns one who entered religion and left within the year, and he recovers everything (below, *De regularibus*, c. *Super eo* and c. *Statuimus*); or he left after the year, and then either he left with his superior's leave, and then his goods will be restored to him, lest he be burdensome to the second monastery which he must enter (C. 27 q. 1, c. *Si quis rapuerit*); or without leave, and let him who received him, whom he ought not to have received, blame himself (below, *De regularibus*, c. *Licet*), and therefore the goods will not be returned, as in Auth. *De monachis*, § *Si vero relinquens*. And this is true if the entry was valid. But if it was not valid, then whether the expelled man recovers goods conferred tacitly or expressly: say that either he knew

the entry did not hold, and then he does not recover, because he is deemed to have donated (as in Dig., *De regulis iuris*, l. *Cuius per errorem*); or he did not know, for instance because on entering he believed his wife dead when she was alive, and then, the entry being vitiated, the conferral of the goods is vitiated, according to what has been said; on which more fully Baldus on the said Auth. *Ingressi*, and Hostiensis in the *Summa*, this title, last §.

Hence, when the gloss here says that the goods are to be restored to this cleric, against which are C. 12 q. 2, c. *Nulli liceat*; the rule *Quod semel*, *De regulis iuris*, in the Sext; C. 19 q. 3, c. *Quae semel*; dist. 45, c. *Ex antiquis*, c. *Frequens* and c. *Si servus*, with similar texts, the gloss solves it by saying that the contrary texts speak of when someone withdraws of his own accord, and this one and similar texts of when he does so by the judge's authority. But against this: here he withdrew of his own accord and by his own fault, because he contracted marriage, and yet the goods are restored to him, which ought not to have happened (argument from c. 1 above, *De aetate et qualitate*); for the damage that someone suffers by his own fault must be imputed to himself and not to another (as in c. *Damnum*, *De regulis iuris*, in the Sext). For fear of this the gloss does not stand by the first solution but passes to the others, and so on.

But the first solution still seems defensible, because there cannot rightly be said to be fault where the authority of law intervenes (Dig., *De iudiciis*, l. *Qui auctoritate*); but here he contracts by the authority of law, because *it is better to marry than to be burnt* (1 Corinthians 7; to which dist. 28, c. *De his*). Hence, where there is no fault there ought to be no penalty (as in Cod., *De adulteriis*, l. *Gracchus*). Hence, if the church wished to retain these goods, it would indirectly compel him to continence, which ought not to be (C. 32 q. 1, c. *Integritas*; and Dig., *De conditionibus institutionum*, l. *Quae sub conditione*, § *Qui sub iureiurando*); nor ought anyone to be excluded from the freedom of contracting by fear of a penalty (as in c. *Gemma*, below, *De sponsalibus*, and Dig., *De verborum obligationibus*, l. *Titia*). Therefore this seems to be special to a cleric removed from office and benefice by reason of marriage, that he recovers the goods handed over to the church, as here. Hence, if he had withdrawn for another reason, on account of his own offence, it would be imputed to him; or if he transferred himself to another church.

But the gloss in its second solution seems to hold that in every case in which he leaves, the goods are to be returned to him on account of a tacit condition, as with a dowry, as appears in the gloss. This can be true if someone leaves lawfully, for example within the year, as in c. *Beneficium*, *De regularibus*, in the Sext; otherwise if unlawfully and rashly, as in a similar case in c. *Ut periculosa*, *Ne clerici vel monachi*, in the Sext. But the gloss says that it seems truer that this text speaks from benignity and the contrary texts from strict law; and this Guilelmus Naso [text unclear] and Vincentius hold, and Hostiensis in his distinction. But this text stands strongly against it, saying *recta via … absque contradictione redire* ("return by a straight way … without any contradiction").

Hence the gloss solves it lastly thus: either he conferred his goods expressly, and they are not restored; or they followed the offering of his person tacitly, and then, the principal being taken away, the accessory is taken away (as in Dig., *De iureiurando*, l. *Cum principalis*, and c. *Accessorium*, *De regulis iuris*, in the Sext; to this point Cod., *De donationibus inter virum et uxorem*, l. *Si sponsum*). But say that this distinction has no place where the entry did not hold, for then the goods are restored to him in either case, according to Bartholomew of Brescia in the *quaestio disputata* beginning *Quidam invita uxore*, which is the eighteenth *dominicalis*. He cites as foundation Dig., *De donationibus inter virum et uxorem*, l. 2, and the last law; and C. 17 q. 2, c. *Si quis incognitus*.

Accursius seems to understand this to be true when the goods come tacitly, as his gloss notes on Auth. *Ingressi*, Cod., *De sacrosanctis ecclesiis*; and the same says Guilelmus [Durandus] in the *Speculum*, *De statu monachorum*, verse 48; on this dist. 92, the penultimate chapter; and Cynus on the said Auth. *Ingressi*, in the fifth principal question, at the verse "Item circa hoc quaeritur: quidam uxoratus," and so on. Johannes Andreae here recites the distinctions of Hostiensis and of Lord Petrus de Ancharano. Innocent recites the gloss's distinction and finally says: "But others say that if the donation was made simply, it is never to be revoked" (Cod., *De donationibus*, l. *Irritam*; Cod., *De revocandis donationibus*, l. 2 and 3, and l. *Generaliter*); "here, however, it was made under the condition that he remain there"; and there he ends.

Certainly there would then be no doubt if he had donated expressly and purely, for a perfected donation is not revoked (Cod., *De donationibus quae sub modo*, l. *Perfecta*). Yet if he were poor, the church ought out of canonical equity to provide for him from the use and the increase of the goods, the property remaining with the church (as in c. *De lapsis*, C. 16 q. 6, and what is noted there); and so this text could well be understood, and c. *Ex transmissa*, above, *De renuntiatione*. And it would be the same if he had procured to have children of a lawful marriage, for then by the law of heaven [*iure poli*], that is, in the court of conscience, all the goods would have to be returned to him, but not by the law of the court, that is, in the contentious forum (C. 17 q. 4, last chapter). Limit this, except as regards the legitimate portion, since even in rigour the church would be compelled as to the legitimate portion, because it is of natural law (as in Cod., *De inofficiosis donationibus*, l. *Si totas*; and Bartolus holds this in Dig., *De legatis* 2, l. *Titia*, § *Si Imperator*).

And as to what some say above, "or they followed the offering of the person tacitly," Johannes Andreae says he does not see how anyone can be said to offer his goods tacitly to a secular church, except by a pact. But Lord Antonius de Butrio says this might perhaps happen by a statute of the church providing that one who enters it, or accepts a benefice in it, is understood tacitly to confer his goods on it; or, according to Hostiensis in the *Summa*, this title, at the end, when someone becomes a *conversus* of a secular church, for then he seems tacitly to offer his goods, at least by custom, according to Hostiensis; for which c. *Per exemptionem*, *De privilegiis*, in the Sext. The gloss, however, holds the contrary, noted in c. *Ut lex continentiae*, C. 27 q. 1, on the word *professi*. But it can be said that a *conversus* or oblate who has not changed his habit does not seem to offer his goods unless he says so expressly, even if he offered himself to a monastery without change of habit, as in Clem. 1, *De decimis*. Likewise he may be held to have donated tacitly if he says, "I offer myself with my goods to such a secular church"; for then the goods seem to come as accessories; and so this text could also be understood, and the said c. *Ex transmissa*; for which Dig., *De peculio legato*, l. 1, 2 and 3, and l. 3 and what is noted there, Cod., *Si pendente appellatione*. And the gloss here at the end seems to mean this. And take note that in the aforesaid cases in which the donation is revoked, as to property the ownership reverts by the law itself, as above; to this point Cod., *De revocandis donationibus*, l. *Si unquam*, and the said l. *Si totas*. And so it is to be held.

Chapter Sane (c. 4)

Summary. Those who contract marriage in fact while in sacred orders can, with the bishop's dispensation, exercise their office after long penance; and within how long a time penance is called long; nos. 1, 3.

Sane. Priests contracting marriage in fact while in sacred orders cannot exercise their office without the bishop's dispensation. This is what it says. Or thus: when penance has been done, bishops dispense with those in sacred orders who have contracted in fact. This is what it says. In the text, at *post longam*, note that although those in sacred orders contracting marriage in fact are deprived of their churches and suspended from office, yet bishops can dispense after long penance. But I ask: within how long a time is it called long? And it seems ten years (Cod., *De praescriptione longi temporis*, last law; and it is express in dist. 82, c. *Presbyter*). But say that one can be dispensed with such a man even sooner, as in c. *Ex tenore*, above, *De temporibus ordinationum*; for although formerly as a rule there was a seven-year penance for each mortal sin (C. 33 q. 2, c. *Hoc ipsum*, and the following chapter; and C. 22 q. 1, c. *Praedicandum*), today it is arbitrary (C. 26 q. 7, c. *Tempora*; *De poenitentia*, dist. 1, c. *Mensuram*; below, *De poenitentiis et remissionibus*, c. *Deus qui*).

It is objected that the bishop cannot dispense, because the vow is solemnized by the reception of a sacred order, as in c. *Quod votum*, *De voto*, in the Sext, and dist. 32, c. *Seriatim*; and so they have sinned more gravely than adulterers (C. 32 q. 1, c. *Meliore proposito*). If so, it is necessarily concluded [that] bishops cannot dispense regarding crimes greater than adultery, as above, *De iudiciis*, c. *At si clerici*. Solution: they can where it is permitted by law, as here; otherwise not, as in the contrary. Or say that they are said to sin more because they fall from a greater good: for there are three grades, namely virgins, the continent and the married; adulterers fall from the third, these clerics from the second; on which in c. 1, above, *De summa Trinitate*. It is objected also that the bishop can dispense by his own right (above, *De temporibus ordinationum*, last chapter). Solution: here in a notorious case; there in a hidden one.

Chapter Diversis fallaciis (c. 5)

Summary. 1. Clerics in minor orders holding benefices who have contracted marriage are deprived of their benefices, appeal set aside. 2. What the cithara and the psaltery signify, life lay and clerical. 3. One who knowingly confers a benefice on an unworthy man cannot remove him from such a benefice. 4. Whether one can go against his own act. 5. Whether a prelate badly alienating a thing of the church can revoke it, and whether he is bound for the price or for eviction; no. 6. 7. Whether a bishop knowingly promoting a criminous or irregular man can accuse him of that crime. 8. Whether one promoted can be accused of a crime or irregularity before his promoter. 9. Whether the promoter can inquire against one promoted by himself. 10. Whether one promoted may except against his promoter. 11. When the exception "my crime," and so on, can be opposed. 12. Who confers benefices after despoliation. 13. Whether one holding a benefice by a dispensation made without cognizance of cause sins, and is bound to restitution of the fruits. 14. Whether the collation of a curate benefice made to one in his twentieth year holds. 15. Whether, when the defendant excepts against the inquiring judge and opposes that he cannot inquire, [the judge] can condemn. 16. Whether a married man can by common law have a benefice in title.

Diversis fallaciis. Clerics in minor orders holding benefices who have contracted marriage are deprived of their benefices, appeal set aside. This is what it says. It makes two [parts]: first it narrates, second it reproves. The second at *cum ergo*. And in the second it assigns two reasons, and orders him to be corrected throughout the diocese, and excepts one case. The second of the second at *mandamus*; the third at *nisi*. Note at *clerici* that clerics contract marriage; understand of minor [orders],

because it is otherwise of major ones, as above, *De vita et honestate clericorum*, c. *Clericus si tonsura*, and above, this title, c. 1, and c. *Quod a te*, and see there.

Note at *cithara cum psalterio male concordat* that the cithara signifies the active or lay life, and the psaltery signifies the contemplative or clerical life, as in the first gloss. And say, according to Johannes Andreae, this is because the cithara has many strings, is always in motion while it is struck, and has a clamorous sound; hence it well signifies the secular life, always hindered by occupations and motions. But the psaltery is a smooth instrument, having a slender and thin sound; hence it signifies the contemplative [life] in a cleric. For if a cleric speaks well, it is only a psaltery without a cithara; if he works well and is silent, it is a cithara without a psaltery. The letter therefore wills that in a cleric deputed to the service of God the cithara and psaltery accord, that is, the active and contemplative life, especially in a secular cleric (dist. 40, c. *Multi sacerdotes*). But in a married man here they accord badly, because it is neither fitting that he sing with the clerics on account of uncleanness, nor does he work for the utility of the church, but for his own. Hence that of the Apostle well suits him (Philippians 2): *For all seek the things that are their own, not the things that are Jesus Christ's*; and that of Jeremiah 6: *From the least of them even to the greatest, all are given to covetousness; and from the prophet even to the priest, all are guilty of deceit*. For which Jerome (C. 12 q. 2, c. *Gloria episcopi*) says: it is the ignominy of a priest to be zealous for his own riches.

There are therefore two kinds of clerics: the married, and in these things accord badly which altogether disagree; and the continent, and of these some work and sing psalms, some sing psalms but do not work. Of the first the Apostle says: *Let the priests that rule well be esteemed worthy of double honour, especially they who labour in the word and doctrine* (1 Timothy 5). Of the second, however, since they seem to limp, yet it does no harm, says Hostiensis, unless they are found at fault; he alleges above, *De aetate et qualitate*, c. *Cum sit*. But say that he can scarcely be without fault if he omits either of the aforesaid: for if he omits acting well he is reproved by Christ (Matthew 23: *Upon the chair of Moses*, and so on; it follows: *for they say, and do not*). If they act well and do not preach, they are called dumb dogs not able to bark (Isaiah 56). Indeed, if the sound, namely of the preacher, is not heard, God threatens him with death (Exodus 28: *that the sound may be heard when he goeth in and cometh out of the sanctuary, and that he may not die*); on which fully by Gregory in the *Pastoral*, c. 15, and dist. 43, c. *Sit rector*.

And note at *male concordat* that things repugnant do not suit well in the same subject, nor do majesty and hatred dwell in the same seat. Hence verses also are said:

These four, fear, hatred, love and wealth, are often wont to pervert the right senses of men.

On which it is had in C. 11 q. 3, c. *Quatuor modis*. Note in the verse *cum ergo*, at *quomodo placere*, that the husband thinks how he may please his wife, and conversely; and so he is divided,

because a married man does not have full power of his own body (1 Corinthians 7); on which above, this title, c. *Quod a te*, at *decima est*, in what I wrote there. From this, then, it follows that he cannot well think of the things that are God's (1 Corinthians 7): *He that is without a wife is solicitous for the things that belong to the Lord, how he may please God*; and it follows: *And the unmarried woman and the virgin thinketh on the things of the Lord, that she may be holy both in body and in spirit. But she that is married thinketh on the things of the world, how she may please her husband.* For man and wife are companions and are made one flesh (Genesis 2): *This now is bone of my bones, and flesh of my flesh … Wherefore a man shall leave father*

and mother, and shall cleave to his wife: and they shall be two in one flesh. The same Apostle, 1 Corinthians 6; on which fully C. 30 q. 4, c. *Si quis unus ex coniugio*; C. 32 q. 4, c. *In eo*; C. 35 q. 3, c. *De incestis*, and c. *Nec eam*; and below, *De eo qui cognovit consanguineam uxoris suae*, c. *Discretionem*. And in the aforesaid laws and the said authority of the Apostle, which speaks properly there of a harlot, it is proved expressly that the same holds also in fornicating intercourse: that because they become one flesh, affinity is contracted, indeed even co-paternity, as blessed Thomas holds in [*Sentences*] 4, dist. 42, art. 3, q. 2. Likewise the gloss in the said c. *Discretionem*, and Innocent in c. *Martinus*, below, *De cognatione spirituali*, and the gloss also in the said c. *Si quis*.

Note at *a quo stipendium recipit plenius famuletur* that the benefice is given on account of the office, and that labour longs for its reward. Hence the Apostle too says that he who serves the altar ought to live from the altar (1 Corinthians 9). Hence from that text are gathered certain causes for which married men are deservedly deprived of benefices, of which they are unworthy; on which see more fully above, this title, c. *Quod a te*, where sixteen, and so on. Since therefore the cause ceases for which the benefice is given, the effect ought consequently to cease likewise, as in c. *Cum infirmitas*, below, *De poenitentiis et remissionibus*. Hence also a cleric who does not say the office ought not to have a benefice (Cod., *De sacrosanctis ecclesiis*, l. *Qui sub praetextu*), just as neither ought a soldier who does not serve to have provision (Cod., *Quibus non obiicitur longi temporis praescriptio*, last law). Of saying the divine office it is had fully in c. *Dolentes*, below, *De celebratione missarum*.

Note at *deperire* that ecclesiastical substance is wont to perish through married clerics; understand the same of any incontinent cleric, for which dist. 28, c. *De Syracusanae*. Note at *scienter* that he who knowingly conferred a benefice on an unworthy man cannot remove him from such a benefice. And so it is an argument that against one's own act, although badly done, he who did it knowingly cannot go by his own authority; but his successor or his superior well can, as here. And so note that one knowingly performing an act in which he can dispense does not seem to dispense unless he expresses it; for which c. *Summus pontifex*, *De sententia excommunicationis*, in the Clementines, suffices, where if the Pope greets, blesses, kisses or promotes to a dignity someone excommunicated, he is not understood to have absolved him unless he expresses it. Yet in the case of this chapter a certain colour of holding is impressed by such an act as regards the one performing the act, because he cannot go against it. And so it seems that the bishop cannot dispense with married men so that they may have benefices. But the contrary seems express in c. *Si qui vero*, dist. 32; C. 12 q. 1, c. *Quia sanctitas tua*; and below, this title, c. *Ioannes*.

I answer: although Johannes Andreae here in the *Novella* solves it in many ways, say briefly: either the married man is a bigamist, and the bishop cannot dispense, as above, this title, c. *Sane*, no. 1; or he took one wife and a virgin, and then either you ask whether he can [dispense] in greater benefices or in lesser. In the first case he cannot. In the second case say that either, cognizance of cause having been applied, he intends to dispense, and then either the married man wishes to wear the tonsure, and the bishop can dispense; otherwise not (below, this title, c. *Ioannes*); or the bishop conferred a benefice on a married man, yet did not express that he dispensed, nor applied cognizance of cause, and then the collation of the benefice is not valid, as here; and so this chapter ought to be understood, according to Petrus de Ancharano. See what I shall say below in the gloss on the word *divisus*, which begins *Quia pluribus intentus*, and so on, at l. *Nemo*: say what the gloss says there:

He who will hunt two hares in one hour will sometimes lack one, sometimes both.

Cod., *De assessoribus*, l. *Nemo*. In the great gloss on the word *non potest*, [the] argument that no one can go against his own act: the gloss solves it in two ways. You, say that neither is perfect. Not the first, because even in collations of benefices we have that even where they are null, the one conferring can revoke them, as in c. *Nosti*, above, *De electione*, and dist. 55, c. *Poenitentes*. Nor is the second solution perfect, because it does not assign a reason for the special rule why here the bishop cannot go against his own act. And therefore it must be said that here it speaks of a case in which the collation was not wholly null, because it was a case in which he could dispense against the law for a just cause; for instance because the bishop had conferred simple benefices on married clerics who were not bigamists. Hence it seems that as regards himself he dispensed, and so

he cannot revoke his dispensation, as here and in c. *Veniens*, above, *De filiis presbyterorum*; but the successor or the superior well can, as I said above, if a just cause of dispensing did not underlie it, or if the dispensation was not duly made, that is, with cause known. And Innocent holds this here; for which it makes that so also a prince knowingly conferring a dignity on an incapable man seems to have dispensed, as in l. *Quidam consulebat*, Dig., *De re iudicata*; for he who wills the consequent seems to will also the antecedent, without which the consequent cannot be reached, as in l. *Illud*, Dig., *De acquirenda hereditate*; and l. *Ad rem mobilem* and l. *Ad legatum*, Dig., *De procuratoribus*; and in c. *Praeterea*, above, *De officio delegati*. But this seems expressly against this text, because then even the superior could not revoke, the contrary of which is said here; and Innocent also notes the contrary in c. *Veniens*, above, *De filiis presbyterorum*. And so Hostiensis holds here, namely that he does not seem to dispense in a doubtful case. l. *Quidam consulebat* does not stand in the way, because it speaks of a prince, who can dispense against the laws without cause, which he seems to do by acting against the laws, since he is reckoned to have them in the shrine of his breast, as in c. 1, *De constitutionibus*, in the Sext. But a bishop or another cannot dispense at random, but with cognizance of cause. Hence it is required that he dispense expressly and according to the order of cognizance, and then even the superior cannot go against it, according to Hostiensis; on which fully in c. 2, below, *De schismaticis*; dist. 31, c. *Quicunque*; dist. 51, c. *Qui in aliquo*; and in c. *In his*; on which dist. 54, c. *Si servus*; and what Johannes Andreae notes in c. *Cum ad monasterium*, below, *De statu monachorum*, on the last gloss. And so too Petrus de Ancharano seems to will here.

From the teaching of Innocent, however, one rule is gathered here which is often alleged: that in all cases in which dispensation against the law for a just cause and with cause known is permitted to bishops, if bishops knowingly perform an act against the law, they seem to dispense as regards themselves, so much that a true title is acquired by the beneficiary, as here and in the said c. *Veniens*; yet such a dispensation can be revoked by the superior or the successor, but not by the same man. But it seems better that this text be understood here to speak of cases in which the collation was null by the law itself, yet this was not notorious but hidden or doubtful; as because the bishop conferred on a married cleric a benefice which was curate, or was a dignity, and so the collation was null, as in c. *Cum decorem*, below, this title; but it was doubtful in fact, namely whether it was a curate benefice or a dignity. Hence if the bishop wishes to inquire against such men by his office, he can be repelled on account of his own turpitude (argument l. *Si filium*, and what the gloss notes there, Cod., *De liberali causa*); and so Innocent and Antonius de Butrio seem to hold here. From which note the rule that every exception which could be opposed against an accuser can be opposed against a judge inquiring into this; and for this Bartolus alleges this text in l. 2, § *Si publico*, Dig., *De adulteriis*; yet he sets down there certain exceptions. But if it were notorious that the collation was null by the law itself, then the

bishop could not be repelled by this exception, as in the said c. *Nosti*, above, *De electione*; for just as in notorious matters a judge cannot be recused as suspect, as in c. *Proposuit*, above, *De appellationibus*, and as I said in c. *Vestra*, above, the preceding title, so it cannot be opposed to him that he was a participant in the crime by conferring on an unworthy man, as Innocent holds.

In the same gloss, at *ad hoc dixit Ioannes*, say that when it is asked whether one can go against his own act, distinguish: either the act takes effect by law, and then if error intervened, it is as a rule revoked (l. *Error* and l. *Regula*, Dig., *De iuris et facti ignorantia*); or error did not intervene, and then either the act has taken effect by law or it is null. If it holds, then either the act is by its nature revocable, as a last will, an interlocutory sentence and the like, and one can go against his own act, as in the rule *Quod semel placuit*, *De regulis iuris*, in the Sext, by Dinus; or the act is by its nature not revocable, and then after it has held one cannot go against it, as in l. *Sicut*, Cod., *De actionibus et obligationibus*. This fails by the benefit of minority, of weakness, or by another benefit of law, as in the titles *De minoribus*, *Ad Velleianum*, *Ad Macedonianum*, and the like. In the second case, when the act does not take effect by law, then either you ask whether he can go against it by excepting or by acting. And if by excepting, either in going against it he would allege his own turpitude, and he cannot (l. *Si servus plurium*, § 1, Dig., *De legatis* 1); or he would not allege his own turpitude, and then he can go against it, as in a nude pact and the like (l. *Iurisgentium*, Dig., *De pactis*). In the second case, when you ask whether he can go against it by acting: then either the act was null in favour of a third party, and then the one performing the act cannot allege the right of the third party for its rescission, as in l. *Si traditionibus*, Cod., *De servo pignori dato*; or the act was not null in favour of a third party but for another reason, and then either he who performed the act

performed the null act wishes to rescind it in another's name, and he can, as a prelate in the name of the church (Cod., *De sacrosanctis ecclesiis*, l. *Iubemus*, and in the Authentic *Qui res*; and l. *Una*, § *Et ut lex*, Cod., *De rei uxoriae actione*, where of a husband who badly alienated a dotal estate); or he wishes to rescind it in his own name and for his own advantage, and then either in the rescission he would allege his own turpitude, and he cannot, as in the said last §, in l. *Si servus plurium*, *De legatis* 1, and in l. *Cum profitearis*, Cod., *De revocandis donationibus*; or he would not allege turpitude, and then either the act was celebrated against the law, and he himself can go against it, as in l. *Quemadmodum*, Cod., *De agricolis et censitis*, book 11, and here in the gloss according to Laurentius; or beyond the law, and then either the act is null in favour of public law, and he himself can go against it unless it has been confirmed by time; or it is null in favour of the private person himself, and then either [he acted] knowingly, and he cannot, as in l. *Post mortem*, Dig., *De adoptionibus*; or ignorantly, and he can, as l. 2, Cod., *Si adversus rem iudicatam*. And Johannes de Lignano makes this distinction here; but it is the distinction of Lord Bartolus in the said l. *Post mortem*, Dig., *De adoptionibus*, according to Petrus de Ancharano; more fully there by Bartolus.

In the same gloss, at *idem qui alienavit*, say that Johannes Monachus in c. 1, below, *De praebendis*, in the Sext, holds the first member of the gloss, namely that a prelate badly alienating a thing of the church himself revokes it, because the prelate is not the owner but the procurator of the church (above, *De donationibus*, c. 2), and he is not reckoned to have a mandate except for preserving the rights of the church; and therefore he can revoke what he badly alienated, because he is reckoned to have a mandate for revoking, but not for dilapidating and badly alienating; to this Dig., *De procuratoribus*, l. *Qui duos*, and the following law. Hostiensis says that where someone can dispense in something, as

here was the case, he cannot go against his own act; but where he cannot dispense, he himself can go against it (above, *De bigamis*, c. 2; above, *De filiis presbyterorum*, the penultimate and last chapters). For when he can dispense, he who has obtained the benefice holds it without sin until it is revoked; otherwise if he could not dispense. You, say according to Bartolus in the said l. *Post mortem*, Dig., *De adoptionibus*, as I wrote.

I ask also: when someone goes against his own act in a case in which he can, as a prelate revoking a thing badly alienated, whether he is bound for the price which came to him, or for eviction? Say: either it was done against the law or beyond the law. If against: then either it was against the law and public utility, or against the law and private utility. If against the law and public utility, then he is not bound for the price, as l. 1, at the end, Cod., *De praediis curialium*, book 10; and l. *Quemadmodum*, Cod., *De agricolis et censitis*; and Cod., *De fundis rei publicae*, l. *Nemo*, at the beginning, book 11. If against the law and private utility: then either he who wishes to recover the price was ignorant, and so the one sued is bound for the price (Cod., *Non licere habitatoribus metrocomiae*, l. 1, book 11, and Cod., *De suis et legitimis liberis*, last law); or he was knowing, and then he is not bound, as the said l. *Nemo*. But if it was done beyond the law: then either the buyer was ignorant or knowing. If ignorant, he sues for eviction; if knowing, he can sue neither for the price nor for eviction (l. *Si fundum*, Cod., *De evictionibus*). This fails in the last law, Cod., *Communia de legatis*, at the end. And the aforesaid are true where no stipulation was interposed about eviction or the price to be returned in the case of revocation (last law, Cod., *De evictionibus*). And note this distinction, because the glosses vary on the aforesaid article; and add what is noted on this in c. *Ad audientiam*, below, *De rebus ecclesiae non alienandis*, and by Baldus in the Authentic *Qui res*, Cod., *De sacrosanctis ecclesiis*.

The aforesaid make for the questions which Innocent and Johannes Andreae set here. First it is asked: a bishop knowingly promoted a criminous or irregular man; can he accuse him of that crime? The aforesaid say that he cannot, since he approved his morals (Dig., *De adulteriis*, l. *Si uxor*; C. 4 q. 3, c. *Si quis testibus*); yet he can denounce him (above, *De iureiurando*, c. *Quemadmodum*); although there is an argument to the contrary below, *De praebendis*, c. *Cum non ignores*, where on this. So says Johannes Andreae. But from the aforesaid it can be inferred that he can, because the said act was null in favour of the commonwealth or of public law. Likewise it was against the laws which exclude criminous men from benefices, as in c. *Nihil*, above, *De electione*; to which l. *Sed reprobari*, Dig., *De excusationibus tutorum*. Moreover this man asks that he be excluded as one conducting another's business, pursuing the public interest, not his own; and so he seems to be admitted, like a prelate revoking an ecclesiastical thing badly alienated. But it seems truer that he cannot accuse, because the exclusion of a person from acting does not exclude the crime from being punished, since he can be accused by another (below, *De accusationibus*, c. *Licet in beato Petro*). For just as the collator is excluded from the collation of the benefice for that turn in which he badly conferred, as in c. *Cum in cunctis*, above, *De electione*, so also from the accusation of one unworthily promoted by him.

Likewise it is asked whether the one promoted can be accused of a crime or irregularity before the promoter? Innocent says yes, notwithstanding the illicit promotion which he made; for the accuser will not be able to recuse him as

suspect, before whom he brought the accusation; for he seems to renounce this exception by choosing him as judge, as in c. *Insinuante*, above, *De officio delegati*. But it is certain that the accused will not be able to recuse him, since he was promoted by him. But the promoter himself ought to

recuse himself, committing the cause to another (argument Dig., *De iurisdictione omnium iudicum*, l. *Praetor*).

Likewise it is asked whether the promoter can inquire against such a man promoted by him? Say: either the crime about which he inquires was known to him at the time of the promotion, and he cannot inquire, but is excluded by that exception, "my crime was as well known to you yesterday as today" (C. 3 q. 7, c. *Iudicet*); or he was then ignorant of the crime, and he can inquire, if the promoter affirms that he was ignorant, which is presumed if knowledge is not proved, as in the rule *Praesumitur*, *De regulis iuris*, in the Sext, and in l. *Verius*, Dig., *De probationibus*. There is an argument to the contrary in c. *Innotuit*, above, *De electione*; but it does not stand in the way, because the metropolitan cannot dispense with an illegitimate man, as there at the end, and c. *Cum de tua*, above, *De corpore vitiatis*.

But I ask whether such a promoter can except against the one promoted? Say that he cannot, as Innocent notes in c. *Accepimus*, above, *De aetate et qualitate*; yet another judge will inquire by his office, as in the said c. *Accepimus*, and below, *De praebendis*, c. *Cum secundum*; C. 2 q. 7, c. *Quaerendum*; Dig., *De postulando*, l. *Quos prohibet*; above, *De appellationibus*, c. *Constitutis*; Dig., *De adulteriis*, l. 1, § *Si publico*; Dig., *De petitione hereditatis*, last law. Understand: when he knowingly promoted a criminous man. But if ignorantly, then the exception ought in equity to be admitted, whether of a preceding or of a following crime, because benefices ought not to be conferred on the unworthy (above, *De rescriptis*, c. *Cum adeo*; above, *De praesumptionibus*, c. *Dudum*). Yet he who ordained an unworthy man is to be punished (above, *De aetate et qualitate*, c. *Cum sit ars artium*).

But again it is asked: when ought that exception, namely "my crime," and so on, be opposed against the promoter? I answer that it ought to be opposed before joinder of issue, because an exception excluding the person is dilatory, which is to be proposed at the beginning of the trial, as in c. *Pastoralis*, above, *De exceptionibus*. There is an argument to the contrary above, *De filiis presbyterorum*, c. *Veniens*; but it does not stand in the way, because there he did not have the opportunity of proposing the exception before joinder of issue; hence he could propose it afterwards (above, *De officio delegati*, c. *Insinuante*), according to Johannes Andreae.

In the gloss on the word *spoliando*, it asks who confers those benefices after despoliation. The gloss concludes that in those benefices in which the power devolves from the chapter to the bishop and conversely, if the canons consented to the bishop in the collation made to an unworthy man, then the archbishop will confer; if they did not consent, then the chapter will confer. But in the other benefices, in which the power does not devolve, the archbishop alone will confer, who despoiled; the gloss alleges c. *Cum in cunctis* and c. *Nihil*, above, *De electione*. You, say that this gloss does not proceed in simple benefices: for although someone confers them on an unworthy man, yet he is not deprived by the law itself of the power of conferring, as in c. *Grave*, *De praebendis*, and in the said c. *Nihil*; but by sentence of the superior he well can be deprived, as is noted in the said c. *Nihil est*.

Innocent asks whether he sins who holds a benefice by a dispensation made without cognizance of cause, and whether he is bound to restitution of the fruits of the benefice? Innocent says not; which understand if the bishop dispensed for a just cause; otherwise it would be otherwise, as here. But what if the dispensation was obtained by subreption: is the collation null by the law itself? Say that it is, as appears in a decree so obtained, as in l. *Si vero*, § *Subventum*, Dig., *De fideicommissariis libertatibus*;

on which above, *De rescriptis*, c. *Super litteris*; and see what I wrote above, the preceding title, c. *Super eo*.

I ask: if a bishop conferred a curate benefice on one in his twentieth year, is it valid? I answer that it is not, even if he dispensed, since he does not have power of dispensing in this, as the gloss notes in c. *Cum dilecti*, above, *De electione*; and then the bishop himself can go against his own act, since such a defect is notoriously established, as was said above here. I ask also: what if the defendant excepts against the inquiring judge and opposes to him that he cannot inquire against him because he was a participant in the same crime with the one under inquiry? I answer, according to Innocent, that he can nonetheless condemn him, because, since it is notorious through his confession, in such a notorious case such an exception is not admitted, for in a notorious case the order of law is not required, as above, the preceding title, last chapter, and c. *Vestra*, as I noted there; and it appears in c. *Proposuit*, above, *De baptismo*. Hostiensis also holds this, who alleges what is noted in c. 1, *De testibus*, in the Sext; the same Lord Antonius de Butrio, by the gloss in the said c. 1; Bartolus holds the same in l. *Si confessus*, Dig., *De custodia reorum*; c. *Exceptionem*, *De regulis iuris*, in the Sext, amply makes for it; on which matter it is fully noted in c. *Cum venerabilis*, above, *De exceptionibus*.

Lastly I ask whether a married man can have a benefice in title by common law? I answer: not as a rule, as here, and above, this title, c. 1 and c. *Quod a te*. It is otherwise by dispensatory law; and then one inferior to the bishop cannot confer, since he cannot dispense

dispense, except where it is expressed, as Innocent notes in c. *Cum*, *De eo qui furtive ordinem suscepit*, and as is noted in c. *Is cui*, *De praebendis*, in the Sext. But of the dispensation of the bishop say that either we speak of dignities, and he cannot, as below, this title, c. *Cum decorem*; the same is so in curate benefices, because they are equated, as in c. *Dudum*, the second, above, *De electione*, and in c. *De multa*, *De praebendis*. It is proved by reason, because such benefices require a sacred order, as in c. *Cum in cunctis*, above, *De electione*, and in c. *Praeterea*, above, *De aetate et qualitate*; but married men cannot be promoted to sacred orders, nor to minor ones, nor to the first tonsure, as in the last chapter, *De temporibus ordinationum*, in the Sext, and as noted above, this title, c. *Sane*, no. 1, in the third note. Or we speak of simple benefices, and then if they have sacred orders annexed by the disposition of the testator or by a statute of the chapter, they cannot be conferred on a married man (argument in Clem. *Quia contingit*, *De religiosis domibus*); or by a statute of the bishop, and then the bishop can dispense, because it is his to unwill whose it is to enact (Dig., *De constitutionibus*, l. 1; and in c. 1, *De constitutionibus*, in the Sext; and below, *De regulis iuris*, c. 1); and so it is observed in fact. But if the simple benefice does not require residence: then if such married men are bigamists and occupy themselves with temporal affairs, the bishop cannot dispense with them, as here and below, this title, c. *Ioannes*. But if such men occupy themselves with spiritual things and wear the habit and tonsure, then the bishop can dispense and confer a benefice on them (C. 12 q. 1, c. *Quia tua fraternitas*; dist. 32, c. *Si qui vero*); the *Speculum* holds it, under the title *De legato*, § *Nunc vero de episcoporum*, verse 15. Take note, however, that in this case the collation could be quashed by the superior if the bishop had not dispensed with cognizance of cause. And where he can dispense by his own authority, and with a lawful cause subsisting, as because they are poor and of good life and useful to the church, as appears here; and understand this last member of those who are not bigamists, because in bigamists the bishop does not dispense, as in c. 2, above, *De bigamis*, and as I noted above, this title, c. *Sane*, no. 1.

Chapter Cum olim (c. 6)

Summary. 1. The son of a Greek priest begotten of a wife can be promoted even to the episcopate, and among the Latins, if scandal does not stand in the way. 2. Orientals promoted to sacred [orders] do not contract marriage. 3. Whether Orientals in minor orders can be promoted to sacred ones without the wife's permission. 4. When a preceptive constitution of the Pope does not bind subjects. 5. Sacred orders have the vow of continence annexed. 6. One can be deprived on account of scandal of a right he has to obtain a benefice, but not of a right held in a benefice obtained. 7. Where the matter of scandal is treated. 8. In what things the Pope dispenses and in what not; no. 17. 9. Whether and when the Pope dispenses with a monk that he may have property and that he may take a wife; no. 15. 10. Why the office of preaching enjoys so many privileges. 11. The Pope can by his constitutions impede marriage contracted between certain persons. 12. Mary and Joseph promised a vow of virginity to the Lord. 13. The greatness of the Pontiff, and how widely it extends. 14. Whether the Pope dispenses in continence essentially annexed to that by which a vow is solemnized, as in a religious. 16. The difference of a solemn and a simple vow was introduced by positive law. 18. Whether a notary created by a king can draw up instruments outside the kingdom. 19. Whether a testament valid before two witnesses at Venice, made even by outsiders, extends to goods outside the territory of Venice; and no. 25. 20. Whether a statute that a son-in-power may make a testament, and that a spurious son may be instituted, is valid; and supposing it is, whether the dispositions are valid outside the territory and extend to goods wherever situated; no. 22. 21. Whether a simple disposition is understood of goods situated elsewhere. 24. Whether a spurious son legitimated by the Emperor can be promoted to orders. 25. Whether and when the Pope in the lands of the Empire, and the Emperor in the lands of the Church, can legitimate; and following numbers. 27. Whether the Emperor before his coronation can legitimate. 28. It is the custom of England that the firstborn succeeds to all goods: whether of goods existing in Italy the firstborn or all succeed. 29. Custom makes one otherwise eligible ineligible, and conversely.

Cum olim. The son of a Greek priest begotten of a wife can lawfully be promoted even to the episcopate, and among the Latins, if scandal does not stand in the way. This is what it says. It is divided into two parts: in the first the consultation is set out, in the second the decision. The second at *nos igitur*. In the whole, three things are contained, namely the election of the son of a Greek priest, the examination of the confirmation, and the declaration of the doubt. Note at *licet tibi de forma electionis* that he to whom the confirmation of an election belongs ought to inquire about the form of the election and the fitness of the person, as is proved and noted above, *De electione*, c. *Nihil*, and c. *Cum nobis*

olim. Note at *iuxta ritum Graecorum* that in weighing the ability of a person for the act of election, the rite of the place of the one promoted is attended to, and not the rite of the place to which he is promoted, as here. Note at *nos igitur attendentes quod orientalis ecclesia* that according to the rite of the Greeks a priest can have a lawful wife in the priesthood, whom he betrothed when placed in minor orders; and this because the Eastern Church neither admitted nor made the vow of continence (dist. 31, c. *Nicaena*). Hence also the son born thence is legitimate among them; but among us, one begotten in the priesthood is illegitimate (above, *De filiis presbyterorum*, c. *Litteras*); and this was the doubt here, which yet is taken away at the end of this chapter.

Note at *minoribus ordinibus contrahant* that even Orientals, after they have been promoted to sacred orders, cannot contract marriage, as here and dist. 32, c. *Si quis eorum*, and in c. *Ut clericorum mores*, above, *De vita et honestate clericorum*, at the beginning; but they can use a marriage contracted in minor orders even without sin, if other things do not stand in the way, as the last gloss notes in c. *De libellis*, dist. 70. But whether such as contracted in minor orders in the East can be promoted to sacred orders without the permission of the wife? Huguccio said yes; but the last gloss notes the contrary in c. *Quoniam*, dist. 31; for prejudice is done to her, especially because such a widow cannot marry again, which otherwise she could by the authority of the Apostle (1 Corinthians 7): *if her husband die, let her marry whom she will, only in the Lord*; and below, *De secundis nuptiis*, c. *Dominus*, and the last chapter. For if he receives sacred orders with the wife consenting, the wife too is obliged to keep chastity, as is noted in c. *Placet*, below, *De conversione coniugatorum*. This decision is well proved in dist. 28, c. *Quia sunt culpae*; and c. 1, dist. 31, makes for it, since at the time of his turn he is bound to be continent when he ought to celebrate, and so on.

Note at *et in superioribus utantur matrimonio iam contracto* that sons born of Greek priests, as I said, of a wife lawfully taken in minor orders, ought also among us to be reputed legitimate. And this is very notable, that in a foreign country one is reckoned capable of dignities according to the conditions and rites of his region, without regard to the contrary custom of that region where he lives and is promoted to a dignity. Note at *regionis consuetudo* that a preceptive law or constitution of the Pope does not bind subjects when it has not passed into use in a great region, the superior tolerating; on which matter see fully what is noted in the last chapter, above, *De consuetudine*. Which note on account of the penalties against laymen burdening clerics with collections and gabelles, as in c. *Quamquam*, *De censibus*, in the Sext.

Note at *repugnet*, joined with the word above in the same [chapter] at *votum continentiae*, by the contrary sense, that sacred orders have the vow of continence annexed; which is better proved in c. *Quod votum*, *De voto*, in the Sext; and see what I noted in c. *Sane*, no. 1, above, this title. So also it is of religion, as in c. *Cum ad monasterium*, at the end, below, *De statu monachorum*, and in c. *Exiit qui seminat*, *De verborum significatione*, in the Sext, and in Clem. *Exivi de paradiso*, *De verborum significatione*. Note at *si aliud non obsistat*, joined with the verse *nisi pro eo*, and so on, that one otherwise eligible becomes ineligible by custom, as here.

And note from this text that on account of scandal one can be deprived of a right which he has for obtaining a benefice, yet he would not be deprived of the right held in a benefice obtained, because it is more useful that scandal be permitted to arise than that the truth be abandoned, as the gloss on Ezechiel says; and it is had in c. *Qui scandalizaverit*, below, *De regulis iuris*. Hence our Saviour also said: *Woe to the world because of scandals. For it must needs be that scandals come; but nevertheless woe to that man by whom the scandal cometh* (Matthew 18). On the matter of scandal fully by Thomas, II-II, q. 43; and by the Archdeacon, dist. 46, c. *Licet*, and c. *Sed illud*; and *De consecratione*, dist. 2, c. *Prima*; and *De novi operis nuntiatione*, c. 2; by Raymond in the *Summa*, book 2, c. *De scandalo et perplexitate*; and dist. 93, c. *Ille*, it is said: he who scandalizes a bishop or a priest scandalizes God; and deservedly, since he is God's anointed (Psalm: *Touch ye not my anointed, and do no evil to my prophets*).

In the first gloss, on the word *in minoribus*, the gloss alleges for concordance dist. 32, c. *Si quis eorum*. Say better: a mode of living was prescribed to such Greeks (dist. 31, c. *Nicaena*); hence in the subdiaconate and above it is lawful for none to contract, even from the time of the Apostles (dist. 84,

c. *Cum in praeterito*). But in minor orders even our Westerners can contract, as above, this title, c. 1, 2 and 3, and almost throughout, and below, *Qui clerici vel voventes*, c. *Convenit*, and what I wrote above at the beginning of the rubric. In the second gloss, on the word *continentiae*, at *non dispensat*, say: that is, he is not wont to dispense, whatever the gloss says at the end. You, say that the opinion of Vincentius is commonly held: for the Pope or the Church dispenses in all things which are not against the law of God or against good morals (dist. 8, c. *Quae contra mores*; C. 32 q. 7, c. *Flagitia*), unless manifest discolouring would follow, or [unless] there is a just cause why he would dispense in what is forbidden (C. 1 q. 7, c. *Tali*, and c. *Si illa*; and above, *De electione*, c. *Innotuit*, § *Multa* and the last §). Hence he dispenses in consanguinity beyond the divine law, introduced by the Church,

as in c. *Non debet*, below, *De consanguinitate et affinitate*; and in vows, as in c. *Ex multa*, *De voto et voti redemptione*; and in oaths (C. 15 q. 6, c. *Auctoritatem*); for he has the plenitude of power (C. 2 q. 6, c. *Decreto*, and the following chapter). Hence if one placed in sacred orders expressly vowed continence, the Pope does not dispense; or even if he vowed tacitly, he does not dispense so that such a man may contract marriage, because the Pope would sin mortally in doing this, and so would he with whom he dispensed (dist. 40, c. *Si Papa*; and c. *Cum ad monasterium*, at the end, *De statu monachorum*), where the last gloss asks whether the Pope can dispense with a monk that he may have property, or that he may take a wife. And there are many opinions, and the gloss seems to will that the Pope cannot dispense against these two. Yet Innocent holds without distinction that for a just and great cause the Pope can do this. Example: if some part of Christendom is in peril unless a monk becomes king and contracts marriage and acquires the kingdom for himself and his sons. For anyone, and especially a monk, ought to offer himself wholly as a holocaust to God, and should choose to serve Him in that which pleases Him more. But above all things the preservation of the rational creature pleases Him, for which He even gave His life (John 15: *Greater love than this no man hath, that a man lay down his life for his friends*; and John 10: *I am the good shepherd*, and so on; it follows: *and I lay down my life for my sheep*). And by this the reason of that gloss is taken away, that a greater good than the vow of continence is not to be found; for which Ecclesiasticus 26: *and no price is worthy of a continent soul*. For this authority is true in consideration of one soul; but it is otherwise in consideration of many, as is presupposed; for that is the greater good in which the salvation of many is concerned.

Hence the office of preaching enjoys so many privileges because it is concerned with the salvation of many, as in c. *Cum ex iniuncto*, below, *De haereticis*; and in c. *Quod Dei timorem*, below, *De statu monachorum et regularium*; and in c. *Nimis*, below, *De excessibus praelatorum*, 1 and 2; and below, *De sententia excommunicationis*, c. *Cum voluntate*. But in the case put forward the public salvation of many is concerned, for which even a monk can become a bishop and rector of a curate church, as in the said c. *Quod Dei timorem*. Why then could he not become a king, in whom the salvation of a whole kingdom is concerned? For in a vow commutation into something better is always permitted; nor is he called a breaker of the vow who commits himself to the judgement and disposition of the vicar of God, as below, *De voto*, c. *Magnae* and c. *Non est*.

Moreover we see that he can do greater things, namely that the marriage of one who vowed simply should hold, as in c. *Quod votum*, *De voto*, in the Sext. Likewise that the wife of one man should marry another, even after being known, as in c. *Gaudemus*, *De divortiis*, the penultimate chapter; understand of an infidel converted to the same, and so on. Likewise that one under fourteen years is not bound by professing, which is against natural law, since then he can be bound to the devil by mortal sin even

after the seventh year (*De poenitentia*, dist. 4, c. *Parvuli*; and in c. 1, *De delictis puerorum*; and in c. *Omnis*, below, *De poenitentiis et remissionibus*, where by the text and gloss by the contrary sense; in c. 1, *De homicidio*, in the Clementines); and yet the Pope brings it about that such a one is not bound by profession, as in c. *Quia in insulis*, below, *De regularibus*. Likewise by his constitutions he can impede the contracting of marriage between certain persons, so much so that the contract does not hold (below, *De coniugio servorum*, throughout; and in c. *Non debet*, *De consanguinitate et affinitate*). Since therefore it is established that he can do what is greater, why could he not do what is less? For to whom what is more is lawful, surely what is less is lawful, as in c. *Cui licet*, *De regulis iuris*, in the Sext; and the more always contains in itself what is less, as in c. *Plus*, *De regulis iuris*, in the Sext; and Dig., *De arbitris*, l. *Diem proferre*, § *Si plures*; and in c. 1, *De arbitris*, in the Sext; and C. 24 q. 1, c. *Si quis dederit*.

And so also Johannes Andreae holds in c. *Semel Deo*, *De regulis iuris*, in the Sext; the same also Hostiensis and Petrus de Ancharano in the said c. *Cum ad monasterium*. The gloss holds the same on dist. 32, c. *De illo*, where it asks whether the Pope can give a subdeacon permission to contract marriage; and it argues pro and contra; finally it says: "I believe that the Pope can dispense, since this is not against the articles of faith, and he has the plenitude of power" (C. 2 q. 6, c. *Decreto*, and following); and so the gloss ends there. Moreover the reasoning of vows and oaths makes for it by similarity, in which the authority of superiors is understood to be reserved (Numbers 30: *If any man make a vow*, and so on; it is added: *But if the father, as soon as he heard it, gainsaid it, both her vows and oaths shall be void*, and so on). On this vow also C. 33 q. 5, c. *Noluit*, and c. *Manifestum*; and in the said c. *Magnae*, § *Verum*; and *De iureiurando*, c. *Quemadmodum*, with similar places. So also the Blessed Virgin committed the vow of her virginity to the Lord, as the Master says in [*Sentences*] 4, dist. 30; and he says the same of Joseph.

But since it is lawful for God to change His laws, as appears, because many things of the Old Law were changed by the New, as circumcision into baptism and the like, so it is lawful for the Pope to dispense in the law of the Church and in the law of God, which says, *Vow ye, and pay*. Just as it also says, *What therefore God hath joined together, let no man put asunder* (Matthew 19); and yet the Pope dissolves the bond of those joined by consent alone, as in c. *Ex publico* and in c. *Verum*, *De conversione coniugatorum*, and in c. *Commissum*, *De sponsalibus*; but also of those joined by carnal union, as in the aforesaid c. *Gaudemus*. For the Supreme Pontiff is the most singular Vicar of God and of our Lord Jesus Christ, as in c. *Quanto* and in c. *Inter corporalia*, above, *De translatione episcopi*. He indeed holds the principate of the whole world, as in c. 1, *De statu regularium*, in the Sext, and in the proem of the same book; and C. 9 q. last, c. *Cuncta per mundum*. For to Peter alone the Lord said, *Launch out into the deep* (Luke 5), to designate the height of his power (C. 24 q. 1, c. *Non turbatur*). To Peter alone also He said, *Thou art Peter*, and so on (Matthew 16; dist. 21, c. *Quamvis*), where the text says: in the greater indeed is the power of commanding and subjecting, in the lesser the necessity of obeying. To Peter alone also it was said that he should fish with a hook (Matthew 17), by which pre-eminent jurisdiction is designated (C. 24 q. 1, c. *Est et aliud piscandi genus*). To the Apostolic [see] alone also the Lord committed the rights of both empires, when He said, *He that hath no sword, let him sell his coat*, and so on; it is added: *Behold, here are two swords* (Luke 22); and dist. 22, c. 1, at: who committed to the blessed key-bearer of eternal life the rights at once of the earthly and the heavenly empire.

And although Thomas, II-II, q. 88, art. 11, holds that the Pope cannot dispense when continence is essentially annexed to that by which the vow is solemnized, as in a religious, because that which has once been sanctified to the Lord cannot be changed to other uses (Leviticus, last chapter; and in c. *Semel Deo, De regulis iuris,* in the Sext, with similar places), and so the Pope can in no way dispense, as in c. *Cum ad monasterium,* at the end; but if it is not essentially annexed, as in a priest and the other orders, to which chastity is not essentially annexed but by a statute of the Church, therefore the Pope can dispense with such a one: yet the laws and reasons brought forward above support the better opinion. For it is evident that this chastity is essentially annexed to the monastic rule only by a statute of the Church, as in the said c. *Cum ad monasterium,* at the end. But it is doubtful to none that an equal has no command over an equal, as in c. *Innotuit,* above, *De electione,* and in l. *Nam et magistratus,* Dig., *De arbitris*. Just as therefore Pope Innocent III enacted this, so today Martin V can amend it; just as also Nicholas III excommunicated all who glossed the decretal *Exiit qui seminat, De verborum significatione,* in the Sext, and reserved the absolution to himself; yet his successor, namely John XXII, revoked that excommunication, and so on; on which in his Extravagant which begins *Ad conditorem canonum,* and so on. Hence it is to be believed that if blessed Thomas had considered this, he would not have preferred the lesser good, namely the continence of one monk, to the greater good, which would be the preservation of a whole country, or perhaps conversion to the faith of Christ, and so on.

But it is asked: if such a cause were not present, and the Pope dispensed, and a monk, bishop or priest contracted marriage, would it be valid? Johannes Andreae answers that it would; but he will not be able to demand the debt without mortal sin, yet when it is demanded he is bound to render it. But as to property he says it cannot be dispensed. The reason of the difference is because by a dispensation for having property no one is prejudiced, nor does it profit or harm anyone except him with whom it is dispensed; and therefore in this case, unless a cause is present, the dispensation is not valid. But in marriage it is otherwise, because the dispensation profits the spouse; hence the marriage holds, lest she be deceived by the authority of the prince (Cod., *De his qui veniam aetatis impetraverunt,* l. 1). And so Lord Andreae seems to conclude that a dispensation of the Pope without cause does not hold in those things which are against a tacit or express vow, or against the Gospel; but in those which are enacted by his canons or constitutions he well can dispense without cause, and the dispensation makes safe him with whom he dispensed, as in the statutes on the interstices of times (dist. 77, throughout), or that one cannot have several cures, on which *De praebendis,* c. *Cum iam dudum*. For although it is honourable that the prince be held to the observance of his constitutions, as in l. *Digna vox,* Cod., *De legibus,* yet from certain knowledge he can dispense against them without cause, which is not lawful to an inferior; nor does a dispensation of an inferior made against the laws and without cause hold. On this matter by Johannes Andreae in c. *Semel Deo, De regulis iuris,* in the Sext, in the *Mercuriales;* and in the said c. *Cum ad monasterium,* in the *Novella;* and in c. 1, *De voto;* and in the same title *De voto,* c. 1, in the Sext; and in the *Speculum,* title 2, § *Nunc breviter,* verse *Et nota,* where he sets down certain cases in which the Pope does not dispense; and on this Petrus de Ancharano in c. *Cum ad monasterium,* and in c. *Non est,* below, *De voto,* and in c. *Ex publico,* below, *De conversione coniugatorum*.

It also makes for the aforesaid that the distinction between a solemn and a simple vow was introduced by positive law, as in c. 1, *De voto,* in the Sext, and as is noted in c. *Rursus,* below, *Qui clerici*

vel voventes. Hence just as marriage contracted after a simple vow holds, so also after a solemn one, since the Pope has dispensed. Nor does the

text in dist. 32, c. *Si quis eorum*, stand in the way, because the Pope can dispense even against a canon of the Apostles (dist. 34, c. *Lector*; and as noted in c. 2, above, *De bigamis*); see below, this title, c. *Ioannes*, where I wrote fully on this in the second conclusion, whether the Pope dispenses with a bigamist. Yet without cause it does not become the Pope to dispense even with a subdeacon who is a secular cleric, still less a regular; for which c. *Proposuit*, below, *De concessione praebendae*, and the said c. *Magnae*, below, *De voto*. For many things are lawful which yet are not becoming. Hence the Apostle too says (1 Corinthians 6 and 10): *All things are lawful to me, but all things are not expedient; all things are lawful to me, but all things do not edify*. For from this the Pope does not dispense with one who knowingly allowed himself to be baptized twice (*De consecratione*, dist. 4, c. *Eos* and c. *Qui bis*); the same if ignorantly, and when he knew he ratified it. The same also of one confirmed again (argument c. *Nec dum*, *De cognatione spirituali*, in the Sext; dist. 68, c. 1; and *De consecratione*, dist. 5, c. *Dictum*). Nor does he dispense with one who had himself ordained by heretics in order to subvert the faith (C. 1 q. 7, c. *Convenientibus*); nor does he dispense with simoniacs when simony intervened on both sides, namely of the one ordained and of the ordainer (C. 9 q. 1, c. *Ab excommunicatis*; and C. 1 q. 1, c. *Si quis episcopus*), and so of similar cases.

In the last gloss, on the word *repugnet*, at *et qui legitimus*, it makes for the question whether a notary created by a king can draw up instruments outside the kingdom; on which the *Speculum* disputes under the title *De instrumentorum editione*, § *Restat*, verse *Quid de his*. Bartolus holds that he cannot, because acts pertaining even to voluntary jurisdiction, however granted by someone inferior to the prince, namely the general [prince], cannot be exercised outside the territory, as in l. 2, Dig., *De officio proconsulis et legati*, and *De foro competenti*, c. *Romana*, § *Nec clericos*, in the Sext. Yet instruments made by him in the territory of him by whom he was created have effect everywhere, just as an emancipation made by one who has jurisdiction from a municipal law is held ratified everywhere (Cod., *De emancipationibus liberorum*, l. 2). And the same is so of a notary created by some Duke, as of a ducal city, as of the Venetians and the Genoese, and the like.

But about this it is asked: at Venice a testament before two witnesses is valid; is such a testament made there valid outside the territory? It seems so, so that the custom of his country may be observed for him everywhere, by what is noted here. But does such a testament extend to goods situated outside the territory of Venice? Bartolus, however, says of the preceding question that the statute will not profit citizens making a testament outside the city of Venice, because as to solemnity the place where the thing is done is regarded. But in the present question, of a testament made at Venice, he says that it extends its force to goods wherever situated, even if the testament were made for him with the solemnities of common law, by l. *Si non speciali*, Cod., *De testamentis*.

But it is further asked: if the statute does not dispose about the solemnity of the act, but is permissive, taking away an obstacle of the quality of the person, for instance the statute says that a son-in-power can make a testament, or another person prohibited by law, or that a spurious son can be instituted by his father, whether the statutes are valid, see by Bartolus in l. *Testamenti factio*, Dig., *De testamentis*. But supposing they are valid, whether such a person can make a testament outside the territory, or such men be instituted and enter upon an inheritance. This text seems to make that he can, because as to inheritance we regard the place of origin, not the place of residence. Bartolus holds

the contrary if it is granted by another than the Prince: for although it pertains to a voluntary act, yet he cannot exercise it outside the jurisdiction of the one granting, as in the said l. 2, Dig., *De officio proconsulis et legati*; for this the Authentic *Quibus modis naturales efficiuntur sui, § Filium vero*, where the legitimation of a son which is made by offering to the curia has no place except between the father himself offering and the son.

Incidentally it is asked whether a testament made by a son, namely in the place of the statute, or an institution made of a spurious son in the said place, extends its effect to goods wherever situated? And it seems so, just as a testament made with the solemnity of the place where it was made is valid everywhere, as I said; for which l. 1, Cod., *De emancipationibus liberorum*, where an emancipation made in one place has effect everywhere. Similarly also a sentence extends its effect to goods outside the territory of the one pronouncing it, as l. *Argentarius*, last §, Dig., *De iudiciis*, and in c. *Postulasti*, above, *De foro competenti*; but a testament is a sentence and the law of the testator, as in l. 1, Dig., *De testamentis*. To the contrary make l. *Pupillus*, Dig., *De tutoribus et curatoribus datis ab his*, and l. *Non solum*, § *Qui testamento*, Dig., *De excusationibus tutorum*. Moreover a simple disposition is not understood of goods situated elsewhere, as in l. *Cum in rem*, § *Si is qui*, Dig., *De bonis auctoritate iudicis possidendis*; for this in the Authentic *Quibus modis naturales efficiuntur sui*, § *Filium vero*, where legitimation is understood [text unclear]. For this it seems express below, *Qui filii sint legitimi*, c. *Per venerabilem*, where legitimation made by the Pope does not draw to those things which are not of his jurisdiction, as to inheritances and other temporal things which are of the Empire, as is noted there by the gloss and the modern Doctors; and Bartolus holds this part. The contrary [arguments] do not stand in the way, because it is one thing in a disposition about the solemnity of an act, another about the legitimation of a person for an act. For greater and lesser solemnity is applied in an act according to the various necessities and customs of cities: at Venice, indeed, either on account of the occupation of men or on account of their fidelity, a testament before two witnesses is valid, for which make by similarity what is noted in c. *Relatum* and in c. *Cum esses*, below, *De testamentis*; but in other cities it is not so. Hence a testament made at Venice even by outsiders ought to be valid everywhere. But a disposition about a person to be legitimated for doing an act is not of this nature; and therefore I cannot legitimate except as regards myself disposing, nor will it extend beyond my jurisdiction and territory. l. 1, Cod., *De emancipationibus liberorum*, does not stand in the way, nor what was said above of the notary; for he is not applied for disposing, but for solemnizing an act disposed by another. What was said of the sentence does not stand in the way, because there the judge disposes about a right already founded and formed, which right regarded the person everywhere; for instance he condemns someone by reason of a preceding obligation binding the obligated man in every place; therefore it is ordered to execution by another judge. But when the judge himself introduces a right, by making someone a tutor anew, then it does not extend beyond the territory, as was said above. These are the words of Bartolus.

Against whom in this last point this chapter stands, which yet he does not allege. For here it is disposed about the legitimation of a person for an act, and yet the disposition is extended outside the territory where the custom prevails, and so outside its place: this Greek is reputed legitimate even where the contrary custom prevails, as appears here. But you may say that the Pope tolerates in this the custom and rite of the Greeks, because they neither admitted nor made the vow of continence; therefore he seems to tolerate them also as to benefices. It would perhaps be otherwise in temporal goods, in which this Greek begotten in the priesthood would not come together with legitimate

agnates to goods situated outside Greece, as Lord Petrus de Ancharano says; yet he does not confirm the last point. But it seems that it can well be confirmed by what is noted in the said c. *Per venerabilem*, where legitimation made by the Pope does not draw to those things which are outside his jurisdiction.

And from these another question also is decided. Suppose the Emperor has legitimated a spurious son or another illegitimate; this man seeks to be promoted to orders and dignities; it is objected to him that he is illegitimate; he says he was legitimated by the Emperor or a King: does it suffice? I answer that it does not, although some have said the contrary, and not well. For he who was legitimated by some secular prince or by a city is understood legitimated as to all secular acts in the lands subject to the one legitimating, and in other lands as to secular things, unless another is prejudiced. I say this for so much, because in foreign lands they would not succeed on intestacy, since the heirs of the deceased would be prejudiced. But such a one is not understood legitimated for orders, because this is not of the jurisdiction of a lay judge, as in the said c. *Per venerabilem*. But if he was legitimated by the bishop insofar as he could, namely as to minor orders and benefices without cure, he can also in another diocese be promoted to the aforesaid, because these are of ecclesiastical jurisdiction and to no one's prejudice; and much more if by the Pope (argument from what is noted in c. *Si is qui*, below, *Qui filii sint legitimi*, in the Sext). But such a legitimated man, even if by the Pope, is not understood legitimated as to secular acts except in the lands which are temporally subject to the Pope, as the gloss notes in the said c. *Per venerabilem*.

Innocent also holds the aforesaid there; but Lord Antonius de Butrio, in the said c. *Per venerabilem*, distinguishes more solemnly beyond all, when it is asked whether the Pope can legitimate in the lands of the Empire. I say thus: either the Pope wishes to legitimate by disposing of marriage as to future offspring, and I do not doubt that he can, both in his own lands and in the lands of the Empire, because it is principally his to dispose of marriage; so are the sayings of Johannes Andreae and Hostiensis to be understood. Therefore all sons who are produced today from marriage beyond the fourth degree in the lands of the Empire are legitimate; and all also who are born of a ward and her tutor, and of those contracting without the father's consent, and of the rector of a province with a woman subject to him: all are legitimate. Or the Pope wishes to legitimate by disposing in the root of the marriage as to offspring already produced; and then I say that in all cases in which he can legitimate by disposing in the root of the marriage, he can legitimate also in the lands of the Empire. Take the example of Johannes Andreae himself, saying that the Pope disposes in the root of the marriage, as because someone contracted with a blood relative or in-law in the fourth degree, or with a blood relative of his betrothed, the impediment of public honesty standing in the way; and then the Pope can legitimate by referring himself to the root of the marriage. Lord Antonius follows: and in all cases in which he cannot, as because [it is] against the divine law, or will not, as because [it is] against the law of the Church, dispense by beginning from the root of the marriage, in all he legitimates as to his own lands and not those of the Empire. Then it is evident that in the first case he originates a matter subject to him by its mother nature in any place, because marriages in any place are subject to him (below, *Qui filii sint legitimi*, c. 1 and c. *Causam*; and above, *De ordine cognitionum*, c. *Tuam*). In the second case he originates a matter not subject to him except in the lands of the Empire [text unclear]. We see therefore that he can by originating from the root in certain cases. For sometimes he wishes to dispose by legitimating one born, the consent of marriage between

the parents being absent; and I do not see that he can: for he could not make it be a marriage without consent, because this is regulated by the faith

and by a natural act of consent, and requires the true essence of consent. Hence, given certainty of the defect of consent, I do not see that he could do this, although he can feign consent while doubt stands (*De sponsalibus*, c. *Is qui*). And if it is said that the prince feigns consent where there is none (l. 1, Cod., *De rei uxoriae actione*), say that this is in positive matters and in non-sacramental acts; but sacramental things here have the form of a natural fact and require the true essence of consent, in which I do not see that the Pope can do anything. He could therefore legitimate by granting only the rights of legitimacy, but he could not by disposing over the essence of marriage; in which case, whether he can do this in the lands of the Empire, will be said below. And in this Johannes Andreae also agrees; for where truth is required for appearance, fiction does not operate; for which makes c. *Licet*, above, *De foro competenti*.

Or he wishes to legitimate those produced from a marriage given its essence as to its form, yet invalid on account of the resistance of law. And then, if the resistance were of the civil law, because it does not belong to it to dispose of marriage, I say that he could legitimate, because this fiction could be drawn back, as in a similar case in c. *Tanta* and in c. *Constitutus*, below, *Qui filii sint legitimi*, since it would not have any principle resisting when drawn back, and it would be valid. Indeed, since only the civil law resisted, the sons would be legitimate from the very beginning. Or the marriage valid as to its rude external form had a canonical or divine impediment, and still I do not believe that he could legitimate by disposing in the root of the marriage. It is evident, because to dispose of this is by fiction; and since the marriage had the resistance of law, it was impossible that the fiction should operate against the resistance of law by raising up the marriage as from the past, because it failed in the extreme; on which in the said c. *Tanta*, and Dig., *De senatoribus*, l. *Paulus*, otherwise beginning *Eum qui*. And therefore I believe that this legitimation, as drawing its root from the marriage, was not valid as reintegrative, but well can be valid as conferring legitimacy anew. Hence in this, whether he can legitimate in the lands of the Empire, I conclude what I shall say below.

When he does not dispose in the root of the marriage: either the offspring is produced from a marriage of which there can be a probable doubt whether canon law resists the marriage or the legitimacy of the offspring; and I say that in this case he can legitimate by disposing in the marriage and declaring the legitimation on account of the doubt of the marriage; and to avoid perplexity, while the doubt stands, he could confer legitimacy for two reasons: namely on account of the doubt of the marriage, which is subject to him, from which legitimation draws its cause; and because, since it does not have a clear resistance of law, the fiction can be drawn back to the beginning of legitimation; and because on account of the probable doubt the case is submitted to the Pope as among the graver ones. And this is what the Pope meant to say in approving the legitimation of the king's sons and upholding it, in the said c. *Per venerabilem*, verse *Responsionibus*: that thus, while the doubt is pending, so long as the impediment lies hidden, we see that the Pope legitimates the offspring from the colour of marriage by the authority of the Church (below, *De clandestina desponsatione*, c. *Cum inhibitio*; and c. *Referente* and c. *Pervenit*, below, *Qui filii sint legitimi*). Hence in this case he legitimates even in the lands of the Empire, because he disposes of the root of the marriage; to which the said c. *Tanta*. For it is doubtful to none that in c. *Tanta* the legitimation which is made from that chapter, from marriage alone, even given whatever solemnity of dotal instruments is required by the law, makes capable and

legitimates the offspring even in the lands of the Empire. And so in fact Lord Antonius says he gave counsel at Modena, because to dispose of marriage belongs to the lord Pope, and of the effect of marriage, when by disposing he originates from the root of the marriage.

Sometimes the Pope intends to legitimate only by conferring the rights of legitimacy, not disposing in the root of the marriage, either because he will not or because he cannot, as appears above from what has now been said. And then, if it is asked whether he can legitimate in the lands of the Church, it is plain that he can, as the said c. *Per venerabilem*, verse *Id autem*, because in them he exercises the rights of the Empire, holding that the donation made to the Church was valid; which appears from what is noted in c. *Romani siquidem principes*, *De iureiurando*, in the Clementines, and what is noted in the rubric *De iureiurando*, Dig. and Cod., by the writers, which is the common opinion, and in the said c. *Per venerabilem*, approved. Or he wishes to legitimate in the lands of the Empire, and then either he wishes to legitimate one placed or to be placed [in the clergy] by reason of clerical status, because by the fact that he is legitimated on account of clerical status he is said to be a cleric at least in mind, according to what is noted in c. *Ex litteris*, above, *De transactionibus*; and I say that he can, and once he is legitimated, clerical status having followed, he is legitimated as to spiritual and temporal things and as to all things, as appears from one allegation of the said c. *Per venerabilem*. Nor does it stand in the way that by this prejudice is done to one not placed [in the clergy], because he can prejudice by consequence, not principally. Since therefore he disposes over the principal, the consent of him who is prejudiced by consequence is not necessary; and this lest it could be said that he is legitimate and illegitimate, like a monster. For this amply suffices Dig., *De interdictis et relegatis*, l. *Relegatorum*, last §; Dig., *De senatoribus*, l. *Qui indignus*; and Dig., *De servis exportandis*, l. *Cui pacto*. Hence one legitimated for spiritual things, which are greater, is understood legitimated as to temporal things, which are lesser, and so by consequence; for certain things we obtain by consequence (Dig., *De poenis*, l. *Moris*, at the beginning; Cod., *Si adversus transactionem*, l. 1; Cod., *De dilationibus*, l. *Si quando*; Cod., *De temporibus in integrum restitutionis*, l. *Petendae*). Hence Goffredus too says: nor should you wonder; for although the Pope does not exercise contentious jurisdiction in temporal things except in the cases noted above, *De appellationibus*, c. *Si duobus*, and above, *De iudiciis*, c. *Novit*, the third, and c. *Causam quae*; yet to legitimate, he says, is not of contentious jurisdiction but of voluntary, like manumitting, adopting, emancipating and the like, as Dig., *De officio proconsulis*, l. 2 and 3.

Or he wishes to legitimate one not placed [in the clergy], nor to be placed shortly; and whether he can then, say: either he wishes to legitimate with the consent of one who recognizes no superior, and so is in quasi-possession of liberty, and such a one can be legitimated, as the said c. *Per venerabilem*, verse *Responsionibus*; or in the lands of one who recognizes the Emperor as superior, and the case seems to be in the said c. *Per venerabilem*, verse *Insuper*, that he cannot, because these things belong to the supreme Empire, as legitimations without the consent of the superior are reserved to the privilege of the prince; and that c. *Per venerabilem* means this; it is not elsewhere on this. This opinion, that the Pope does not legitimate in the lands of the Empire as to temporal things, Bartolus holds in l. *Qui in provincia*, Cod., *De nuptiis*; and Cynus seems to follow it in l. *Et si contra*, Cod., *De nuptiis*; Bartolus follows the same in l. 1, Cod., *De summa Trinitate et fide catholica*. But if you wished to hold the opposite, that this power would be prorogable in one having similar power, as we say in those things which are of mere empire, as Lord Antonius says above, *De foro competenti*, c. *Si diligenti*, and above, *De officio delegati*, c. *P. et G.*, I believe that then the Pope could not make this legitimation of a subject of the Empire unless all consented, even those to whom prejudice would be done; which is evident,

because such a power could not be prorogued to their prejudice. Johannes Andreae holds this in the said c. *Per venerabilem*, verse *Libere*, where he says that although he can do this freely in the lands of the Church, that is, without anyone's contradiction, yet in the lands subject to the Empire he cannot without the one prejudiced being able to contradict (argument above, *De rescriptis*, c. 2 and c. *Ad aures*; and above, *De maioritate et obedientia*, last chapter), except in the cases noted in the said § *Responsionibus*, in the verse *Insuper*. He says that he ought not [do it] when those whom the matter touches contradict or do not consent, as above, *De pactis*, last chapter; Cod., *De emancipationibus liberorum*, l. *Nec avus*; and Hostiensis sets down the same in the verse *Potuit*, in the same c. *Per venerabilem*.

These, however, do not disclose whether the non-consent or contradiction of those who have only a hope in the inheritance impedes. Hostiensis seems to vary: in one part of the same chapter, verse *Subiacere*, he says that the mind of § *Insuper* is that he does not dispense with one who is known to be subject to another, who perhaps would succeed if he did not have legitimate offspring, but agnates survived (*De donationibus inter virum et uxorem*, c. *Cum nuptiae*); but neither ought agnates to be prejudiced. Here he seems to hold that prejudice in hope is attended to. But Hostiensis in the said c. *Per venerabilem*, verse *Requisivisti*, says that when the father alone requests it, in his lifetime, legitimation can be made, otherwise not (Cod., *De pactis*, last law); but when he is dead, with the consent of those to whom the inheritance has already been deferred, otherwise not; and as to feudal things, with the consent of the lord of the fief, as in the said c. *Cum nuptiae*, *De donationibus inter virum et uxorem*, and *De feudis non alienandis*, c. *Imperialem*, and above, *De foro competenti*, c. *Ex transmissa*, at the end, according to Hostiensis. Lord Antonius says that he can do this notwithstanding the contradiction of those having only hope, but ought not do it out of honesty; therefore in doubt, if he does it without expressing otherwise, it does not extend to the prejudice of agnates having only hope, unless they consent or the Pope expresses otherwise. And by this this matter appears clear, and, the way being thus easily opened, the answer appears to what is objected by those holding otherwise than the aforesaid. On this also by Azo, Cod., *De naturalibus liberis*, in the *Summa*; and by the Archdeacon, dist. 10, c. 1, and dist. 96 [text unclear], c. *Osius*; and as noted in dist. 59, c. 1.

And that it may become known more clearly, it is still urged whether the Emperor can legitimate in the lands of the Church, presupposing the validity of the donation, as above, which is not to be called into doubt, because it would be a species of heresy, since the Church has determined it. And that the Emperor can legitimate seems evident thus: the act of legitimation is to create positive and temporal rights and bonds, namely the right of agnation and cognation, and for temporal ends, as of succession, as was said by the Doctors in the said c. *Per venerabilem*; as in the Authentic *De incestis nuptiis*, § *Dubitatum*, and in the Authentic *De triente et semisse*, § *Hoc idem*; and Inst., *Vi bonorum raptorum*, § *Quos autem*, makes for it; Dig., *De minoribus*, l. *Et si sine*, § *Sed quod Papinianus*; Dig., *Pro socio*, l. *Cum duobus*, § *Idem respondit*. Therefore the Emperor can do this, because this is his matter, as marriage is the Pope's, as has been said. Moreover such things are of voluntary jurisdiction, which are exercised over one not subject, as in l. 2, Dig., *De officio proconsulis*. Likewise thirdly, because the right of legitimating is a certain right inhering in the person of the Emperor; therefore it did not pass by the transfer of things to the Church (above, *De pignoribus*, c. *Ex litteris*; below, *De regulis iuris*, c. *Privilegium*), since

[text unclear]; otherwise an absurdity would follow, that if the Emperor gave away land, he would lose this right of legitimating. Fourthly, because this right is of a certain faculty, like making knights, doctors and the like, which rights he can exercise wherever he pleases, just as [a legate may] confer prebends and the like (above, *De officio legati*, c. *Novit*, and what is noted there). Fifthly, because the prince cannot abdicate such rights from himself (Dig., *De officio praesidis*, l. *Legatum*), since such things inhere in his bones (as l. *Quis ergo casus*, Dig., *De peculio*); to this makes what we say of a bishop, who wherever he is retains the episcopal [power], as noted above, *De donatione apostolica*; below, *De religiosis domibus*, c. *Constitutis*; above, *De censibus*, c. *Cum venerabilis*. Likewise sixthly, because his jurisdiction can be prorogued, granted that he did not have it (l. 1 and 2, Dig., *De iudiciis*; above, *De officio delegati*, c. *P. et G.*). Likewise seventhly, because one delegates causes over one not subject; therefore he also legitimates (Dig., *De officio praefecti urbi*, last law; for which the said l. 2, Dig., *De officio proconsulis*, and l. *Emancipari*, Dig., *De adoptionibus*). Many of the arguments also which make for the Pope can conclude for the Emperor, as Lord Antonius says. Eighthly, because a father legitimates, as below, *Qui filii sint legitimi*, c. *Per tuas*; therefore much more the Emperor; by which it appears that this is not of jurisdiction. Ninthly, the case seems to be in the said c. *Per venerabilem*, near the beginning, expounding *praesertim* as "only," as many expound and Johannes holds: because the Pope legitimates for spiritual things one subject to the Empire, as in the said c. *Per venerabilem*; therefore conversely the Emperor [legitimates] one subject to the Church as to temporal things. Jacobus de Belvisio followed this opinion, as he disputes in the Authentic *Quibus modis naturales efficiuntur sui*; and after him Johannes Calderinus, and after him his son. But Lord Antonius says they are suspect, because they themselves had the right of legitimating from the Emperor; therefore they wished to defend a bad cause. Afterwards the son procured to have it from the Pope; and so he had it from Urban VI, as his son said.

Conclude therefore thus: either the Emperor wishes to legitimate by disposing over marriage and beginning from the root of the marriage, and say that he cannot, because this belongs to the Pope alone. And if the laws which say that sons are legitimated by subsequent marriage had not been approved by the canon (so great is the force of marriage, below, *Qui filii sint legitimi*), I would believe such laws not valid for such a legitimation; on which in c. 1, below, *De sponsalibus*, in the third gloss at the end, where Lord Antonius says that a statute or custom about the substance of marriage is not valid, because it disposes in a matter belonging to the Church; which is quite notable for the attainment of a temporal inheritance to be deferred or not deferred to offspring from such a marriage (above, *De ordine cognitionum*, c. *Tuam*; and below, *Qui filii sint legitimi*, c. *Per venerabilem* and c. *Tanta*; and what is noted below), whatever Cynus says in l. *Si tutor*, Cod., *De matrimonio contrahendo*. Therefore the laws which require in marriages, for the legitimation of offspring when one contracts with a concubine, that dotal instruments intervene, otherwise the marriage is not valid, are not to be observed as regards deferring inheritances, as is noted in the said c. *Tanta*.

But if a custom or statute disposes about marriage by applying some penalty which inflicts loss, as if it imposes a penalty on sons contracting without the father's consent, still it is not valid, as Johannes Andreae disputes in c. *Statutum*, *De haereticis*, in the Sext, and *De secundis nuptiis*, c. 2. Otherwise if it disposes by taking away gains which the law had conferred (Cod., *De secundis nuptiis*, l. *Hac edictali*; and as the gloss notes in c. *Cum secundum*, *De haereticis*, in the Sext, and in c. 2, below, *De secundis nuptiis*). But if the statute does not impose a penalty, but disposes about accidental gains, then it is valid (below, *De testamentis*, c. *Raynutius*; above, *De foro competenti*, c. *Ex parte B.*). But if statutes dispose

about solemnities in the contract, insofar as they do not contradict the canon, then such statutes or customs are to be observed, as in c. *Aliter*, C. 30 q. 5; and those who go against them sin according to the quality of the words and the tenor of the custom or statute, as the Doctors note in the said c. 1, below, *De sponsalibus*; and especially when they omit solemnities by whose omission the marriage is rendered uncertain, according to Alanus, Vincentius and Imola. Yet by this the marriage is not impeded when the substantial requisites are present, as in the said c. 1, *De sponsalibus*. But if they dispose about the capacity or incapacity of persons to contract, then say that neither statute nor custom can make capable, as in c. *Quod super his*, below, *De consanguinitate et affinitate*. But whether they can make incapable, say: either they make incapable against both new and old law, and have no concurrence of law, and they cannot make incapable, as in c. *Super eo*, below, *De consanguinitate et affinitate*; or they make incapable against the new but according to the old, and they can make incapable, as in the said c. *Super eo*, according to Hostiensis; or they make incapable against a privilege, and because they have concurrence of law, they are valid, as in c. *Quod dilectio*, below, *De consanguinitate et affinitate*; for a thing easily reverts to its nature (Dig., *De pactis*, l. *Si unus*, § *Pactus*); and as Johannes Andreae notes in c. *Cum dilectus*, above, *De confirmatione utili vel inutili*, on the word *praescriptis*.

Where there is a statute or custom of the place of the husband, and another of the place of the wife, the Abbot [Antiquus] said that the custom of the contract is to be observed (dist. 12, c. *Illa*; dist. 8, c. *Quae contra mores*); but if in the place of the contract there is no custom, the custom of the husband is attended to, because he is the head of the woman (below, *De frigidis*, c. 1; and the Apostle, Ephesians 5). The gloss and the civil Doctors in l. *Exigere dotem*, Dig., *De iudiciis*, say without distinction that the place of the husband is attended to, where the end of the contract seems destined, for which l. *Contraxisse*, Dig., *De actionibus et obligationibus*; and they say it is special in the dowry, because although otherwise as to statutes the place is attended to where the rude matter of the contract was done (Dig., *De evictionibus*, l. *Si fundus*), now in statutes the place where the end of the contract is destined would be attended to; and so Bartolus holds there and in l. 1, Cod., *De summa Trinitate et fide catholica*. Lord Antonius de Butrio, in c. 1, below, *De sponsalibus*, says that if customs dispose in different ways about the form of contracting, and both contract in one place, the place of the contract ought to be attended to without distinction; and if there were no custom, the common law would have to be observed. But if they contract in different places, as through a messenger or by letters, the place ought to be attended to where the contract was concluded and finished. But if it disposes about the mode of exacting the dowry from the woman: if the contract was entered in the place of the husband, it is plain; but if it was entered in the place of the woman, the place of the husband ought to be attended to, where the exaction of the dowry ought to be made, as the said l. *Exigere dotem*, and as Dinus notes in l. *Contraxisse*, Dig., *De actionibus et obligationibus*, and Bartolus in the said l. 1, Cod., *De summa Trinitate*. But if statutes dispose about the mode of exacting the dowry from the husband, the marriage being dissolved or otherwise: then if the right of exacting arises from some accident of fact or fault, the place of the fault is attended to, as Bartolus writes in the said l. 1, verse *Nunc veniamus*, for which l. *Si uxor*, Dig., *De iudiciis*. But if the right of exacting arises apart from any act or fault of the parties, only by its nature, as because the marriage was dissolved by death, and so the right of exacting the dowry results: then if the husband is in the place where he contracted from the beginning, the place of the husband is attended to. But if he is in another place, although the point is doubtful, Lord Antonius says: I think it is sufficiently decided in l. *Si uxor*, Dig., *De iudiciis*, because

the first place of domicile is attended to; for the place of the purification of the obligation, or of the purifying fact, ought not to be attended to, but the place of the obligation itself which has been purified, as in the said l. *Si uxor* with its gloss.

And by the aforesaid it appears that the Emperor in the lands of the Church cannot make the fullest legitimation, which deletes the original vice; and so Hostiensis is saved. Or he wishes to legitimate collatively, by conferring the rights of legitimacy; and as to spiritual things he could not; therefore I think that one legitimated by the Emperor cannot be ordained nor beneficed unless he is otherwise dispensed with; and so the Doctors commonly hold. Johannes holds this on dist. 59, c. *Si officia*, and dist. 101, c. 1; the Archdeacon, dist. 10, c. *Lege*; C. 25 q. 7, c. 1; and it is had in dist. 26, c. *Denique*; dist. 34, c. *Si quis viduam*; C. 15 q. last, c. *Cum multae*; C. 32 q. 4, c. *Dicat*, and the last chapter; and above, *De ordine cognitionum*, c. *Tuam*; and above, *De probationibus*, c. *Per tuas*; and *De desponsatione impuberum*, c. *Accessit*; and below, *De clandestina desponsatione*, c. *Cum inhibitio*; and the gloss on dist. 10, c. 1, which begins *Imperator*. Or he wishes to legitimate as to temporalities and honours and other inheritances, and he can in the lands of the Empire, just as he formerly could. But whether he can in the lands of the Church, say: either he legitimates by enacting a general law, as appears in the cases set out in c. *Per tuas*, below, *Qui filii sint legitimi*; and then the force of the law extends to those existing in the lands of the Church, not by virtue of such a law alone, but by the general approval of the Church (dist. 10, c. *Si in adiutorium*); which approval the sacred Canon makes, since it is not repugnant to it, namely the law is not repugnant to the canon, which the Pope is reckoned to approve by the fact that he does not disapprove (above, *De iudiciis*, c. *Novit*, and there the Doctors; above, *De constitutionibus*, c. *Ecclesia Sanctae Mariae*; and above, *De solutionibus*, c. *Is qui*). But do not think that then such men are legitimate as to spiritual things, on account of the nature of the matter, which is neither directly nor indirectly subjected to the power of a layman (above, *De ordine cognitionum*, c. *Tuam*). And that the law is understood approved by the canons and is extended to subjects of the Church proceeds when the Emperor disposes in a matter subject to him, as because about temporal things. Or he wishes to legitimate by rescript, and then he cannot in the lands of the Church, holding that this jurisdiction is not prorogable by recognition of superiority, and that it is special in those things which are of mere empire and supreme power, that they are not prorogable even in one having cognizance of similar causes; and in this it differs from those which are of mere empire and not wholly supreme. But holding that it is prorogable, I believe that he cannot legitimate except with the consent of those who are prejudiced, namely those succeeding on intestacy (Cod., *De pactis*, last law; Cod., *De emancipationibus liberorum*, l. *Nec avus*); and Johannes Andreae holds this in the said c. *Per venerabilem*, verse *Insuper*, at the word *potuit*, and in § *Illud autem*, at the word *libere*; he alleges above, *De rescriptis*, c. 2 and c. *Ad aures*, and *De maioritate et obedientia*, last chapter. Hostiensis there, in the said c. *Per venerabilem*, at the word *responsionibus* and at the word *requisivisti*, seems to hold

that while the father lives, in proroguing the power the consent of the father and the son suffices, since with the father consenting one can make a pact about his inheritance; but when he is dead, the consent of those who have an acquired right is required; and as to feudal things the consent of the lord of the fief is required. He alleges *De donationibus inter virum et uxorem*, c. *Nuper*; and in the feudal constitutions, *De feudis non alienandis*, c. *Imperialem*; and above, *De foro competenti*, c. *Ex transmissa*. For it cannot be denied that this act is of jurisdiction, as appears in the said verse *Responsionibus*, and it is of a jurisdiction prejudicial to another, at least as to taking away hope. Hence he cannot exercise such things over those not subject; by which many objections cease, because he abdicated jurisdiction even

in temporal things from himself by donating, nor does he exercise it in the lands of the Church, as appears above, *De appellationibus*, c. *Si duobus* and c. *Cum sit Romana*. It does not stand in the way that these rights, as personal, cannot be abdicated, because it is true; nor does he abdicate here, but the power is restricted on account of the defect of the object, because he does not have those men as subjects. Nor is the argument from similarity of the bishop good, because he cannot be in a territory without pre-eminence, since he cannot make anyone his equal in pre-eminence; but the Emperor can, who can relax what he has from the Church, namely temporal jurisdiction, both in whole and in part. Nor do these follow the territory, but they are extinguished or restricted in the prince; and the Pope never loses that which he has, [but] exercises jurisdiction from the Empire: for he himself gives it to the Emperor and retains it in habit. He does not need, then, that it be transferred to him, but only an object in which what was given in the donation of those cities may be given; therefore he exercises it, and the power of the Empire withdraws from them; and this is the very truth. For it would be very absurd that the Emperor should have greater power in the lands of the Church than the Pope in the lands of the Empire. Let both, then, be content with their own boundaries. And Baldus [text unclear] holds this opinion in l. 1, Cod., *De iure aureorum anulorum*, and in l. *Praeses*, Dig., *De officio praesidis*.

All these proceed in a crowned Emperor. But whether he can legitimate before coronation? Jacobus de Arena holds that he can; on which by Johannes Andreae below, *De successionibus ab intestato*, § 1, verse *Sed ex facto*, at the word *Item scire debes*; and the *Speculum*, *De rescripti praesentatione*, last §, verse *Item quod obtentum est*, where he holds that he can. From these it is easily understood whether and where those having power from the Pope or from the Emperor can [legitimate]: because one having power from the Empire can where the Emperor can, according to the words of the privilege; and where the Emperor cannot, still less can one having power from him; and so of those having it from the Pope. And clearly, in those having it from the Emperor, the Doctor [text unclear] holds that he cannot legitimate in the lands of the Church, in the said l. *Praeses*, Dig., *De officio praesidis*, because another [deriving] from a proconsul cannot exercise voluntary jurisdiction outside the province decreed to him; and he determines the same in the rubric Dig., *De officio praesidis*, and in the rubric Cod., same title. One thing, however, I think: that one having power from the Pope or the prince cannot legitimate to the prejudice of another anywhere, even with respect to hope, because such concessions are understood without anyone's prejudice, as in l. 1, § *Si quis a principe*, Dig., *Ne quid in loco publico*; and above, *De officio delegati*, c. *Super eo*; and *De privilegiis*, c. *Pastoralis*, with similar places. Nor does it stand in the way that such hope is not attended to, because indeed sometimes it is attended to, as Bartolus notes in the last law, Cod., *De pactis*, and in l. *Is potest*, Dig., *De acquirenda hereditate*. And on the matter fully by Johannes Andreae and Lord Antonius de Butrio, and commonly by the moderns, in the said c. *Per venerabilem*.

But here also falls the question of Bartolus, namely: the custom in England is that the firstborn succeeds to the goods; now an Englishman who died leaving several sons has goods in Italy: will that firstborn succeed, or all? Jacobus de Ravanis and Guilielmus hold that in the goods situated in England the firstborn will succeed, but in those situated in Italy all will succeed, so that the right of succeeding is regulated as to goods according to the custom of the region. Bartolus says that the words of the custom or statute are to be considered: because either they are conceived in rem or in personam. If in rem, for instance "let the goods of the deceased come to the firstborn," then, because the statute affects things, they will belong to the firstborn, whether he be a newcomer or an outsider, as in l. *Rescripto*, at the end, Dig., *De muneribus et honoribus*. Or the words of the statute dispose about

the person, as because they say "let the firstborn succeed," and so on; and then either the deceased was not of England, although he had possessions there, and then such a statute or custom does not extend to him, because a statute about the person does not extend to an outsider (Dig., *De tutoribus et curatoribus datis*, l. 1, at the end; and *De tutoribus*, l. *Etiam*, and what is noted there); or he was an Englishman, and then the firstborn son succeeds in the goods which are in England, and in the others he succeeds by common law, according to the opinion of Jacobus de Ravanis, Guilielmus and Cynus. These are the sayings of Bartolus in l. *Cunctos populos*, Cod., *De summa Trinitate*, in the seventh principal question; and he touches it also in the third question; see there.

Lastly note from this gloss that custom makes one ineligible who is otherwise eligible, and similarly conversely (dist. 12, c. *Nos consuetudinem*; and dist. 50, the penultimate chapter). But Innocent, above, *De consuetudine*, in the rubric, says that here scandal makes him ineligible rather than custom; and so conversely, in c. *Nos consuetudinem*, there was dispensation on account of scandal rather than custom. Hostiensis holds the same in c. *Cum secundum*, above, *De temporibus ordinationum*, on the word *Latini*, near the end. At the end of the gloss, at *contra*, above, *De consuetudine*: say that there the custom was irrational, because against the good of obedience and against the authority of the Apostle, as is noted there. But it seems probable enough that either suffices to quash an election, namely custom or scandal, by c. *Cum teneamur*, *De praebendis*; and so the gloss is saved here for custom, and Innocent there for scandal, and so on.

Chapter Ioannes (c. 7)

Summary. 1. A married cleric without a benefice is not compelled to wear the tonsure, even if there is a custom to the contrary; no. 11. 2. Whether an acolyte, as beneficed, can be compelled to wear the clerical tonsure. 3. The acolyte is of the minor ecclesiastical orders. 4. What "acolyte" means in Latin, how he is ordained, and his office. 5. What order is. 6. Ordinations can be held at six times of the year, and when on Sundays. 7. A boy can receive the first tonsure and the minor orders, except the acolytate, from the seventh to the twelfth year; and at what age the acolytate, subdiaconate, diaconate, episcopate, and the office of the inquisition of heretical depravity [may be received]. 8. How one to be ordained is to be examined. 9. The clerical tonsure differs from that of monks, and that it can be borne by bishop and abbot. 10. Scandal between spouses is to be guarded against. 11. A married man by the bishop's dispensation is capable of an ecclesiastical benefice. 12. It is a reproach to the clergy if a cleric mixing himself in secular business wears the clerical habit and tonsure. 13. Whether and when a married cleric enjoys clerical privilege, and is compelled to wear the tonsure and obtain a benefice. 14. In what things a bishop can dispense. 15. A truly married cleric, not a bigamist, wearing the habit and tonsure, enjoys the privilege of the canon *Si quis suadente*; and that for a crime he can be sued criminally or civilly; yet this fails in six cases. 16. A bigamist cleric, whether married or not, does not enjoy clerical privilege. 17. Dispensation of bigamy. 18. Whether a bigamist made a monk recovers ecclesiastical privileges. 19. Feigned or presumed bigamists: who they are, and whether they enjoy clerical privilege. 20. By a valid marriage of a cleric, all his benefices previously held become vacant. 21. A married cleric having a benefice in title is bound to live clerically and do other things like one not married. 22. Whether custom is introduced by non-use. 23. Whether one is helped in court by the proofs of another. 24. Whether one believing himself bound to continence by the reception of the acolytate can contract, and whether the contract holds. 25. Whether married

clerics without benefices are compelled by custom to wear the habit and tonsure. 26. Whether a married cleric who has put off the habit and resumes the tonsure resumes the two privileges of c. 1, *De clericis coniugatis*, in the Sext. 27. In how long a time perseverance in not wearing the habit and tonsure is induced. 28. Whether clerical status impedes marriage. 29. Whether a married cleric loses his benefice and clerical privilege, and is bound to wear the habit and tonsure; nos. 31, 32.

Ioannes. A married cleric without a benefice is not compelled to wear the tonsure. This is what it says. It is divided into two principal parts: in the first the complaint is set out, in the second the decision. The second at *quoniam igitur*. The first makes two [parts]: first it narrates the fact and its cause; the second expresses from it two causes of grievance. The first at *ex qua*; the second at *cum de consuetudine*. The second principal [part] makes four: for first it sets out one cause of the decision, at *quoniam igitur*; second it sets out the decision itself, at *mandamus*; third it sets out one limitation, at *dummodo*; fourth it sets out another cause of the decision, at *quia cum eum oporteat*.

Note the text at the beginning, at *Ioannes nobis*, that this John, who laid the complaint about the bishop before the Pope, could also have gone to the metropolitan by such a complaint, since there was a question between John himself and the bishop (above, *De officio ordinarii*, c. *Ad reprimendam*, and c. *Pastoralis*; *De sententia excommunicationis*, c. *Venerabilibus*, in the Sext). But perhaps this bishop of Poitiers did not recognize a superior except the Pope. Note at *cum eum* that this bishop wished to compel this acolyte to wear the clerical tonsure, which in this case he ought not to do, although a married beneficed cleric can

[be compelled], above, *De vita et honestate clericorum*, c. *Clericis* and c. *Si quis*; and see what I wrote there.

Note at *in acolitum fuerat ordinatus* that the acolyte is one of the minor ecclesiastical orders, on which above, *De temporibus ordinationum*, c. 1 and c. *De eo*. And what pertains to the office of the acolyte, see dist. 25, c. *Perlectis*, verse *Ad acolitum*; and there what to the porter, what to the lector, what to the psalmist, what to the subdeacon, what to the deacon, what to the priest, what to the bishop, what to the archdeacon, and so on. And know that "acolyte" in Greek is in Latin called *ceroferarius* [candle-bearer]; and of his office, dist. 21, c. *Cleros*, verse *Acoliti*. And how the acolyte is ordained and what is committed to him, dist. 23, c. *Acolitus*. And that the acolyte can say the epistle without solemn vestments, see above, *De vita et honestate clericorum*, c. *Ut quisque*, and see there what I wrote; because if he says the epistle with solemn vestments he becomes irregular, as in c. 1 and 2, below, *De clerico non ordinato ministrante*; and the gloss touches it in the said c. *Ut quisque*.

And because it is said here *in acolitum fuerat ordinatus*, note that ecclesiastical order is one of the seven sacraments of the Church, on which in c. *Veniens*, above, *De transactionibus*, by the gloss. And say that order is the disposition of things equal and unequal assigning to each its place (Augustine, *De definitionibus*; and the Archdeacon, *De consecratione*, dist. 2, c. *In Christo pari*); and dist. 48, last chapter, makes for it, and C. 10 q. 1, c. *Decrevimus*, where the Archdeacon says: order is properly so called when each of diverse things holds its own place.

And it is to be known also that ordinations to ecclesiastical orders can be held at six times of the year, namely on all four Saturdays of the fasts of the Ember days; and on the Saturday of Mid-Lent, when at the Introit is sung *Sitientes, venite ad aquas*, namely the day preceding Passion Sunday; and on Holy Saturday of Easter of the Resurrection (dist. 75, last chapter; and in the said c. *De eo*, above, *De*

temporibus ordinationum). It fails, however, in two cases. The first is that the Pope can confer even the order of subdeacon on Sundays and on other principal feasts. The second is that any bishop can confer minor orders, namely by ordaining to one or two on Sundays and other principal feasts; but it is never lawful for a bishop to confer the order of subdeacon except at the aforesaid six times. And understand the said c. *De eo*, when it says "one or two," to be the same even if several orders, provided not so many that he seems to make a general ordination, as the Doctors commonly hold in the said c. *De eo*.

And note that not before, but from the seventh year to the twelfth, a boy can receive the first tonsure and the minor orders, except the acolytate, which he can receive only after the twelfth year (dist. 77, c. *In singulis*). But he can receive the subdiaconate in the eighteenth, the diaconate in the twentieth, the priesthood in the twenty-fifth, as in c. *Generalem*, *De aetate et qualitate*, in the Clementines; and it suffices to have reached the said time (argument above, *De electione*, c. *Cum in cunctis*). But he cannot receive the episcopate except when thirty years are completed, as in the said c. *Cum in cunctis*. And an inquisitor of heretical depravity cannot be [appointed] unless he has reached the fortieth year, as in c. *Nolentes*, *De haereticis*, in the Clementines.

And what kind of examination ought to be made of those to be ordained, say according to Hostiensis (1 Timothy 3): *It behoveth therefore a bishop to be blameless, the husband of one wife, sober, prudent, of good behaviour, chaste, given to hospitality, a teacher, not given to wine, no striker, not quarrelsome, not covetous, but one that ruleth well his own house … not a neophyte.* And the Apostle sets down this rule also to Titus 1. And although the Apostle seems to speak of bishops, yet it is extended to all to be ordained, according to Augustine, *De definitionibus*; and it is had in dist. 34, c. *Cognoscamus*; and the same Ambrose, on which dist. 81, c. *Apostolus*; and see what I wrote above, the preceding title, c. 1. Hence the verses:

First it is commanded that the bishop be without crime, monogamous, sober, prudent, chaste, of good bearing, and hospitable, teaching chaste things, no striker, not quarrelsome, not covetous, well ordered, not a neophyte.

On which by the gloss on dist. 25, c. *Nec autem*; and Goffredus in the *Summa*, *De temporibus ordinationum*, § *In qualitate*. But he must still be examined about other things, namely [that he be] not a solemn penitent (dist. 50, c. *Ex poenitentibus*; dist. 36, c. *Illiteratos*). Likewise not a curial, namely that he not be bound to any office of the court, whether honourable or dishonourable, as of actors, lictors and the like (dist. 51, c. 1, 2 and 5; dist. 96, c. *Clericus*, verse *Clericum*; *De consecratione*, dist. 1, c. *Pro dilectione*; dist. 61, c. *Osius*; dist. 50, c. *Si quis post*; dist. 51, c. *Aliquantos*; below, *Ne clerici vel monachi*, c. *Sententiam*). Likewise not bound to accounts, as a tutor, curator, procurator and the like (C. 21 q. 3, c. 1 and 2; below, *Ne clerici vel monachi*, c. 1 and 2; dist. 89, c. *Iudicatum* and c. *Pervenit*; C. 16 q. 1, c. *Monachum*; and above, *De obligatis ad ratiocinia*, throughout). Likewise not a slave (above, *De servis non ordinandis*, throughout). Likewise not vitiated in body (above, *De corpore vitiatis*, throughout; C. 2 q. 7, c. *Ipsi Apostoli*). Likewise not the son of a priest (above, *De filiis presbyterorum*, c. *Veniens*, and throughout), nor otherwise illegitimately born (above, *De electione*, c. *Innotuit*; below, *Qui filii sint legitimi*, c. *Per venerabilem*; below, *De excessibus praelatorum*, c. *Inter dilectos*). Likewise not one who

put off being baptized until sickness, and so on (dist. 57, c. *Si quis*; *De poenitentia*, dist. 7, c. *Valerius*). Likewise not a stranger (*De temporibus ordinationum*, c. *Cum nullus*, in the Sext, and c. *Eos*). Likewise not under age, on which you have seen above, this chapter, verse *Et nota quod non ante*. Likewise not a woman (dist. 23, c. *Sacratas*); and see what is noted in c. 1, above, the preceding title.

And it is to be known that there is a difference between the clerical and the monastic tonsure, on which above, *De vita et honestate clericorum*, c. *Clerici* and c. *Clericus*, 1. And note that the tonsure ought to be conferred by the bishop (above, *De aetate et qualitate*, c. *Cum contingat*); it can also be conferred by an abbot, as in c. *Abbates*, *De privilegiis*, in the Sext.

Note the text at *scandalum generari* that scandal is to be guarded against between married persons, and that a woman is easily scandalized if her husband wears the clerical tonsure. And so note that future scandals are to be met, which pertains to the office of the judge (Dig., *De usufructu*, l. *Aequissimum*); for what can be blamed is also to be guarded against (above, *De servis non ordinandis*, c. 1). For scandal between spouses is grave (below, *De excessibus praelatorum*, c. *Quod sit grave*). On scandal see what I wrote below, the next chapter, and above, this title, c. *Cum olim*, where I set down many references.

Note the text at *cum de consuetudine*, by the contrary sense, that a custom is valid that married clerics be compelled to wear the tonsure even if they are not beneficed; for in the wearing of the tonsure the custom of the country is attended to, as in marriages and elections, as above, the preceding chapter, and below, *De cognatione spirituali*, c. *Martinus*; for this makes c. *Accedens*, above, *De praescriptionibus*, and c. *Non est*, *De consuetudine*, in the Sext. See more fully in this same chapter what I wrote in the third question, according to Johannes Andreae. And note from this text that custom can be introduced about a negative act, namely that one is not bound to do this, as here the acolyte is not bound to wear the tonsure.

Note at *clerici uxorati* that married clerics placed in minor orders are not bound to wear the tonsure; but if they are not married and wish to live clerically, they are well bound and compelled, as in c. *Clericis* and c. *Clericus*, 1, above, *De vita et honestate clericorum*; on which by Johannes Andreae in c. *Tuae*, below, *De apostatis*. Note the text at *privilegio* that a married cleric in minor orders does not enjoy clerical privilege; on which say as below, this title, c. 1, in the Sext. And for this reason, because he does not enjoy it, he does not wear the tonsure, because he who does not feel the advantage ought not to feel the burden (*De regulis iuris*, c. *Qui sentit*, in the Sext). Hence from this text it appears that even if such a married man went about in the habit and tonsure he would not enjoy [it]; understand, except as to excommunication and suit, as the said c. *Clerici*, same title, in the Sext.

Note at *mandamus quatenus*: from this take the form of the sentence. For the Pope orders the bishop not to molest, and so prohibits molestation in the future, like the interdict *Uti possidetis*, as above, *De probationibus*, c. *Licet causam*, and above, *De restitutione spoliatorum*, c. *Audita*; l. *Legi* and l. *Harum*, Dig., *Si servitus vindicetur*, make for it. Note at *beneficium* the express text that a married man is capable of an ecclesiastical benefice; understand by the dispensation of the bishop, as I said above, this title, c. 1; and then he would be compelled to wear the tonsure, on which I shall speak more fully below. For anyone having a benefice in title, even if he is a married cleric, is bound to wear the tonsure, and acting to the contrary sins mortally, as here and in c. *Si quis ex clericis*, above, title 1.

Note at the end of the chapter that it is a reproach to the clergy if a cleric mixing himself in secular business wears the clerical habit and tonsure: for so it appears that the dishonourable act of one cleric redounds to the injury of the whole clergy; and if one cleric suffers injury, the whole clergy seems to suffer (argument here, and above, *De renuntiatione*, c. *Ad supplicationem*); c. *Si diligenti*, above, *De foro competenti*, makes for it. Hence the Apostle too says (2 Corinthians 6): *Giving no offence to any man, that our ministry be not blamed; but in all things let us exhibit ourselves as the ministers of God*. And the same word, *that our ministry be not blamed*, is written in C. 2 q. 5, c. *Si mala fama*. And *vituperare* is said

as if *vitia parare* [to prepare vices], as the Archdeacon notes on C. 6 q. 1, c. *Sunt plurimi*. Hence many things are done, and many abstained from, lest something become cheap, as is noted on dist. 80, c. *Episcopi*; on which by the Archdeacon, dist. 45, c. *De Iudaeis*, and dist. 50, c. *Quis caute*. So also a bride is not at once handed over, lest she become cheap (C. 27 q. 2, c. *Institutum*, and there the concordances; and below, *De privilegiis*, c. 1).

In the single gloss, at the beginning, at *argumentum contra*, it is objected also that a married cleric enjoys clerical privilege, because even a concubinary enjoys it (above, *De iudiciis*, c. *Cum non ab homine*; above, title 1, c. 2; and below, *De sententia excommunicationis*, c. *Si vero*, at the end); otherwise it would follow that the canon favoured lust more than chastity, and so vice more than virtue, against the text in the Authentic *De restitutionibus et ea quae parit*, at the end. Solution: the married man by the fact renounced the clerical profession; the concubinary, however, did not. Hence not by intercourse but by marriage he loses the privilege; similar above, *De bigamis*, c. *Quia circa*, and dist. 34, c. *Fraternitatis*. In the same gloss, at *et clericus coniugatus*, it opposes secondly that a married cleric is compelled to wear the tonsure, as in c. *Clericus*, *De vita et honestate clericorum*, in the gloss alleged, and C. 20 q. 3, c. *Eos qui semel*. Solution: c. *Eos* speaks of one placed in sacred orders, as appears there in the text; and as Innocent notes in c. *Tuae*, below, *De apostatis*, and there Johannes Andreae, on the gloss

To c. *Clericus* answer that he is bound to wear it if he wishes to enjoy clerical privilege, otherwise not, as here, provided he holds no ecclesiastical benefice, as the text says here. From which it is hinted that a married cleric can obtain a benefice. But above, this title, c. 1, and throughout, seems to stand in the way. Solution: say that by grace a man married to one wife, and she a virgin, can hold a benefice on account of the hope of returning to the clerical state if the woman dies or wishes to vow chastity; and then he ought to wear the tonsure, as here; and so dist. 32, c. *Si qui vero*, can be understood. Or say, according to Goffredus, that a layman can be a prebendary in a church, although not a canon, as is noted above, *De constitutionibus*, c. *Cum M. Ferrariensis*. And understand that by the dispensation of the bishop he can obtain a simple benefice without cure, as Goffredus and Philippus note in the next chapter, and Guilielmus in the *Speculum*, *De legato*, § *Nunc de episcoporum*, verse 26. For he dispenses even with a homicide as to such a benefice (below, *De homicidio*, c. *Ad audientiam*), and with one deposed (dist. 50, c. *Studeat*; dist. 28, c. *Presbyterum*); and therefore rather in a simple benefice than in a dignity, because there is less scandal. Alanus, however, above, *De praescriptionibus*, c. *Causam*, says that by the bishop's dispensation a layman cannot have even a simple benefice in title, but [only] for stipend and subsidy; not, however, in perpetuity, but he can for a time. Vincentius, Tancredus and Philippus also hold this there. Hostiensis says that in this chapter it was by the custom of the place that laymen were beneficed there, because they served in the church by cleaning the lamps, lighting them and doing similar things; and it was the custom that such men wore the tonsure and an honest habit; for which add what is noted on dist. 32, c. *Placuit*. Others say, and this pleases Aegidius, that this is to be understood by dispensation of the Pope.

But against this: because the bishop can dispense with a homicide cleric so that he may retain his benefice, although he cannot dispense with him as to office, as below, *De clerico pugnante in duello*, c. 1 and 2. Moreover he can dispense in those suffering a defect of age for all dignities below the title of the episcopate, if yet they are without cure and they have completed the twentieth year (*De aetate et qualitate*, c. *Permittimus*, in the Sext; and as Johannes Andreae notes in c. *Licet canon*, *De electione*, in the Sext). Moreover he can dispense in one who is in minor orders, provided he can be ordained priest

within a short time, so that he may be admitted to the rule of a parish church, as in c. *Praeterea*, above, *De aetate et qualitate*, and in c. *Multis*, same title, in the gloss which begins *Sic olim*. Likewise he can dispense in adulteries and any crimes lesser than adultery, as above, *De iudiciis*, c. *At si clerici*, and as the gloss notes there which begins *Argumentum contra*. Likewise with those ordained outside the four [Ember] times, a fitting penance being imposed (above, *De temporibus ordinationum*, c. *Consultationi*, and as noted there in the gloss which begins *Ita*). Likewise with those ordained ignorantly by an excommunicated bishop, as above, *De ordinatis ab episcopo qui renuntiavit episcopatui*, last chapter; C. 9 q. 1, c. *Ab excommunicatis*. Likewise with one ordained ignorantly by a bishop who renounced the episcopate, as the said last chapter. Likewise with those who are in the fourteenth year, who cannot be taken up to the cure of a parish church, according to the distinction of Goffredus; so he understands *De aetate et qualitate*, c. *Indecorum*. Others [say] the contrary, and better, because there the argument from the contrary sense ceases, as in l. *Caelicolarum*, Cod., *De Iudaeis*, because elsewhere the contrary is in the law, as in c. *Cum in cunctis*, above, *De electione*; because crimes are not to be stroked, lest wounds be kept uncured (dist. 50, c. *Si quis diaconus*). Likewise with a sacrilegious man (dist. 50, c. *Si quis presbyter*). Likewise in perjury, theft, a fornicator and other capital crimes, if they are hidden (dist. 50, c. *De his vero*; and as the gloss notes in the said c. *At si clerici*). Likewise with priests having several concubines, that they may remain in their office, because they do not incur the irregularity of bigamy, as the said c. *Quia circa*, above, *De bigamis*. Likewise with stranger clerics, that, inquiry having been made about their life and orders, he may permit them to celebrate (below, *De clericis peregrinis*, c. *Tuam*). Likewise with those who while still little children, unknowingly, received an order simoniacally, money having been given through the cupidity of their parents (C. 1 q. 5, c. *Quicunque*, and c. *Praesentium*). Likewise with a schismatic who has returned, that he may remain in the clerical state, lest he despair. For holy David did penance for deadly crimes and remained in honour; of whose history, namely of the adultery, betrayal and homicide, and also of his penance, it appears in 2 Kings 12 and in the preceding and following chapters. And so the blessed Apostle Peter, although he denied Christ three times, yet wept bitterly, and afterwards remained the prince of the Apostles and the Vicar of Christ (Matthew 26; Luke 22; and John 21); on which dist. 50, c. *Ut constitueretur*. Likewise he dispenses by mitigating penitential stains (dist. 50, c. *De his clericis*; C. 26 q. 7, c. *Tempora poenitudinis*). Likewise with clerics of another diocese instituted in his dioceses without their knowledge, that he either remove them or permit them to remain there (below, *De clericis peregrinis*, c. *Te nobis*). Likewise with priests who have contracted marriage in fact, that when penance has been done he

restore to them their benefices or offices (above, this title, c. *Sane*, the second). Likewise with a priest who went to a private place, not with the intention of invoking a demon, but to find something in the future by inspection of an astrolabe (below, *De sortilegiis*, c. *Ex tuarum*, and as the gloss notes there which begins *Habita*). Likewise with one who received orders furtively, in the case of which c. *Veniens* speaks, below, *De eo qui furtive ordinem suscepit*, in the gloss which begins *Hic est argumentum*. Likewise with one who, believing that he was offering service to God, had himself castrated (above, *De corpore vitiatis*, c. *Significavit*). Likewise with those simoniacally promoted, in the case of c. *Si laicus*, above, *De electione*, and C. 1 q. 1, c. *Praesentium*. Likewise with a cleric ordained in contempt of the Church who ministers (dist. 50, c. *Studeat*; and below, *De clerico non ordinato ministrante*, c. 2, in the gloss). Likewise with a monk who transferred himself from the White to the Black [monks], if the monastery to which he passed was of a lesser religion; because if it were of a greater, he would not need

dispensation, as below, *De regularibus*, c. *Licet*; on which in c. *Ex parte*, the second, above, *De temporibus ordinationum*, where the abbot dispenses; therefore all the more the bishop, unless the abbot dispensed by a special privilege. Likewise with those who were ordained without the permission of their bishop (above, *De officio archidiaconi*, c. *Significasti*, and as noted in the gloss which begins *Hoc ideo*). Likewise with a deacon who on a Saturday wounded another deacon and took a wife, that when penance has been done and the wife dismissed he may remain in his office (below, *Qui clerici vel voventes*, c. 1). Likewise with a cleric who of his own accord undertook and offered a duel, that he may remain in his office (below, *De clerico pugnante in duello*, c. *Porro*). Likewise with a cleric who after a prohibition had himself promoted to two sacred orders, if he wishes to pass to religion (below, *De eo qui furtive ordinem suscepit*, c. *Innotuit*). Likewise with a cleric promoted *per saltum* (below, *De clerico per saltum promoto*, single chapter, in the gloss which begins *Ut ipse*). Likewise in every vow except the vow of continence and the vow in subsidy of the Holy Land (below, *De voto*, c. 1, in the gloss which begins *In omni*, and c. *Ex multa*, in the gloss which begins *Ecce hic*). Likewise with the heirs of those who killed the clerics of those churches in which they had the right of patronage, who are prohibited from benefices to the fourth generation, that they can be promoted by the indulgence of bishops (*De poenis*, c. *In quibusdam*, and as noted in the gloss which begins *Cum non determinent*). Likewise in the cases expressed in dist. 58, c. *Quamvis*, and dist. 100, c. *Chorepiscopi*. Likewise with one who had become ineligible because he had received an election made through abuse of secular power or might (above, *De electione*, c. *Quisquis*, in the gloss which begins *Per hoc*). Likewise with one ordained through simony committed with [his] ignorance (below, *De simonia*, c. *De simoniace*, in the gloss *Dispensative*). Likewise with a church annexed to a dignity, that he reside personally in the greater, and serve in the church through a vicar (below, *De praebendis*, c. *Extirpandae*; above, *De aetate et qualitate*, c. *Cum te*, in the gloss *Qualiter*). Likewise with a heretic who has returned (*De haereticis*, c. *Ad abolendam*; dist. 50, c. *Presbyteros*; and as noted in the said c. *At si clerici*). Likewise with a homicide who fell into homicide not deliberately but by chance, that he may obtain a simple benefice and be promoted to minor orders (below, *De homicidio*, c. *Ad audientiam*; below, *De clerico pugnante in duello*, c. *Henricus*; dist. 28, c. *Presbyterum*). Since therefore the things above said are greater than the case about which it is asked, namely whether the bishop can dispense with a married cleric for obtaining a simple benefice, provided he is not a bigamist, say as I wrote above, this title, c. *Diversis fallaciis*, in the last question.

In the same gloss, at *dicas quod non loquitur de illo privilegio* C. 17 q. 4, c. *Si quis suadente*: say, whatever the gloss says, that this text is to be understood according to the distinction of c. 1, *De clericis coniugatis*, in the Sext. Hence this verse *Quoniam igitur* ought to be understood of privileges other than those two which are contained in the said c. 1, namely of excommunication and suit. For even a married man, not a bigamist, wearing the habit and tonsure enjoys the privilege of c. *Si quis suadente*, and also [the privilege] that he cannot be sued for a criminal cause, neither criminally nor civilly, before a lay judge, as in the said c. 1, same title, in the Sext. Hence when the text says here *etiam tonsuratus*, and so on, say: he cannot enjoy privileges other than the aforesaid two. And when it adds *quia cum eum oporteat*, and so on, supply "especially"; for whether the married cleric mixes himself in secular affairs or not, he is not stripped of all clerical privilege, except these two aforesaid. Yet it is to be admitted that if a married cleric going about in habit and tonsure mixes himself in secular business, and especially dishonourable ones, he could be warned to desist, if he does not wish to be stripped of the aforesaid two privileges as of the others, by the reason set down here at the end of the text; for which makes Clem. 1, *De vita et honestate clericorum*. But in a bigamist this text cannot be

understood, since he is stripped of all clerical privilege and made incapable of an ecclesiastical benefice; and therefore he ought in no way to wear the clerical tonsure, as in c. 1, *De bigamis*, in the Sext; and therefore the verse here *dummodo* would serve.

And that we may grasp more fully, when it is asked whether a married cleric enjoys clerical privilege, take these conclusions.

The first conclusion is that a married cleric who is not a bigamist, so long as he is married, does not enjoy [privilege] except the aforesaid two, namely of c. *Si quis suadente*, and that for crimes they cannot be sued criminally or civilly except before an ecclesiastical judge, as above; but for causes other than criminal they well can be sued civilly. And for the aforesaid crimes understand that married men cannot [be sued before a lay judge] if they wear the habit and tonsure, as in the said c. 1, same title, in the Sext, and as noted there by Johannes Andreae in the *Novella*. This conclusion is to be limited as to six cases.

The first, where it has been dispensed by the bishop with a married man that he may have a simple benefice in title; because then he will have a third privilege, namely of this capacity of spiritual right, as here in the verse *dummodo*, and dist. 32, c. *Si qui vero*, with similar places. Likewise he will then have all the rights accessory to this right; for which the gloss below, title 5, c. *Quia in tantum*. Hence a married man having a benefice in title will be capable of tithes and of the right of conferring benefices depending on his benefice, as in the rule *Accessorium*, *De regulis iuris*, in the Sext. Hence if he were a canon of an episcopal church he could be a delegate of the Pope, by c. *Statutum*, *De rescriptis*, in the Sext; which understand when [the cause] is spiritual, because then it could not be delegated to him as a layman (argument c. *Decernimus*, above, *De iudiciis*).

The second case is where there is a custom to the contrary, namely that married clerics enjoy also other privileges; for such a custom is valid, especially if it preceded that constitution of the said c. 1, same title, in the Sext; for which makes c. 1, *De constitutionibus*, in the Sext, and c. 1, *De bigamis*, in the Sext, by the contrary. Johannes Monachus notes this in c. 1, same title, in the Sext, although Johannes Andreae there holds the contrary, and perhaps not well, as Lord Matthaeus says; for which it makes that such a custom is in favour of clerics. Hence just as a contrary custom, that married clerics should not enjoy the aforesaid two, would not be valid, as being against ecclesiastical liberty (argument c. *Noverint*, below, *De sententia excommunicationis*).

The third case is where married clerics are *conversi* of a secular church, or are oblates of some church to which they offered themselves and their goods, even without change of habit; because such men, even if they were pure laymen, would enjoy every clerical privilege, as Johannes Andreae holds in c. *Per exemptionem*, *De privilegiis*, in the Sext. For if such *conversi* or oblates enjoy the privilege of exemption where the church is exempt, all the more ought they to enjoy the privilege of common law (argument l. *Eius militis*, § 1, Dig., *De testamento militis*). And I think that wives also, who are *conversae* and oblates with themselves and their goods, enjoy the same privilege, by the text of the said c. *Per exemptionem*, joined with l. 1, Dig., *De verborum significatione*. It is otherwise in the wives of married clerics where they themselves are not oblates of the church, because they enjoy no privilege, according to Johannes Andreae, same title, c. 1, in the Sext, where he reproves the gloss of Johannes on C. 11 q. 1, c. 3. But perhaps that gloss can be saved in two cases. First, in the wife of a married cleric who was promoted to sacred orders, even if she, remaining in the world, vowed continence; for then she would be an ecclesiastical person. Which is evident, because when her husband is dead she

could not marry another, by c. *Coniugatus*, below, *De conversione coniugatorum*. Secondly, it can be saved in the wife of an Eastern priest, because she too, when her husband is dead, cannot marry another (dist. 28, c. *Quia sunt culpae*).

The fourth case is where married clerics are servants of some bishop; for these as to their person enjoy every privilege, because [they are] of the bishop's household (argument last chapter, above, *De officio archidiaconi*), even if they are pure laymen, as the Doctors commonly hold in c. 2, above, *De foro competenti*, where fully by Lord Antonius de Butrio, who understands it of long-standing members of the household. c. *Cum non ab homine*, above, *De iudiciis*, makes for it, and C. 12 q. 2, c. *Ecclesiarum servos*; also C. 7 q. 4, c. *Quisquis*, and C. 11 q. 1, c. *Continua*, with the two following chapters.

The fifth case is where a married cleric, warned three times, does not desist from the exercise of butchery or of a tavern in his own person; because so long as they persevere in these they enjoy no privilege, as in c. 1, *De vita et honestate clericorum*. The sixth case is wherever even unmarried clerics would lack clerical privilege, *a fortiori* (argument same title, c. 1, in the Sext).

From this it is inferred, for the question whether a married cleric, even going about in habit and tonsure, can be vicar or official of the bishop, or delegate for a spiritual cause. Johannes Andreae says that although he has sometimes seen the contrary observed, yet the truth is that he cannot, by c. 1, same title, in the Sext, at *in ceteris*, and so on. For it is evident there that as to two things he is reckoned a cleric, and not beyond; for which C. 16 q. 7, c. *In nova*, with the aforesaid and following; above, *De constitutionibus*, c. *Ecclesia*; and below, *De rebus ecclesiae non alienandis*, last chapter. And so it is said to have been disputed in the University of Padua, and what is said of uncleanness above, this title, c. *Quod a te*, was brought in. Further, that disputant held that a sentence given by such a man in that case does not hold, since he was not a judge (C. 11 q. 1, c. *Clericum nullus*; and above, *De constitutionibus*, c. *Ad nostram*). Another [question] also was disputed: whether a married cleric reading the epistle in the pulpit without vestments is excommunicated by a statute of the bishop excommunicating all non-clerics so reading the epistle. And the disputation was resolved that he was not excommunicated,

because although married, yet he remains a cleric, as appears above in the rubric and as is noted there at the end. For in penalties interpretation is strict (*De regulis iuris*, c. *In poenis*, in the Sext), especially in this case, because this man can be called mixedly cleric and layman; and in penalties we ought to take what is more benign, as in the aforesaid c. *In poenis*; for which below, *Ne sede vacante*, c. 1, in the second gloss. And dist. 32, c. *Si qui vero*, and C. 12 q. 1, c. *Quia tua*, make well for it, where it says that such clerics ought to be diligent in singing psalms, yet they ought not to minister at the altar (C. 27 q. 2, c. *Multorum*). Likewise in general all things which are forbidden to laymen are forbidden to these married clerics, as in c. *Contingit*, *De arbitris*, according to Lord Antonius de Butrio.

From these it is also inferred that where a married cleric ceases to be married through the death of his wife, he recovers all privileges (argument last chapter, above, title 2). Likewise that where a cleric is married only in fact, because the marriage does not hold by reason of consanguinity, he enjoys every privilege (argument above, *De iudiciis*, c. *Cum non ab homine*); which seems to be the mind of Johannes Andreae here at the end of the apparatus. Likewise that although, unless he goes about in habit and tonsure, he does not enjoy the privilege, if he resumes them he enjoys those two, according to the Archdeacon and Johannes Monachus there, and Lord Antonius here. Yet I think that in the case in which it would not profit a layman to be ordained a cleric, as because he was captured by a lay

lord or power, so also it would be in a married cleric resuming [them], as above; on which there is a text, according to one understanding, in c. *Ex parte M.*, below, *De privilegiis*; what is noted in c. 2, *De obligatis ad ratiocinia*, makes for it.

The second conclusion is that bigamist clerics in no way enjoy clerical privilege, whether they are married or not, as was said above; unless they were *conversi* of some monastery, as in the Authentic *Ingressi* and in the Authentic *Si qua mulier*, Cod., *De sacrosanctis ecclesiis*, and as noted above, *De foro competenti*, c. 2. Yet the Pope, if he wishes to dispense, can; because irregularity was not added to bigamy by natural law but by positive law; nor is it of the essence of order that one not be a bigamist. It is evident: because although he is a bigamist, yet if he is ordained he receives the character, like any illiterate, layman and married man, as the gloss notes on dist. 36, c. 1, and Innocent in c. *Cum in cunctis*, above, *De electione*, and Johannes Andreae in c. *Nullus*, *De temporibus ordinationum*, in the Sext, in the *Novella*. Nor does c. *Nuper*, above, *De bigamis*, stand in the way, because although difficulty is noted, yet the faculty is not taken away. Nor does the authority of the Apostle stand in the way, saying *the husband of one wife*, and so on (1 Timothy 3); because against the authorities of the Apostle one cannot dispense in those things which concern nature, and so are of natural law (dist. 8, c. *Quae contra mores*); nor can one dispense as to the necessary sacraments and the faith of the bishop, as the theologians note on [*Sentences*] 4, dist. 27, and there Thomas. Hence by dispensation of the Pope a bigamist could be promoted to all orders, even to the episcopate, as the Archdeacon notes on dist. 50, c. *Quicunque*; and Pope Lucius dispensed with the Archbishop of Palermo, who was a bigamist, as the gloss notes on dist. 34, c. *Si quis viduam*, § *Sed postea*; for which dist. 82, c. *Presbyter*; although scarcely, and not without great and just cause; for which see what I wrote fully above, this title, c. *Cum olim*, in that question which begins *Sed quaeritur si non subesset talis causa*. But in those things which are not of natural law, nor against morals or against the faith of Christ, the Pope well can dispense even against the authority of the Apostle, because the Pope is greater than the Apostle, just as Peter was of greater authority than Paul in administration (dist. 21, § 1); hence the Pope is in the place of Peter, and so greater than Paul (C. 2 q. 7, c. *Puto*; dist. 21, c. *In novo*). Hence if an equal has no command over an equal (Dig., *De arbitris*, l. *Nam et magistratus*; Dig., *Ad Trebellianum*, l. *Ille a quo*, § *Tempestivum*; and in c. *Innotuit*, above, *De electione*), much less has the lesser command over the greater (C. 24 q. 1, c. *Quia vetus*; dist. 30, § 1). For the Pope is the Vicar of Jesus Christ, and not of Paul (above, *De translatione episcopi*, c. *Quanto* and c. *Inter corporalia*; and below, *Ut ecclesiastica beneficia*, c. *Ut nostrum*). And it is very wonderful that the gloss and its followers in c. *Super eo*, *De bigamis*, say that bishops can dispense with bigamists that they may receive minor orders (dist. 34, c. *Lector*), or minister in those received, and the Pope cannot do more than other lesser bishops, since he has the plenitude of power, but the others a part of the solicitude (C. 2 q. 6, c. *Decreto nostro*, and c. *Qui se scit*). And so it is to be held that the Pope can dispense with a bigamist.

But I ask whether a bigamist made a monk or religious would recover ecclesiastical privileges? I answer yes: for if he recovers [them] from the bishop's household alone, as above, how much more from entry into religion; although the Archdeacon left it in doubt on dist. 84, c. *Quisquis*. Today, however, it is express so, in the rule *Delictum personae*, *De regulis iuris*, in the Sext, and there fully by Johannes Andreae in the *Mercuriales*; for this *De statu monachorum*, c. *Recolentes*, and *De regularibus*, c. *Veniens*. And note that a bigamist today is forbidden under anathema to wear the tonsure, in c. 1, at the end, *De bigamis*, in the Sext.

The third conclusion is that unmarried clerics are feigned bigamists; for, taking the word properly, a bigamist is one who successively and at different times had two lawful wives. The fifth conclusion is that a married cleric [having a] benefice

in title is bound to live clerically and wear the habit and tonsure, even if [his wife] is scandalized, as here in the verse *dummodo*. Likewise he is bound to say the whole office like one not married, because the benefice is given on account of the office (C. 12 q. 1, c. *Quia tua*; and in the last chapter, *De consuetudine*, in the Sext; and in c. *Dolentes*, below, *De celebratione missarum*). Yet the Doctors say here that married men ought not to minister at Mass (C. 27 q. 2, c. *Multorum*); but this is not observed by custom, for even a bigamist serves the priest at Mass, which is tolerated without vestments; but with vestments they ought in no way to be admitted, as in the said c. *Multorum*.

I ask whether custom is introduced by non-use. It seems not, because custom is as it were a common habituation and repetition of acts (C. 25 q. 2, c. *Ita nos*; Cod., *De episcopali audientia*, l. 3, at the end, with similar places); but about a negative no act is to be found, as if I do not compel, do not read, do not sing, and the like; therefore neither the habituation or iteration of it; to which c. *Ad audientiam*, below, *De ecclesiis aedificandis*, the first; and below, *De desponsatione impuberum*, c. *Ad dissolvendum*. Solve: according to Johannes Andreae and Petrus de Ancharano, and the common theory of the Legists, it is this, namely, when it is asked whether custom is introduced by non-use, say that sometimes non-use has an implicit act contrary to the disposition of the law, sometimes not. In the first case, sometimes non-use contradicts the disposition of the law in substance: as because the law wills that the succession be divided equally among heirs; the custom of England defers the inheritance to the firstborn. Likewise, on the days on which the royal cities, Rome and Constantinople, were founded, the law orders a cessation from lawsuits; custom does not observe this. Similarly the law forbids that criminal causes be heard in the time of Lent; custom is contrary (Cod., *De feriis*, l. *Omnes dies* and l. *Quadraginta*). Likewise the law permits one having free soil to build up to the sky (Cod., *De servitutibus*, l. *Altius*); custom in many places prohibits this beyond a certain form (Cod., *De aedificiis privatis*, l. 1); and similar examples of contrariety in substance, not in form. Sometimes it contradicts in form, not in substance: for instance, in the alienation of a thing of the church, according to the laws, great solemnity ought to intervene, which custom takes away, as is noted in the Authentic *Hoc ius porrectum*, Cod., *De sacrosanctis ecclesiis*, and in c. *Hoc ius*, C. 10 q. 2, and in c. *Dudum*, *De rebus ecclesiae non alienandis*, in the Sext. And in all these cases, when the custom has an act contrary to the disposition of the law, in substance or in form, by non-use of the law the law itself is taken away wholly.

Sometimes non-use does not have an implicit act contrary to the disposition of the law in substance or in form: for instance because that case of the law does not occur; or it occurs, but men have not used the law in such a case, yet they have not used the contrary. Example, when it does not occur: in a hermaphrodite, who is judged male or female according as he grows more heated. Suppose that this case does not occur for a thousand years: certainly not by this will prescription run against the law disposing, as above; rather it will be observed if it occurs in future. Example of when it occurs, but they have not used the law nor its contrary: in the security for threatened damage, which is sought when a neighbour's house threatens ruin; when it was never sought, though it had many times occurred that ruin threatened, certainly not by this are those laws on threatened damage taken away. Put another example: the law permits building up to the sky, as l. *Altius*, alleged above; yet for a very

long time it has been built up to a certain height and not higher. This simple abstinence would not take away by this the right of building up to the sky. Johannes Andreae [and] Cynus note this fully in l. 2, Cod., *Quae sit longa consuetudo*; and what is noted in l. *Rem non novam*, Cod., *De iudiciis*, makes for it; and Hostiensis in the *Summa*, *De consuetudine*, last §, verse *Nunquid ergo*.

Now let us discuss something of the questions which Johannes Andreae forms here. I ask, therefore: I proceeded against John for the deprivation of his benefice on the ground that he contracted marriage with Bertha, and so I proved. Then Bertha, by force of these proofs, wishes to proceed against John, and says he is her husband, and so asks that it be pronounced: can she? It seems so (C. 3 q. 6, c. *Hoc quippe*). Johannes Andreae determines the contrary, by l. *Denuntiasse*, last §, Dig., *De adulteriis*, and by the penultimate chapter, above, *De re iudicata*, where it is fully had by the Moderns whether in connected matters a sentence with one of the connected profits or harms the other; what is noted in c. *Dilecti*, at the end, below, *De praebendis*, makes for it. And say the same conversely, if John by those acts and the sentence wished to prove her his wife. Likewise the same if John, who was being compelled to the tonsure, excepted that he was married to Bertha and proved it: for this is a confession and proof which, as to Bertha, who was not in the trial, does not prejudice; to which above, *De re iudicata*, c. *Exceptionem*, with similar places, in the Sext. But if John seeks Bertha as wife, whether by this very fact he is to be deprived of his benefice? It seems not, by the decretal *Mulieri*, above, *De iureiurando*; for which in the *Speculum*, *De confessionibus*, § 2, verse 10; and what Bartolus notes in l. *Cum filius*, Dig., *De verborum obligationibus*, makes for it; and fully in c. *Fertur*, C. 5 q. 1, in the gloss *Ecce*; and dist. 81, c. *Tantis*, in the gloss *Sic ergo*; and most fully by the Legists, Cod., *Res inter alios acta alteri non praeiudicat*.

Secondly I ask whether one believing the acolytate to be a sacred order, and so believing himself bound to continence by the reception of the acolytate, can afterwards contract marriage; and if he has contracted, whether it holds? It seems not, because the intention is weighed more than the effect (Cod., *De episcopis et clericis*, l. *Si quis non dicam rapere, sed attentare*; and in l. *Is qui cum telo*, Cod., *Ad legem Corneliam de sicariis*; and above, *De bigamis*, c. *Nuper* and the last chapter, with similar places); and so Johannes Andreae holds. c. *Litteras*, § *Porro*, above, *De restitutione spoliatorum*, also makes amply for it, because one acting against conscience builds unto Gehenna; for *all that is not of faith is sin*, says the Apostle (Romans 14), gloss: "of faith," that is, of conscience; and above, *De praescriptionibus*, c. *Quoniam omne*; C. 28 q. 1, c. 1; *De poenitentia*, dist. 3, c. *Illud*, beyond the middle, toward the end of the distinction. Yet if he has contracted, it holds, because not the vow but the solemnity of sacred order, by the constitution of the Church, has the power to dissolve (*De voto*, c. 1, in the Sext); and what the antepenultimate gloss notes there makes well for it. Hence one receiving a sacred order, although he does not believe he is bound to continence by it, yet is bound; on which above, the preceding chapter, in the first gloss; what is noted in c. *Si vero*, the second, below, *De sententia excommunicationis*, and in c. *In audientia*, same title, makes for it.

Thirdly I ask whether by custom married clerics without benefices can be constrained to wear the habit and tonsure. It seems that such a custom is not valid, that one should wear a habit contrary to his profession and his state (below, *De statu monachorum*, c. 2; dist. 96, c. *Illud*; *Ne clerici vel monachi*, c. 2, in the Sext); for which the text here at the end makes, for it is a disgrace to the Church if such men exercising secular business wear the tonsure. Johannes Andreae holds that the custom is valid (argument c. 1, *De bigamis*, in the Sext): for if custom is not valid in a bigamist, therefore it is valid in

a non-bigamist, because when one is denied the other is granted (above, *De rescriptis*, c. *Nonne*); and here by the contrary sense: for if he is not compelled because there was not a custom, therefore by the contrary, if there had been a custom, he would be compelled; to which makes well *De regulis iuris*, c. 1, in the Sext; dist. 50, c. *Si quis virorum*; below, *De re iudicata*, c. *In nonnullis*. And such a custom is founded on canon law (C. 20 q. 3, c. *Eos qui*) and on the character of order impressed, as was said on the rubric at the end. To the contrary [arguments] I answer that custom can restrict, but not relax, the form and quality of the habit and tonsure, as Johannes Andreae notes fully in c. *Quod super his*, below, *De consanguinitate et affinitate*, on the second gloss.

Fourthly I ask: if a married cleric went about as a layman, [and] afterwards resumes the habit and tonsure, does he recover those two privileges of which in c. 1, below, this title, in the Sext? It seems not: because in prejudicial and contrary matters it suffices to have chosen one way for the perpetual exclusion of the other, as in c. *Ut quis duas*, above, *De electione*. Likewise it is certain that by not wearing the habit then he did not enjoy clerical privilege; therefore by his contrary will alone, by resuming, he ought not to recover it. For he could at pleasure now put it off, now resume it, again and again in a month, and so the law would be a mockery with him, which ought not to be (last law, last §, Cod., *De iure deliberandi*; and l. *Si praetor*, § *Marcellus*, Dig., *De iudiciis*). After he has once renounced the privilege, therefore, at least tacitly by putting off the habit, what is extinguished ought not to revive, as in c. *Quam periculosum*, C. 7 q. 1, and l. *Qua res*, § *Aream*, Dig., *De solutionibus*; to this makes well l. *Quid sit fugitivus*, at the beginning, Dig., *De aedilicio edicto*. To the contrary: because the humanity of just repentance ought not to be cut off (C. 2 q. 6, c. *Si quis libellos*); but this man now wears it; therefore he enjoys the privileges. Nor is it absurd to be restored to that which he had betrayed by his own act (*De electione*, c. *Quia speciali*, in the Sext, with the concordances noted there); for everything is dissolved by the same causes by which it is born (below, *De regulis iuris*, c. 1). For this part make well what is noted in the last chapter, above, *De vita et honestate clericorum*, where those clerics are deprived of immunity while they involve themselves in secular business, and recover it when they have ceased. Johannes Andreae says that he saw it defined at Padua that he would recover, which commonly did not please the Doctors; yet for the definition what Johannes Monachus and the Archdeacon note in c. 1, same title, in the Sext, and in Clem. *Dioecesanis*, *De vita et honestate clericorum*, amply suffices. Johannes Andreae says that it seems quite equitable that he not lose the privilege unless he perseveres in the excess or the defect; it makes for this, above, *De vita et honestate clericorum*, c. *Clericus*, according to one reading which sets down one case only; and by Johannes Andreae after Innocent there.

But in how long a time is such perseverance induced? Johannes Andreae argues that by a year (*De vita et honestate clericorum*, single chapter, in the Sext). Yet one can argue for three days by c. *Ad nostram*, below, *De regularibus*, and c. *Constitutionem*, same title, in the Sext; likewise for ten days (C. 2 q. 6, c. *Anteriorum*); likewise for a month by c. *Quam sit*, above, *De electione*. Indeed it can be argued even for one day and for less time, by c. *Ut periculosa*, *Ne clerici vel monachi*, in the Sext, at *in scholis vel alibi temere habitum suae religionis dimittat*. Indeed the Canon says that a monk ought to use the habit (dist. 23, c. *Sanctimoniali*), and other

canons say that [he must] even in bed (C. 20 q. 1, last chapter); hence he ought to sleep clothed with the habit. C. 20 q. 1, c. *Vidua*, at *in lectulo*, makes for the aforesaid; and the gloss on c. *Sanctimoniali*, dist. 23, says that he ought always to keep the habit, even in bed and in sickness. But the Archdeacon

says that it does not seem it ought to be understood so bitterly (C. 21 q. 4, c. 4, at *extra domos*); but certainly there it speaks of a secular cleric, who is not bound so much as a monk. Johannes Andreae, in the said c. *Ut periculosa*, in the *Novella*, says that whenever a monk or religious shows himself to the sight of men without his own habit, whether in a clerical habit or in a lay habit, he is bound by that constitution if [it is] without just cause, for instance of fear or danger, as above, *De vita et honestate clericorum*, c. *Clerici*, and see there what I wrote; and understand him bound by the greater excommunication by the very fact, as in the said c. *Ut periculosa*, at the beginning; for it intends to provide against the wandering of religious. Johannes Andreae says that a declaration of the Pope on this doubt would be necessary. It seems probable enough that until he has been warned he does not wholly lose it; and if he resumes the habit and tonsure he will resume the privilege, by what is noted in c. *Monasteria* and in c. *A crapula*, above, *De vita et honestate clericorum*, and in the last chapter, same title, where a threefold warning is required before he loses the clerical privilege; for which c. *Contingit*, the second, below, *De sententia excommunicationis*; and in c. 1, *De vita et honestate clericorum*, in the Clementines; and in c. 1, below, *De apostatis*. For which also makes C. 21 q. 4, c. *Episcopi*, at the end, at *donec quae statuta sunt adimplere maturent*; and C. 21 q. 2, c. 2, at *quamdiu eum restituat*, and so on; and dist. 81, c. *Clericos*. But if when warned they do not resume, then they lose it wholly (argument dist. 92, last chapter; and above, the preceding title, c. *Si quis*, c. *Sicut*, and c. *Si autem*). For to whom is it doubtful that it is a greater crime for priests to keep concubines than for married clerics not to wear the habit and tonsure? Therefore, and so on.

Lastly, Johannes Andreae here makes a notable and beautiful distinction about this married cleric, from which a compendium of the whole matter can be had. For he himself says: either you ask whether marriage is impeded on account of clerical status; or whether he loses his benefice; or whether he loses his privilege; or whether he is bound to the habit and tonsure; or whether he recovers what he had previously given to the church; or whether he can have a benefice.

To the first, whether marriage is impeded on account of clerical status: say either he is a cleric in minor orders, and it is not impeded, as above, this title, c. 1, 2 and 3; or he is in sacred orders. And then either the one ordained to sacred orders was not of age, and say as in the said single chapter, below, *De clerico per saltum promoto* [text unclear], because even one under age receives sacred orders, although he ought not to minister at the lesser age, as above, *De temporibus ordinationum*, c. *Vel non est compos*; on which fully in Clem. *Generalem*, *De aetate et qualitate*. Or he was of age, and then either he was ordained under compulsion or of his own accord. If under compulsion, say as is noted below, *De baptismo*, c. *Maiores*, toward the end of the gloss, at *et sic coacta*. If he was ordained of his own accord, then either you ask whether he can remain in a marriage previously contracted notwithstanding the subsequent reception of sacred order, and say as below, *De conversione coniugatorum*, c. *Placet*, at the end; or you ask whether this cleric in sacred orders presents an impediment to contracting marriage. And then either this man who was in sacred orders was deposed, and say that he is not exempted from the vow of chastity (dist. 94, c. *Dictum*; below, *Qui clerici vel voventes*, c. 1, at the end, and what is noted there), although by degradation he loses the privilege (*De poenis*, c. 2, in the Sext, at the end). Or this cleric in sacred orders was not deposed, and then say that he cannot contract; and if he contracts he is separated (below, *Qui clerici vel voventes*, c. 1 and 2; and above, this title, c. 3). And this is true as much in a Latin cleric as in a Greek; for although in sacred orders he uses a marriage previously contracted, yet in sacred orders the Greeks do not contract (above, this title, c. *Cum olim*; and as noted on dist. 32, c. *Si quis eorum*), although many Greeks observe the contrary.

To the second, whether a married cleric loses his benefice? Say either the marriage held or not. And if not, either it did not hold through defect of consent, or for another cause; if for another, either only on account of order, or on account of another impediment. In the first case, namely if the marriage held, the benefice is vacant, as above, this title, c. 1, and what is noted there. But if it did not hold through defect of consent: either the defect proceeded from the part of the cleric contracting or from the part of the woman; and in either case the defect proceeded either from age, or from madness, or from fear inflicted. If from age, as because they understand betrothals *de futuro* (*De desponsatione impuberum*, c. 1, in the Sext), then the benefice is not vacant, just as it would not be vacant by a promise of professing without express or tacit profession, as in c. *Beneficium*, *De regularibus*, in the Sext; and just as by the acceptance of a second curate [benefice] the first, even curate, is not vacant unless possession follows or it is not his fault (*De praebendis*, c. *Licet*, the second, in the Sext): so neither by the sole promise of contracting marriage; that just as betrothals *de futuro* do not dissolve a marriage (below, *De sponsalibus*, c. *Sicut*), so neither do they dissolve a spiritual marriage; what is noted above, this title, c. 1, makes for it. But if the defect of consent proceeded from madness: then if from the part of the cleric, it is plain that he does nothing by contracting, because just as he would not be bound by professing, so neither by contracting, nor even by making a testament (above, *De successionibus ab intestato*, last chapter). But if from the part of the woman, although it is not a marriage, nor does it even induce public honesty (*De sponsalibus*, single chapter, in the Sext), yet on the model of what is said of a blood relative, above, c. 1, he would lose the benefices, for he did what he could; yet it is more equitable to say that he does not lose the benefice, as if he had contracted with some image, or with a sleeping woman. It is otherwise in consanguinity, because it holds and induces public honesty from consent. And the same if the defect of consent proceeded from fear which could fall on a constant man (below, *De sponsalibus*, c. *Veniens*, the first and second, and c. *Ad id quod*); for neither does an express renunciation hold (above, *De his quae vi metusve causa*, c. *Ad audientiam*). But if the marriage would hold as to consent, but does not hold on account of another cause, and only on account of the order of the cleric contracting in sacred orders, by rigour he loses the benefices; yet if he does not incur by that contract the penalty of bigamy, the bishop can dispense in office and benefice after penance has been done (dist. 28, c. *Presbyterum*; and above, this title, c. *Sane*, the second). But if he incurs the penalty of bigamy, then he is indispensable by another than the Pope (above, *De bigamis*, c. *Nuper*). But if not [held] on account of another impediment than the order of the one contracting, it seems that he loses the benefice, as Dinus and Bartholomew of Brescia hold in their questions, who hold that even when the marriage is dissolved he cannot recover the church. Understand these things true unless they are done in fraud of the prelate in whose hands he ought to have renounced; for then, although the tacit renunciation holds as to him, yet not as to the superior, so that he cannot retain him in the benefice; otherwise it would be easy to elude the prelate, against c. *Admonet*, above, *De renuntiatione*; for the way is to be closed to such frauds (below, *De divortiis*, c. *Quanto*).

To the third, whether a married cleric loses clerical privilege? Say: either the marriage held or not. In the first case, if by the contract he incurred bigamy, he is stripped of all privilege (*De bigamis*, c. 1, in the Sext). But if he did not incur bigamy: if he goes about in habit and tonsure, he keeps the privilege as to those two only; otherwise he loses it wholly (below, this title, c. 1, in the Sext). But if the marriage does not hold, then if by the contract he incurs the penalty of bigamy, on account of the intention with the work following, although it is indispensable as to the execution of office, yet he is

not stripped of all privilege, according to Johannes Andreae; and so he understands c. *Nuper*, *De bigamis*. Therefore, according to him, c. 1, *De bigamis*, in the Sext, speaks of a true bigamist; and so Petrus de Ancharano.

To the fourth, whether he is bound to wear the habit and tonsure? Say: either the marriage does not hold, and he is compelled, as in c. *Clericus*, above, *De vita et honestate clericorum*; or the marriage holds, and he is not compelled, although he may use it whenever [he wishes], as appears from the aforesaid. To the fifth, whether he recovers, and so on: say [as] fully in the said c. *Quod a te*. To the sixth, whether a married cleric can acquire a benefice anew: say as above, this title, c. *Diversis fallaciis*.

Chapter Cum decorem (c. 8)

Summary. 1. Married clerics are compelled to give up ecclesiastical dignities, and ought not to be taken up to them. 2. What ecclesiastical dignities are. 3. Dignity is taken in various ways. 4. Whether something is to be omitted or done on account of scandal.

Cum decorem. Married clerics are compelled to give up ecclesiastical dignities, and ought not to be taken up to them. This is what it says. Note at *non admittatis* that married clerics cannot acquire dignities or benefices anew; understand of curate ones. But of simple ones say that they can, as above, this title, c. *Quod a te*; but of dignities they are wholly incapable, as here. Note at *sine pravo exemplo et gravi scandalo* that married men are said to hold ecclesiastical dignities with scandal; nor in such things does custom excuse, because it is irrational, according to Johannes Andreae and Petrus de Ancharano. And so note the argument that on account of scandal one is repelled from a benefice, and that by the taking of wives by clerics benefices are vacant by the law itself; on which fully above, this title, c. 1. And of that custom say as above, the preceding chapter, and c. *Diversis fallaciis*.

I ask what are called ecclesiastical dignities. Say that it is a certain pre-eminence in grade; and dignity and *personatus* are taken almost for the same, as the archdeaconate, the primicerate, the deanery and the like. And dignity or *personatus* is understood according to the institution of the church: for it could be that someone in some church exercises the office of archdeacon by hearing the causes of clerics and of others; yet he is not on this account to be reputed to be in a dignity unless he is called by a name which sounds dignity. And then, although he performs no ministry, yet he is in a dignity, provided he obtains it as his own (below, *De statu monachorum*, c. 2, last §; and in c. *Permittimus*, *De aetate et qualitate*, in the Sext; and fully in c. *Statutum*, above, *De rescriptis*; and *De consuetudine*, c. 1, by the Archdeacon and Johannes Andreae, in the Sext, in the *Novella*; and above, *De constitutionibus*, c. *Cum venissent*, and there how a dignity can be created or suppressed, by the gloss, Innocent, Johannes Andreae and Johannes Calderinus); on which also dist. 22, c. 6.

And note that dignity is taken in various ways. Sometimes most broadly, so that every man is said to be in dignity who is of good fame and great standing (Dig., *De variis et extraordinariis cognitionibus*, l. *Cognitionum*, § 1). Sometimes dignity is taken for an office which has a dignity annexed (below, *De praebendis et dignitatibus*, c. *De multa*; Dig., *De muneribus et honoribus*, l. *Honor*; and Cod., *De dignitatibus*, l. 1, book 12). Sometimes it is taken for a certain quality which makes a person differ from the common people, and so properly in common speech it is nobility, which is considered in two ways.

First, as this dignity or nobility stands in the name of its genus and has no special name, as is decurion, knight and baron, and so on. And this and every other dignity or nobility is to be conferred

on virtues alone (below, *De praebendis et dignitatibus*, penultimate chapter, at "we therefore, attending that not nobility of birth but of virtues, and honesty of life, make a servant pleasing and fit to God"); and there I will speak fully of nobility, God granting. There are also certain other named dignities, and these are divided by their grades, as superillustrious, illustrious, *spectabilis* and *clarissimus*; on which Bartolus in the said l. 1, Cod., *De dignitatibus*; and I will speak below, *De praebendis et dignitatibus*, on the rubric.

In the second gloss, at *quia coniugati*, etc., say of this as I noted above, the preceding chapter, § "To the second, whether a married cleric loses the benefice of the church," and as I noted in c. 1, above, this title, and in the places alleged by the gloss here. In the fifth gloss, at "because nothing is to be done with scandal" (above, *De praescriptionibus*, c. *Nihil prodest*): say to the contrary, below, *De regulis iuris*, c. *Qui scandalizaverit*, and below, *De novi operis nuntiatione*, c. 2. Solution: say that when the gloss on Ezekiel says "it is more useful that scandal be permitted to arise than that truth be abandoned," it understands it of the truth of life, the omission of which would lead to mortal sin; and so also the said c. 2, alleged above, is understood.

Hence when it is asked whether on account of scandal something is to be omitted or done: say, either a spiritual good is to be omitted or a temporal one. If spiritual: either it is of necessity of salvation, and it ought not to be omitted, because the omission would be a mortal fault, which is wholly to be avoided; for everyone is bound more to himself before God than to others (Canticle 2: "he set in order charity in me"); on which order dist. 1, c. 1, and dist. 42, c. *Quiescamus*. From this, indeed, it is said that ordered charity begins from oneself; on which in l. *Deberi*, Cod., *De fideicommissariis libertatibus*. Or such a spiritual good is not of necessity of salvation, as giving alms from things necessary to oneself and the like; and then either the scandal proceeds from the proper malice of the one stirring up the scandal, as because he wishes to impede preaching and the like. And say that for no scandal whatever is what is contrary to truth to be taught, but [only] pure truth; but the act of preaching and similar counsels, although they may sometimes be deferred so that the scandal may cease, yet those on whom it is incumbent of necessity, as from prelacy or an enjoined office, ought not to omit them. Hence the Apostle (2 Timothy 4): "Preach the word; be instant in season, out of season," and so on. And in Isaiah 58 God says: "Cry, cease not, lift up thy voice like a trumpet, and show my people their wicked doings, and the house of Jacob their sins." And dist. 86, c. *Cum multa*. For holy preachers go out from the secrets of contemplation to the active life on account of charity toward neighbours and the necessity of hearers, says Blessed Gregory, *Moralia*, book 17, c. 7; on which fully in the said book, almost from the beginning up to c. 33. Hence the same Gregory says that the preacher ought to be strong, bold and fervent, holy, perfect and just, after the likeness of the horse; on which *Moralia*, book 31, c. 6 and 8; and he applies it to Paul. From this indeed the Pharisees were scandalized at the preaching of Christ Jesus, whom Christ taught were to be disregarded (Matthew 15): "Not that which goeth into the mouth," and so on; it is added: "The Pharisees, when they heard this word, were scandalized. But he answering said: Every plant which my heavenly Father hath not planted shall be rooted up. Let them alone," namely to be scandalized, because unjustly; hence he adds: "They are blind, leaders of the blind," and so on.

But sometimes scandal comes from weakness or ignorance, and scandal of this kind is that of the little ones; on account of which spiritual works are to be hidden or sometimes deferred, where danger does not threaten, until, a reason having been given, scandal of this kind ceases. But if after

the reason has been given and the truth shown someone is still so scandalized, let it be imputed to himself, because now it proceeds from malice, on account of which good things are not to be omitted (Acts 4): "But Peter and John answering said to them: If it be just in the sight of God to hear you rather than God, judge ye. For we cannot but speak the things which we have seen and heard," and so on. And so much of the first member.

But if it is a temporal good: then either the temporal things are committed to us to be preserved, as the goods of the church are committed to prelates, as above, *De donationibus*, c. 2, and what [I wrote] above, this title, c. *Diversis fallaciis*; and the common goods of the commonwealth are committed to rulers. Hence it is said that to safeguard the welfare of the commonwealth befits no one more than Caesar (Dig., *De officio praefecti vigilum*, l. 2); on the defence of which commonwealth enough is had in C. 23 q. 8, c. *Ut pridem* and c. *Suppliciter*. The preservation of such things, therefore, as of other deposits, is of necessity (above, *De deposito*, c. *Bona fides*; and Dig., *Depositi*, l. 1, § *Si res*, and throughout). Therefore such things are not to be given up on account of scandal, just as those things which are of necessity of salvation, as was said above. Hence Blessed Thomas of Canterbury reclaimed the things of the church with scandal to the king, and became a martyr on this account; for which the decretal *Quicumque*, *De sententia excommunicationis*, in the Sext, seems sufficiently to have issued. But if the temporal things are not such, but are one's own as to dominion and property: then either the scandal arises from the ignorance or weakness of others, as above, and then either they are to be given up wholly, or the scandal is to be calmed otherwise, as by admonitions and soft speech; because "a soft word breaketh wrath, and a harsh speech stirreth up fury" (Proverbs 15). But if the scandal arises from malice, let him who is scandalized impute it to himself, because an occasion of plundering would be given to the wicked, which ought not to be; on which above, in the proem of this volume, at "and therefore the law is put forth so that harmful appetite may be limited under the rule of law, and human boldness restrained, and innocence be safe among the wicked" (dist. 4, c. *Factae*). Hence to give, or not to reclaim, out of such scandal is harmful to the commonwealth, and to the one retaining for himself with mortal [sin] on account of his malice and fraud, which ought not to protect him (above, *De rescriptis*, c. *Ex tenore*); nor ought anyone to gain from another's or his own fraud (C. 1 q. 5, c. *Ex hac itaque*; and Cod., *De transactionibus*, l. *Transactione finita*). And so it is to be held. Add what I wrote above, this title, c. *Cum olim* and c. *Ioannes*.

Chapter Ex parte (c. 9)

Summary. 1. Married clerics do not enjoy clerical privilege in their goods. 2. Married clerics, however learned, are not excused from public burdens. 3. The resumption of a tonsure given up does not profit to the damage of a third party. 4. Whether a married man, since he never gave up the tonsure, retains the privilege. 5. Whether deposed clerics enjoy clerical privilege.

Ex parte. Married clerics do not enjoy clerical privilege in their goods. This is what it says. It makes two [parts]: in the first the complaint is set out; in the second the provision. The second at *cum igitur*. Note the text at *litterati*, that married clerics, however learned, are not excused from public burdens, as here, and Dig., *De muneribus et honoribus*, l. *Ut gradatim*, unless they were teachers, as physicians and the like (Cod., *De professoribus et medicis*, l. *Medicos* and the last law; and Inst., *De excusationibus tutorum*, § *Item Romae*); and note the privilege of students in the Authentic *Habita*, Cod., *Ne filius pro patre*. Note at *resumunt* that the resumption of a tonsure given up does not profit in fraud and damage of a third

person; on which fully above, this title, c. *Ioannes*, in the fourth question according to Johannes Andreae; see what I wrote there, § "Fourthly I ask." Note at *similiter contrahunt*, namely marriage, in the clerical habit and tonsure which they never gave up; and in this they differ from the preceding.

But then I ask whether, since they never gave up the tonsure, they retain the privilege. It seems so, because such men are to be held under the rule of the church (dist. 32, c. *Si qui*; and C. 12 q. 1, c. *Quia tua*), especially if they hold a benefice, as there according to Goffredus. Yet Hostiensis says the contrary, and it seems to be proved by this verse, *quidam etiam accepta prima tonsura similiter contrahunt*, etc., where it seems to be understood [that] they never left it, and nonetheless they do not enjoy [it], since they took wives. For this also makes the response here, where it says: "since therefore the things that are Caesar's are to be rendered to Caesar, and the things that are God's to God" (words of Christ, Matthew 22), which thus is adapted to him who did not give it up as to him who gave it up. For such a man is deemed to be a cleric by the sign alone, which does not profit him, as in l. *Qui sub praetextu*, Cod., *De sacrosanctis ecclesiis*. Hence as to the privilege of temporal dominion, both the married man wearing and the one not wearing are deprived. But in those things by which the person is pressed they differ, as below, this title, c. 1, in the Sext, according to the Abbot and Petrus de Ancharano. Hence as to their temporal goods, or as to personal burdens, or as to the forum, namely in respect of all causes, married men do not enjoy [the privilege] if they do not wear the habit and tonsure; or even if they wear them, according to others, because such men do not enjoy [it] except those two privileges of which below, this title, c. 1, in the Sext. On this see above, this title, c. *Ioannes*, in what I wrote, § "The first conclusion is," and § "To the third, whether a married cleric."

I ask what of deposed clerics: do they enjoy [the privilege]? Answer: either they are corrigible or not. In the first case they ought to live clerically and wear the habit and tonsure (dist. 81, c. *Dictum*; dist. 50, c. *Accedens*), and so such men ought to be defended by the church. But the incorrigible are to be handed over to the secular court (above, *De iudiciis*, c. *Cum non ab homine*; and in c. *Degradatio*, *De poenis*, in the Sext). And Lord Antonius de Butrio says, on the said c. *Cum non ab homine*, that the crime of a deposed man with incorrigibility does not subject [him], nor does deposition subject anyone to the secular judge before he is handed over; and so it seems that even on account of incorrigibility a deposed man does not lose clerical privilege. He says the contrary could be gathered: that a deposed man with incorrigibility loses the privilege, and no other handing over or degradation is required. By which it seems that a homicide repeating [the crime] many times before deposition

is not to be degraded, but likewise after deposition is at once subject [to the secular power] without other handing over. But against this stands the said c. 2, at the end, below, *De clerico excommunicato*, and below, *De verborum significatione*, c. *Novimus*. Hence Hostiensis says that insofar as the letter of that c. *Cum non ab homine* says that a deposed man is to be restrained by the secular power, this is true at the request of the church, or by its handing over, and not otherwise; and for the one handed over the church even intercedes, that death be not inflicted nor corporal punishment imposed, as in the said c. *Novimus*; but the secular judge will do what seems good to him. Johannes Andreae says that that decretal *Cum non ab homine* does not speak of a degraded man, in whom I do not think incorrigibility necessary, but he says he is at once of the secular forum, as in the said c. *Novimus* and *De poenis*, c. 2, in the Sext; hence he says the said c. *Cum non ab homine* is understood of verbal deposition.

Lord Antonius de Butrio says the practice can be twofold. One, that a deposed cleric, incorrigibility having followed, is degraded; and then no other handing over is awaited, because in the act of

degradation he is stripped of all clerical privilege, as in the said c. 2, *De poenis*, in the Sext; hence then another handing over is [not] necessary, especially since it is done in the presence of the secular judge. In the second way it can be practised that the ecclesiastical judge, the deposition standing and incorrigibility having followed, hands him over or requests the secular judge for punishment, and by this very fact he is handed over. From which you have that a cleric, even apart from the act of degradation, in a case where degradation is to be imposed, can be handed over without degradation and so be stripped of clerical privilege, even with his orders remaining. Nor is this strange, because even one not verbally deposed is sometimes stripped of clerical privilege by a threefold warning alone together with the act of involving himself in violent matters, as in c. *In audientia*, and in c. *Contingit*, and in c. *Perpendimus*, below, *De sententia excommunicationis*. In a third way also it can be understood that by the very fact that he is deposed, without other handing over or degradation, at once the incorrigibility itself loses the privilege and he is subject to the secular power. And Johannes Andreae understands it in this way: because if a threefold warning alone, by which incorrigibility is concluded, strips [him] (*De sententia excommunicationis*, c. *In audientia*) without other handing over or degradation, much more strongly does incorrigibility arising from a threefold warning strip one already deposed. Nor does c. *Cum non ab homine* say that he is handed over or degraded, but restrained. This saying of Johannes Andreae proceeds without doubt when incorrigibility arises from a threefold warning; but if he were incorrigible otherwise, as because the deposed man involved himself again, then it is more doubtful. But that decretal proves this sufficiently, and hold this, although Petrus and Johannes de Lignano hold the contrary; but they violate that letter, therefore not well.

Chapter Si clericus in minoribus (c. 10)

Summary. 1. A cleric in minor orders made a knight is not compelled to the habit and tonsure. 2. One made a soldier of God does not keep a fief. 3. A soldier of God can be made a soldier of the world, and much more strongly the converse. 4. Clerics are said to serve as soldiers for God. 5. Clerics are called kings, and the prelates of the church princes. 6. Whether and when a cleric without a benefice may renounce clerical privilege. 7. Whether the benefice of a married cleric made a knight is vacant by the law itself.

Si clericus in minoribus. If a cleric in minor orders, so that he may be [text unclear], is made a knight, he is not to be compelled to the habit or tonsure. This it says. Note that a cleric in minor orders without a benefice can live wholly as a layman, and is not to be compelled to wear the habit or tonsure. Hence note that he who is made a secular soldier ceases to be a soldier of God, just as conversely one made a soldier of God ceases to be a soldier of the world. Hence he cannot keep a fief, since he cannot do the service, as in the *Usus feudorum*, coll. 10, *De eo qui arma bellica deposuit*, c. 1, and *Si de feudo controversia fuerit*, c. *Si clericus*. Hence also the Apostle says (2 Timothy 2): "No man being a soldier to God entangleth himself with secular businesses." See above, *De vita et honestate clericorum*, c. *Clerici*. For no one can have two military services (Cod., *Qui militare non possunt*, l. 4, § *Si posterum*, book 12 [text unclear]; and *De collegiis illicitis*, l. 1 and the last; and Dig., *Ad municipalem*, l. *Libertus*, § *Praescriptio*); similarly no one can have several ecclesiastical benefices (below, the next title, c. *Quia nonnulli*; and c. *Relatum*, below, *De praebendis*). But observe that a soldier of God can pass to the military service of the world, as here, and much more strongly conversely, because a soldier of God is greater than a soldier of the world, as noted in c. *Episcopus*, below, *De praebendis*.

And note that all clerics are said to serve as soldiers for God (C. 23 q. 1, c. *Militare*, where there is a notable gloss); and dist. 61, c. *Quid proderit*, the text says: "what will it profit that clerics have served through each campaign," and so on; and C. 1 q. 3, c. *Salvator*: "but if the said soldiers of the church," and so on, the text is there; and C. 1 q. 7, c. *Qui in qualibet*, at *ad ecclesiasticam militiam*. Indeed clerics are called kings (C. 12 q. 1, c. *Duo sunt genera Christianorum*, at "for these are kings, ruling themselves and others by virtues"); see above, *De vita et honestate clericorum*, c. *Clericus*, the second, what I wrote there. For this also the Epistle of Peter, c. 2: "But you are a chosen generation, a kingly priesthood, a holy nation, a purchased people," and so on. And the prelates of the church are called princes, as in c. 1, *De iureiurando*, in the Clementines, at "on the part of princes, both ecclesiastical and secular"; and holy Church sings of Peter and Paul, "Glorious princes of the earth," and so on.

In the last gloss, at the end, which says that it is lawful for a cleric to renounce clerical privilege since he has no ecclesiastical benefice, it alleges c. *Ioannes*, above, this title. Say: there it speaks of a married man, here of one not married at all, but a knight; hence that chapter does not seem to be to the purpose. But the gloss says truly in general of any cleric in minor orders, as noted in c. *Tua*, below, *De apostatis*. c. 1, by the contrary sense, above, *De postulando*, also makes for it, and what the Doctors note in c. *Clericis* and c. *Sententiam sanguinis*, below, *Ne clerici vel monachi*, and what is noted in C. 23 q. 8 [text unclear], in the summary, and in Clem. 2, *De vita et honestate clericorum*. Nor does c. *Ioannes*, above, this title, stand in the way, where it seems by the contrary sense to hint that if that John had not been married he would have been compelled to wear the tonsure although he lacked a benefice; because such an argument from the contrary sense ought not to be taken where an absurd understanding results; l. 3, Cod., *De conditionibus insertis*, makes for it, and l. *Caelicolarum*, otherwise *Conventiculam*, Cod., *De Iudaeis*. These things are true unless there is a custom to the contrary; for then even married men would be compelled, as Johannes Andreae notes in c. *Ioannes*, above, this title, and see there what I wrote.

I ask whether the benefice of a married cleric made a knight is vacant by the law itself. Answer: yes; on which the gloss below, title 1 [text unclear], c. *Qualiter*. For if it is vacant by the law itself even when he was not made a knight, more strongly is it vacant when he was made a knight; for which see what I wrote above, this title, c. 1.

On Clerics Not Residing (X 3.4)

Summary. 1. A cleric ought to reside in the church; otherwise, warned three times, he is deprived.

It has been said above how clerics are deprived of their benefices on account of the company of women; here he subjoins of those who are excluded from benefices on account of non-residence. Or thus: the Lawgiver, about to treat of ecclesiastical dignities and prebends, in which clerics ought to reside, therefore first it is to be seen how one ought to proceed against them if they do not reside, according to Johannes Andreae. On the matter, C. 7 q. 1, throughout; and it is repeated in the Sext; and agrees with the rubric *De constitutionibus*, c. *Cum omnes*; *De renuntiatione*, c. *Ad supplicationem*; *De officio vicarii*, last chapter; *De appellationibus*, c. *Pervenit*; *De voto*, last chapter; and in the Sext, *De rescriptis*, last chapter; *De electione*, c. *Licet canon* and c. *Cum non deceat*; and in the Clementines, *De statu monachorum*, c. *Ne in agro*, § *Sane*. And according to the Abbot this whole title intends this: a cleric ought to reside in the church; and if he does not do so, he is to be warned to return to the church; and if, warned three times, he does not return, he can be deprived; and this if it is known; otherwise let what is said below, this title, c. *Ex tuae*, be observed; and on this especially below, this title, c. *Quia nonnulli* and c. *Relatum*.

Chapter Non oportet (c. 1)

Summary. 1. A bishop ought not from ambition to pass from his own see, though lesser, to another's bishopric. 2. A bishop may not stay in another's city. 3. If by statute it is forbidden to take grain out of the borders, whether those carrying it from elsewhere passing through those territories are included. 4. A presumed act is sometimes called manifest. 5. An effective presumption arises from the fact that something was never customary. 6. What is called manifest and evident. 7. Whether one renouncing a rich benefice in order to exchange it for his nephew's poor one is presumed to act fraudulently. 8. When doubtful things are to be interpreted in the better and when in the worse part.

Non oportet. A bishop ought not from ambition to pass from his own, though lesser, to another, greater bishopric. This it says. Note the text at *transire*, that the translation of bishops is prohibited. Note at *ad aliam* that a bishop may not stay in another city, and especially in one greater than his own; and understand "it is not lawful" of propriety and without cause, because properly the prohibition is made lest he wish to pass over as prelate. And this is also understood of one elected (above, *De translatione*, c. *Inter corporalia*), even if, his own being vacant, he was elected by the clerics of that church. Or say: if he wishes to pass over for the purpose of making a longer stay, his own church being spurned, as below, this title, c. [text unclear]; nor for the purpose of usurping others' boundaries (C. 9 q. 1, throughout). But a simple passing through does not seem prohibited, even in things which would otherwise be prohibited, as l. *Si quis post hanc*, Cod., *De aedificiis privatis*; because he who did not stay is not said to have come (above, *De iudiciis*, c. 1). And it makes for the question: if by statute or ban it is prohibited that grain be taken out of the borders, are those who carry it from elsewhere passing through such territories

included? Say not, by what is noted above.

Note the text at *manifesta est enim causa*, etc., that a presumed act is sometimes called manifest, as here; on which fully above, *De cohabitatione clericorum*, c. *Vestra*, and see what I noted there. Note at *cum nullus sit inventus*, etc., that an effective presumption arises from the fact that something was not customary at any time; l. *De quibus*, Dig., *De legibus*, makes for it. And note that where it says "it is manifest," that is, it is presumed, says Goffredus; and so gather that that is called manifest which is gathered from probable conjecture. It is also called evident, as l. *Licet*, Dig., *De legatis* 1, and l. *Si quis locuples*, Dig., *De manumissis testamento*. From which also note that in doubt the interpretation is made in the worse part. Against which object below, *De regulis iuris*, "Be ye merciful," etc., words of Christ (Luke 6), where he adds: "Judge not, and you shall not be judged." Object also l. *Merito*, Dig., *Pro socio*. Solution: say that in an act which can relate to a crime, we presume no crime, as in the contrary texts. But in an act which at first sight savours of crime, the interpretation is made against the doer, as here and in c. 1, above, *De praesumptionibus*, and in l. *Si non convicii*, Cod., *De iniuriis*, and C. 7 q. 1, c. *Si episcopus*, where on this.

I ask whether one renouncing a rich benefice for the purpose of exchanging with a nephew who has a barren benefice is presumed to act fraudulently. It seems so, especially if he is old; for the words of c. 2, *De renuntiatione*, in the Sext, although they do not say this expressly, yet claim a place for it from their mind. For he is presumed to have renounced from carnal affection, not by right judgement of reason, as ought to be done (below, *De rerum permutatione*, c. *Quaesitum*); for no one is presumed easily to renounce a rich benefice for a slender one, as in c. *Super hoc*, above, *De renuntiatione*; and among blood relatives there is a presumption of fraud and carnality, as in c. *Grave*, below, *De praebendis*. And Johannes Andreae holds this in the said c. 2, *De renuntiatione*, in the Sext. But Johannes de Lignano holds the contrary here, because he says that the said chapter speaks where one does not use a permitted right; but here he does. Nor does the presumption of blood stand in the way, provided he is worthy (dist. 56, c. *Nasci* and c. *Undecumque*). But the opinion of Johannes Andreae is truer; for against this exchanger there is a twofold presumption of blood, namely the giving up of a rich benefice, and old age; which three presumptions do not seem to be excluded by one alone, namely that of the fitness of the relative. For in presumptions one must stand by the more numerous and the stronger (above, *De praesumptionibus*, c. *Litteras*); nor can fraud appear otherwise (above, *De praescriptionibus*, c. *Sedes*; Dig., *De legatis*, § *Maeviae et Titio*). In the second gloss, at the end: solution as above, and noted in c. 2, above, *De electione*, where it is noted fully by the Moderns. And when doubtful things are to be interpreted in the better and when in the worse part is fully noted by Thomas, II-II, q. 60, and noted in c. *Ad audientiam*, below, *De homicidio*; and c. *Ex studiis*, above, *De praesumptionibus*, makes for it; and Proverbs 20: "By his inclinations a child is known." Hence the verse:

By the manners you will know the inner things outside; Peasant, think from the calf what kind of ox will be.

And the Apostle says (Romans 14): "He that eateth not, let him not judge him that eateth," where the gloss says that doubtful things are to be interpreted in the better part. So also the law says: it is better to acquit the guilty than to condemn the innocent (Dig., *De poenis*, l. *Absentem*). In the last gloss: say that it is more easily dispensed from a lesser to a greater [see], or on account of greater utility, as the gloss says. Or say that this proceeds in a greater dignity, as is an archbishopric in respect of a bishopric, or in respect of a greater people. But if it is greater only as to revenues, then there is less dispensing, to remove avarice and ambition, as here. And from these it appears that the

gloss here understands this text of perpetual passing over. Or it can more plainly be understood of a temporary one, as if to say: let the bishop reside in his own city, and not go to stay in another, because it is likely that he goes to scheme for a greater bishopric; c. *Magnae*, below, *De voto*, makes for it. And on restraining the avarice of prelates and other clerics, see what is noted in C. 12 q. 2, c. *Gloria episcopi*, and c. *Aurum*. About which see what I wrote in c. *Clerici*, above, *De vita et honestate clericorum*, and in c. 1, above, *De cohabitatione clericorum*, and in c. *Cum decorem*, above, *De vita et honestate clericorum* [text unclear], and by Johannes Andreae below, *De praebendis*, c. *Avaritiae*, and in c. *Avaritiae*, *De electione*, in the Sext; and I hope to speak fully in the said c. *Avaritiae*, below, the next title.

Chapter Ex gestis (c. 2)

Summary. 1. A cardinal not residing in his title or benefice is deposed. 2. Perpetual faith is given to the acts of the court. 3. The Pope, with the counsel of a general synod, deposes and excommunicates a cardinal. 4. Cardinals, even those not bishops, enjoy their privilege [and that] of the chapter *Quia periculosum*, *De sententia excommunicationis*. 5. Cardinals are as patricians written in the diadem of the prince. 6. How a negative is proved. 7. Whether the Pope alone can depose a cardinal, or the College of Cardinals is required. 8. How many witnesses are required to convict cardinals. 9. What power the cardinals can have concerning the Pope. 10. Whence "cardinal" is named. 11. Where cardinals ought to be created. 12. Whether the Pope or the cardinals can create a cardinal disjunctively.

Ex gestis. A cardinal not residing in his title or benefice is to be deposed. This it says. Note at the first word, *ex gestis*, that perpetual faith is given to the acts, that is, the records, of the court, as here and in the last chapter, above, *De probationibus*, and in l. *Gesta*, Cod., *De re iudicata*. Note at *in synodo* that it does not become the Pope alone to depose a cardinal, but he ought to do this with the consent or counsel of a general synod. And so it is an argument that cardinals enjoy the privilege of bishops, even cardinals who are not bishops, according to Hostiensis, by argument of this letter. Hence he holds that they enjoy the privilege of c. *Quia periculosum*, *De sententia excommunicationis*, in the Sext, where Johannes Andreae holds the same; c. 1, *De officio legati*, in the Sext, makes for it on account of the reason set there; and c. 2, *De celebratione missarum*, in the Clementines, also makes for it; and Johannes Monachus notes in c. 1, verse *Omnes*, *De schismaticis*, in the Sext, and there Johannes Andreae says the same, and says it was so declared concerning the revocation of benefices, on which *De concessione praebendae*, last chapter, in the Sext: namely that where a sentence of suspension or interdict is passed, just as bishops are not included, so neither cardinals, unless expressed, as in the said c. *Quia periculosum*, which speaks of bishops. And he says that even if bishops were included, yet cardinals would not be included unless they were expressed, because the reason is greater in the cardinalate; for the nearer they are to the Pope, the less is a penalty presumed to be inflicted by him. For cardinals are as patricians written in the diadem of the prince (Inst., *Quibus modis ius patriae potestatis solvitur*, § *Filiusfamilias*), and are part of his very body (C. 6 q. 1, c. *Si quis*; Cod., *Ad legem Iuliam maiestatis*, l. *Quisquis*), and are more specially brothers of the prince and privileged more than others (*De officio legati*, c. *Officii*, in the Sext); *De officio legati*, c. *Quod translationem*, makes for it, where it is noted of the power of a cardinal legate concerning the exempt.

Note at *per annos quinque* that by this text a negative is proved, because it can be proved that someone did not make a stay for five years in one diocese or province; for by the very fact that, diligent inquiry having been made, he is not found in the place, he is not presumed to be there; and so in this way a

negative is proved; l. *Hoc iure*, Dig., *De verborum obligationibus*, and by Bartolus, Dig., *De damno infecto*, l. 4; and [Clem.] *Pastoralis*, *De re iudicata*, in the Clementines; for which Johannes Andreae in the additions to the *Speculum*, same title, at the end.

In the first gloss, at *quia solus Papa*: I ask whether the Pope alone can depose a cardinal, or it is required that the College of Cardinals depose. The gloss answers: the Pope alone; and so hold Alexander and Innocent. Hostiensis, although he protests that he does not intend to derogate from the plenitude of the power of the Pope, says that here for the deposition of a cardinal a synod was assembled, since cardinals as the greatest ought to be marked with prerogative (*De officio legati*, c. 1, in the Sext). Besides, cardinals are part of the body of the Pope, who cannot be judged by another (dist. 40, c. *Si Papa*, at "here no one of mortals presumes to rebuke his faults, because he who is to judge all ought to be judged by no one," etc.; and C. 9 q. 3, c. *Nemo iudicabit primam sedem*). But if he were caught in error of faith, he ought to submit himself to the judgement of the Church (dist. 21, c. *Nunc autem*, verse *Marcellinus*, who, compelled by pagans to sacrifice to idols, a council having been gathered, submitted himself to their judgement; who said to him: "Judge your cause with your own mouth"). Hostiensis alleges C. 9 q. 3, c. *Aliorum*. So therefore on account of nearness they ought to be partakers of the singular privilege, as l. *Non tantum*, Dig., *De excusationibus tutorum*; and one and the same thing ought not to be deemed by diverse law, as l. *Rerum mixtura*, Dig., *De usucapionibus*. Johannes Andreae after Hostiensis concludes that the Pope has not been accustomed, and according to some cannot, excommunicate any of the cardinals or make any precept without the counsel and consent of his brothers; to which makes c. *Irrefragabili*, § 1, above, *De officio ordinarii*, and c. 1, below, *De excessibus praelatorum*. Johannes Andreae and Petrus de Ancharano also say that if the Pope does not bind a cardinal in specie, it is not likely that he wishes to bind him in general. Put the example of the canon *In nomine Domini*, dist. 23, and in c. *Licet*, above, *De electione*. He brings in the authority of the Canticle of Anna (1 Kings 2): "For the pillars [*cardines*] of the earth are the Lord's, and upon them he hath set the world." And so much of the power of the Pope concerning cardinals.

How many witnesses are required to convict a cardinal, say as noted in C. 2 q. 4, c. *Praesul* and the following chapter, and *De schismaticis*, single chapter, in the Sext, in the gloss.

But I ask what power the cardinals have or can have concerning the Pope. Say that the assembly of cardinals ought to elect the Pope, according to what is noted in c. *Ubi periculum*, above, *De electione*, in the Sext; and that the assembly of cardinals, the see being vacant, does not exercise papal jurisdiction except insofar as the

Council of Lyons permits, on which in the said c. *Ubi periculum*. Nor can the assembly of cardinals alter the said council in whole or in part (said chapter). But if the Chamberlain or the penitentiaries of the Pope die, the assembly of cardinals can for the time of the vacancy substitute others; on which and more is had in c. *Ne Romani*, *De electione*, in the Clementines; and see what the gloss notes in the single chapter, *De schismaticis*, in the Sext, on the words *sede vacante*, which begins "note the argument that the College of Cardinals, the see being vacant, does not exercise the jurisdiction of the Pope," etc.; there the gloss treats it fully. And it is to be known that cardinals ought not to be condemned except by a fixed number of witnesses: a cardinal bishop by 72, a cardinal priest by 64, a cardinal deacon by 27 (C. 2 q. 4, c. *Praesul*). But a law can be indicated to the Pope, but cannot be imposed (*De rescriptis*, last chapter, in the Sext; above, *De electione*, c. *Innotuit*; and Cod., *De legibus*, l. *Digna vox*);

what I noted in c. *Cum olim*, above, the preceding title, in the question of legitimation, etc., makes for it.

I ask whence "cardinal" is named. Answer: it is named from *cardo*, hinge. For the hinge is the place in which the door turns and is always moved, as Isidore says, *Etymologies*, book 15, c. 7, at the end. But the Pope is Cephas, that is head and hinge, by which the door of the whole Church militant is governed (dist. 22, c. *Sacrosancta*, at the end). The cardinals therefore are as it were those at his side, who are also sometimes called patricians, sometimes senators; on which the Archdeacon and Johannes Andreae in the said c. *Officii*, *De officio legati*, in the Sext; what is noted in c. *Felicis*, *De poenis*, in the Sext, makes for it; and dist. 96, c. *Constantinus*; and C. 16 q. 1, c. *Ecclesia habet*. Hence *cardo, cardinis* is the principal part; and the world has hinges, namely the four seasons of the year (dist. 76, c. *Huius* and c. *Statuimus*).

I ask where cardinals ought to be created. Answer: cardinals properly ought to be of the college of the holy Roman Church, nor can they be created in another church, as the Archdeacon notes on dist. 22, c. 1.

I ask whether the Pope or the cardinals can create a cardinal disjunctively. Answer: the Pope with the cardinals present in the Roman court creates cardinals; but the cardinals themselves of the college, even when the see is vacant, do not create cardinals, as the gloss notes on Clem. *Ne Romani*, *De electione*, in the gloss which begins *Reprobatur ergo*; although the Archdeacon alleges for both parts, namely that the Pope [can] without the cardinals, and the cardinals without the Pope, namely when the see is vacant (dist. 79, c. *Nullus umquam*). Yet the text in the said c. *Ne Romani* proves sufficiently that the cardinals cannot. Nor does what Hugo alleges stand in the way, who said that they could, [arguing] the greater: because they create the Pope, therefore more strongly what is less, by the rule "to whom what is more is lawful, what is less is surely lawful" (*De regulis iuris*, c. *Cui licet*, in the Sext; and Dig., *De regulis iuris*, l. *Non debet cui plus licet*). Because this rule has many exceptions, as the gloss notes on the said laws. Hence we see that the chapter creates the bishop, yet does not confer the benefices belonging to the collation of the bishop alone, as in c. 1, *Ne sede vacante*, in the Sext.

Chapter Quia nonnulli (c. 3)

Summary. 1. Several dignities or churches ought not to be conferred on one. 2. Many set no measure to avarice. 3. Two negatives are taken affirmatively and copulatively. 4. Parishes and dignities of the church are made equal as to the prohibition of plurality. 5. One obtaining several dignities or curate churches transgresses the canons. 6. The revenues of the church are called stipends; clerics are stipendiaries of God, after the example of secular soldiers. 7. One retaining several benefices is bound to say the office several times. 8. A collation is not valid where several dignities are conferred together on the same man. 9. Whether a wife burdened with residing with her children, residing with them together with a second husband, loses the legacy. 10. Whether one taken up to exercise an office can serve by a substitute. 11. A benefice, even simple, requiring residence cannot be given without dispensation to one having another similar. 12. How many benefices one can obtain. 13. Whether a bishop dispenses over two simple benefices, one of which requires residence. 14. How the dignities of the church are taken. 15. A canonry of a cathedral church is not a dignity; and who are

called cardinal canons. 16. In what cases it is lawful to serve a benefice by a vicar. 17. How "to give to one who has is to lose" is understood.

Quia nonnulli. Several dignities or churches ought not to be conferred on one; and the church ought to be conferred on such a one as resides and is able to rule by himself; otherwise he will lose the church, and the conferrer will be deprived of the power of conferring. This it says. It makes three [parts]: first it sets out the vice, second it applies the remedy, third it imposes the penalty. The second at *ne id*; the third at *quod si aliter*. But the first also makes three, in setting out the vice: for first it names it, second it gives examples, third it reproves. The first at *modum avaritiae*; the second at *diversas dignitates*; the third at *ne id*; and there is the second principal [part], which is also divided in two, because first it decrees, second it punishes; the second at *quod si aliter*.

Note the text at *avaritiae modum*, that many set no measure to avarice, but always desire greater things. Seneca in the Letters: "Have you ever seen a dog snapping with open mouth at pieces of bread thrown by its master? Whatever it catches it at once devours whole, and always gapes in hope of what is to come." The same: "Poverty lacks many things, avarice all"; although properly the poor man lacks many things, the miser all, to Lucilius, letter 108, where he says: "the miser is good to no one, but to himself worst." On this matter I will speak below, the next title, c. *Avaritiae*.

Note at *quia nonnulli*, that is, some. Hence note that a negative set before a universal negative sign is equivalent to its contrary, and so two negatives make one affirmative; on which Dig., *De heredibus instituendis*, l. *Iam dubitari*; Dig., *De verborum significatione*, l. *Si duobus*; and noted in Dig., *De pactis*, l. *Iuris gentium*, § *Item si quis*. Sometimes, however, two negatives are taken copulatively, as when it is said "Peter, and also [*nec non*] John, write"; on which by the gloss in c. 1, *De officio iudicis delegati*, in the Clementines, in the gloss on the words *nec non*. Sometimes they are taken redundantly, as *nonnunquam*; on which fully Dig., *De iureiurando*, l. *Manifesti*; dist. 47, last chapter, makes for it.

Note at *diversas dignitates*, that as to the prohibition of plurality parishes and dignities of the church are made equal. And parishes were limited from the time of Dionysius, on which in c. *Pastoralis*, at the beginning, below, *De his quae fiunt a praelato*; and so let each be content with its boundaries (below, *De sepulturis*, c. 1). Nor can one parish be built to the prejudice of another, except for cause and by authority of the diocesan, on which below, *De ecclesiis aedificandis*, c. *Ad audientiam*, and below, *De novi operis nuntiatione*, c. 1; nor does the authority of an inferior suffice, as in c. *Sicut unire*, below, *De excessibus praelatorum*. And so it appears that this text makes curate churches and dignities equal. The same also of prebends (below, the next title, c. *Cum non ignores*), provided one suffices by itself; otherwise even by common law several can be held together (below, this title, c. *Conveniente* [text unclear], and below, the next title, c. *Cum teneamur*).

Note at *contra sacrorum canonum instituta* that those who obtain several dignities or curate churches are said to transgress the canons, and such men are also ineligible, as appears above, *De electione*, c. *Dudum*, and we shall see below, the next title, c. *De multa*. Note at *ut cum unum officium*, that a benefice is given on account of the office; in agreement above, *De rescriptis*, the last chapter. Note at *stipendia*: the revenues of the church are called stipends. Hence clerics are stipendiaries of God, after the example of secular soldiers, for whom labour obtains the stipend, as in l. *Qui stipendia*, Cod., *De procuratoribus*, and in l. *Commodis*, Dig., *De re iudicata*. On this word "stipend" see what I noted [above], the preceding title, c. *Diversis fallaciis* and the last chapter. And so it is an argument that one who retains several benefices is bound to say the office several times: for here the plurality of benefices is

denied for this reason, because he scarcely suffices to fulfil one office; therefore if he could say it several times, he would be bound, so that as the benefit is increased the burden is also increased; just as also when the burden is removed the benefit is removed. l. *Et si contra*, Dig., *De vulgari et pupillari substitutione*, and l. *Alumnae*, § *Ab heredibus*, Dig., *De alimentis legatis*, make for it; on which fully in the rule *Qui sentit*, *De regulis iuris*, in the Sext; and so Lord Petrus de Ancharano gathers here.

Note at *districtius inhibemus*, that the collation is not valid if several dignities are conferred together on the same man. Note at *cum igitur ecclesia vel ecclesiasticum ministerium*, that not only a parish church or dignity requires residence, but also an ecclesiastical ministry, that is, a simple benefice, as here and in the next chapter, at the beginning. Note at *talis ad hoc persona quaeratur*, etc., that for governance one is to be chosen who is ready to reside and can bear the care by himself.

It makes for the question: suppose a testator enjoined his wife that she should reside with the children, otherwise she would be deprived of the legacy; the wife marries a second husband, and nonetheless with her husband resides with the children of the first husband: does she lose the legacy? It seems not, because she fulfils the condition or mode, since she resides. I believe the contrary, by what I noted in c. *Quod a te*, in the second gloss, above, the preceding title. On this question also the civil Doctors note in l. *Si quis ita legaverit*, Dig., *De conditionibus et demonstrationibus*, and l. *Quaero*, last §, Dig., *De alimentis vel cibariis legatis*. And on this word "reside" it is had in l. *Devotum*, Cod., *De metallariis*, and Dig., *De agricolis et censitis*, l. *Cum scimus*, last §, and *De tractoriis*, single law, Cod. book 11. The text, the gloss, and what the Doctors note in c. *Si qui*, C. 21 q. 3, make sufficiently for the aforesaid question.

Note at *per seipsum*, an argument for the question whether one taken up to exercise some office can serve by a substitute; and here it is proved not, because it says "by himself," namely the person. Argument to the contrary in the rule "one can [do] through another what he can do by himself," and in the rule "he who acts through another seems surely to act by himself" (*De regulis iuris*, in the Sext). As [if] a doctor elected, or obliged

to lecture for a year, seems able to substitute one equally good. And although various men have said various things, yet Johannes Andreae, in c. 1, *De summa Trinitate*, in the additions, [and] in the said c. *Qui facit*, *De regulis iuris*, in the Sext, in the *Mercuriales*, notes that he cannot substitute; and if he substitutes against the will of the students, he cannot claim the salary. He founds himself on the text in the single law, § *Si vero talis*, Cod., *De caducis tollendis*, where, if the burden of teaching or of painting was imposed on an heir or legatee, it cannot be fulfilled by another. l. *Inter artifices*, Dig., *De solutionibus*, makes for it; l. *Fideicommissa*, Dig., *De legatis* 3, at the end, also makes for it; and above, *De officio delegati*, last chapter. He says the same of one who promised to write a book; the same of the Podestà or another rector of a city; but otherwise of one who promised to build a house. It seems equitable enough that for a just cause he can substitute, as from sickness, from absence for the utility of the commonwealth, as because perhaps he goes as ambassador, and the like; for which Dig., *Si quis cautionibus*, l. *Quoties*, and Dig., *Ad legem Iuliam repetundarum*, last law, make for it; although the *Speculum*, in the title *De salario*, at the end, says that those laws do not make for the question, because they speak of necessary obligations; but it is otherwise in voluntary ones, as in l. *Sicut ab initio*, Cod., *De actionibus et obligationibus*. Cynus says that the custom of the Doctor and of the place is to be attended to, as in l. *Plenum*, § *Equitii*, Dig., *De usu et habitatione*. But custom ceasing, if he wishes to substitute for his own special gain, then he cannot, because the industry of the person seems to have

been chosen, as in the said l. *Inter artifices*; for it is impossible that the industry of one be the industry of another (in the Authentic *De fide instrumentorum*, § 1; Dig., *De condictione indebiti*, l. *Si non sortem*, § *Libertus*). But one withdrawing to exercise a public office, or to the service of the church, can substitute one equally good or better (Cod., *De episcopis et clericis*, l. *Quisquis* and l. *Ad similitudinem*); what the gloss and Johannes Andreae note in c. *Is cui*, in the last gloss, *De officio delegati*, in the Sext, makes for it. Johannes Andreae says it is necessary also to consider the statutes of the universities. On this question also the civilians note in l. *Nemo est qui nesciat*, Dig., *De duobus reis*. For the aforesaid determination of this question make all the laws I adduced below, the next chapter, in the first note; and the gloss noted below, *De verborum significatione*, c. *Propter*, which says that the sense of the testator is to be considered.

Note at *quod si aliter*, that a benefice even simple requiring residence cannot by common law be given or conferred on one having another similar; and so by common law it is not lawful to have several benefices or prebends without dispensation; on which below, the next title, c. *De multa*. Note at *quod contra sacros canones*, that where one confers a benefice requiring residence on one who from the beginning is not ready to be willing to reside or to serve by himself, the collation is faulty, and therefore he can be deprived. But today the penalty against such a recipient has been increased by the Extravagant which begins *Execrabilis*. Note at *et qui dederit*, that one so conferring against the canons is to be deprived of the right of conferring, as here at the end.

For understanding those things which Lord Johannes Andreae asks here in declaring about several curate churches, it is asked whether one can obtain several churches or benefices. Premise that a simple benefice and a curate one can well be obtained together by dispensation of the bishop, because the prohibition of this council prohibits curate ones only; on which below, *De praebendis*, c. *De multa*. This premised, say that sometimes a church obtained has newly begun to be curate, and then whether the newly curate one is vacant, or the other which he held with it, distinguish: either it was done with his knowledge and consent, and the first benefice is vacant (above, *De consuetudine*, c. *Cum dilectus*, § *Dictus*; and what is noted below, *De statu monachorum*, c. *Recolentes*, last §); but if it was done without his knowledge, Johannes Andreae says that within six months he has the option of obtaining whichever he prefers (argument below, the next title, c. *Referente* and c. *Praeterea*; and in c. *Gratia*, *De rescriptis*, in the Sext); for a simple benefice can well be made [so] by authority of the bishop, as was said above.

Sometimes a church obtained was long ago curate, but today has no parishioner, either because they died or because they withdrew from there, transferring themselves elsewhere (*De parochiis*, last chapter); and then Hostiensis says that this church begins to be without cure as to act, because it has no one to care for (argument Dig., *Si quis cautionibus*, last law), but not as to habit, because the parochial rights remain, which are many, as appears in the *Summa*, *De parochiis*, § *In quibus*. It will therefore be called a church of no parishioners, as a bishop *Nullatensis* (above, *De translatione*, c. *Inter corporalia*); for often words are referred to aptitude, not to act (below, *De baptismo*, c. *Maiores*, § *Ceterum*; above, *De restitutione spoliatorum*, c. *Pisanis*; and Dig., *De servitutibus praediorum rusticorum*, l. 1 and *Actilicinus*). Yet Hostiensis says that although that is curate in habit, yet as to the matter of c. *De multa*, which seems to attend to the danger of the souls of the parishioners, such a benefice does not seem to be counted among curate benefices; because where there is no parishioner, the soul of no parishioner can be endangered, and so, the cause ceasing, the effect ceases (above, *De appellationibus*,

c. *Cum cessante*). But to the contrary: since he receives from this church the parochial rights, as praedial tithes, first fruits, burials and the like, is he not at least bound to pray for those who have died and to have care of their souls, according to what is noted in C. 13 q. 2, c. *Animae defunctorum* and c. *Tempus*, and almost throughout? For "it is a holy and wholesome thought to pray for the dead, that they may be loosed from sins" (2 Maccabees 12); and so it seems that it ought always to be deemed curate. Solution: man does not have the care of the dead, but God alone, although works of charity and suffrages are done for them (below, *De sententia excommunicationis*, c. *A nobis*; and the gloss noted in c. *Cum Marthae*, § 1, below, *De celebratione missarum*; and fully in [book] 4 of the *Sentences*, dist. 45; and *De consecratione*, dist. 5, c. *Non mediocriter*). Note however that if the church was from the beginning parochial but the parishioners have died, or if they are absent, if men return it recovers its right, as it were by right of *postliminium* (argument above, *De electione*, c. *Quia diligentia*). Yet the mere concourse of men to one church does not make the church curate, as Innocent, Johannes Andreae and Petrus de Ancharano hold.

Suppose, according to Hostiensis, that a bishop by the same word and moment gives someone two churches with cure, and it cannot be established of which he first obtained possession, since one having a curate church, if he obtains another, loses the first: in this case which will be said to be vacant? It seems by rigour that both are vacant, because by rigour the collation did not hold, just as no one can marry two wives together (below, *De divortiis*, c. *Gaudemus*, § *Quia vero*, and there by Johannes Andreae, in the gloss *Patet ergo*). Yet Hostiensis says that perhaps some would judge the contrary, giving this man the option within six months, as above. Likewise Johannes Andreae says here that although one can prescribe praedial tithes in another's parish, as below, *De decimis*, c. *Cum sint homines* and c. *Apostolicae*, yet not the same of personal ones, nor of the right of baptizing another's parishioner, nor of offerings, nor of first fruits, or other things which are counted among personal things. For a thing is more easily subjected than a person, as appears above, *De foro competenti*, c. *Significasti*; and the custom seems irrational (*De parochiis*, c. 2), except insofar as it is approved by the law of the canons, as that the archdeacon and certain others prescribe parochial rights and have jurisdiction by custom (above, *De rescriptis*, c. *Cum olim* and c. *Veniens*; above, *De officio archidiaconi*, last chapter). For it would be irrational that one rector should prescribe everything within the parish of another (below, *De sepulturis*, c. 1 and c. *Certificari*). But by the receiving of such rights, Hostiensis says, the church is deemed to have cure.

I ask whether this text has place not only in curate [benefices] but also in non-curate ones, if by custom, statute or privilege they require residence. Johannes Andreae, Innocent, Hostiensis and Petrus de Ancharano [say] yes, which is sufficiently proved by c. *Conquerente*, below, this title. From which is taken the argument that over two simple benefices, one of which requires residence, the bishop does not dispense; on which in the said c. *De multa*; it is had more expressly in C. 21 q. 1, c. 1.

In the first gloss, at the end: say of this matter, how ecclesiastical dignities are taken, as Innocent notes in c. *De multa*, and noted in c. 1, *De consuetudine*, in the Sext. Yet do not believe that a canonry of a cathedral church is a dignity, as in c. *Statutum*, *De rescriptis*, in the Sext, at the beginning, unless they were canons who are called cardinal canons, as at Ravenna, on whom in c. *Cum accessissent*, above, *De constitutionibus*. Some canons also of the church of Naples are called cardinals (dist. 71, c. *Fraternitatem*), and some of the church of Syracuse (dist. 74, c. *Quorundam*). And on the name of dignity in general see what I wrote in c. *Cum decorem*, above, the preceding title. In the penultimate

gloss, at "below, *De praebendis*, c. *Extirpandae*, § *Qui vero*": see there enumerated all the cases in which it is lawful to serve in a benefice by a vicar; on which also below, this title, c. *Relatum*, and as the Archdeacon notes on dist. 31, c. *Sacerdotibus*.

The Abbot gathers here that to give to one who has is nothing other than to lose; which seems against the teaching of Christ, who says (Matthew 25): "For to every one that hath shall be given, and he shall abound; but from him that hath not, that also which he seemeth to have shall be taken away." But this is understood spiritually of one having the grace of God, to whom grace is given for grace (John 1: "Of his fullness we all have received, grace for grace"). Hence also the Psalm says: "They shall go from virtue to virtue"; and Zechariah says: "He shall equal grace with grace" (Zechariah 4); and the Apostle says (1 Corinthians 15): "By the grace of God I am what I am, and his grace in me hath not been void"; to which the Church adds: "but his grace always remains in me." But the Abbot understands that to give to one who has is to lose

namely to give temporal goods to one having the same temporal goods; for the Wisdom of God judged that alms are to be given to the needy and poor (Isaiah 58): "Deal thy bread to the hungry, and bring the needy and the harbourless into thy house; when thou shalt see one naked, cover him, and despise not thy own flesh." On which matter by Johannes de Lignano in c. *Mattheus*, *De reliquiis et veneratione sanctorum*, in the Sext; and by Thomas, II-II, q. 32; and by the Theologians commonly on the fourth [book] of the *Sentences*, dist. 15 [text unclear]. And a notable authority, Ecclesiasticus 29: "Shut up alms in the heart of the poor, and it shall obtain help for thee against all evil," etc.; see it beautifully there.

Chapter Relatum (c. 4)

Summary. 1. One presented who is not ready to reside ought not to be confirmed. 2. The sense, not the bark of the words, is to be attended to. 3. Whether a religious wearing a covered habit is called an apostate. 4. Whether one obtaining [a rescript] that he be provided with a benefice can be promoted to a dignity. 5. Power requires act; where deeds are needed, words do not suffice. 6. A church ought not to be conferred on one who is presumed not to reside; and whether one willing to give security is admitted. 7. Whether it is lawful for clerics to absent themselves from benefices for study without the bishop's licence. 8. Whether prelates inferior to bishops can give licence that they absent themselves from benefices for study, or can deprive non-residents or dispense with them; no. 9. 10. On the occasion of study, where someone is absent from a benefice for seven years, he serves it by another at the expense of the church. 11. Treatise and matter of appeal.

Relatum. If it appears that one presented is not ready to reside in the church, he ought not to be confirmed; and even if he has been admitted or confirmed, he ought to be deprived if he does not reside, appeal being removed. This it says. It makes four [parts]: first it narrates the complaint, second it defines, third it excepts, fourth it adds. The second at *cum igitur*, the third at *nisi forte*, the fourth at *nec patrocinari*.

Note the text at *per se valeat exercere*, that one law declares another, as it appears that this chapter declares the preceding chapter, where there are the same words, *per seipsam valeat exercere*. For to this these presented men, to be promoted, said that power without act and exercise sufficed; and so they attended to the bark of the words and not to the sense, which ought not to be, as in c. *Marchion* and

Basilides, C. 1 q. 7, and below, *De verborum significatione*, c. *In his quae ambiguitatem*, where it is expressed that one ought not to consider the words but the will, since not the intention ought to serve the words, but the words the intention. Hence Gregory too in a certain letter says: "Therefore, if it should perhaps befall you to take my long letter for interpreting, I ask that not word from word, but sense from sense be translated; because often while the propriety of words is attended to, the sense of truth is lost." The text is to the letter below, *De verborum significatione*, c. *Propterea*. "For the thing is not subject to the speech, but the speech to the thing" (below, *De verborum significatione*, c. *Intelligentia*), where the gloss says: because the Gospel of Christ consists not in the leaves but in the root of reason and in consent (C. 1 q. 1, c. *Marchion*). For words were instituted so that through them each might bring forth his thoughts to the knowledge of another (C. 22 q. 1, c. *Omnis autem*). For as the soul is preferred to the body, so the meaning to the words (dist. 28, c. *Sedulo*; and C. 22 q. 5, c. *Humanae*; Dig., *De legibus*, l. *Scire oportet*). For the mind of the speaker is weightier than the voice (Dig., *De supellectile legata*, l. *Labeo*); nor ought the word be looked at more than the will (Cod., *Quae res pignori obligari possunt*, last law; and Cod., *De contrahenda et committenda stipulatione*, l. *Omnes*). And the aforesaid make for questions, one of which I wrote above, this title, the preceding chapter, of the wife left burdened with residence with the children; the other I wrote in c. *Quod a te*, above, the preceding title, of the wife burdened with living honestly and chastely.

Likewise they make for the question of a monk wearing a covered or hidden habit: is he to be judged an apostate? It seems not, because he is deemed an apostate when he wholly gives up the habit so as to return to the world (below, *De apostatis*, c. 1 and c. *Tuae*; and dist. 50, last chapter); hence it seems to suffice to wear the habit in effect (above, *De consuetudine*, c. *Quanto*). Lord Guillelmus de Petra Alta disputed this question on c. *Certum*, *De regulis iuris*, in the Sext; see what I wrote in c. *Ioannes*, at "Fourthly I ask," near the end of that question, above, the preceding title. And whatever others have said, the decision of Johannes Andreae seems sounder, especially by Clem. *Quoniam*, at the beginning, *De vita et honestate clericorum*. Hence even if he wore a clerical garment over his own habit, because he seems to plough with an ox and an ass, he is deemed an apostate; below, *De apostatis*, c. *Quidam*, makes for it; and since he does not show the habit of his religion, he is deemed to have given up the habit (below, *De sententia excommunicationis*, c. *Contingit*, the second). For one wearing clerical garments is also deemed a cleric (*De sententia excommunicationis*, c. *Si iudex*, verse *Iustum est*, in the Sext), and so not a religious (dist. 27, c. *Quod interrogasti*). Hence it is briefly to be concluded: either he hid the habit of his own religion for a just cause, as because of fear of death or danger, and it is lawful, as in c. *Clerici*, above, *De vita et honestate clericorum*, or for another just cause, as in c. *Deus qui*, same title, with similar places; but if without just cause he hid his habit, he is to be deemed an apostate, because he would not fittingly use such a habit in the cloister, as in the Extravagant *Ne clerici vel monachi*, [c.] *Gravis*, whose mind is in part had in c. 2, *Ne clerici vel monachi*, in the Sext. For the habit ought to be worn outwardly in effect, as in the said c. *Clerici*, and the habit ought to be distinguished publicly, as in c. *In nonnullis*, below, *De Iudaeis*. For he is not said to wear it who does not wear it as he ought (below, *De regulis iuris*, c. *Qui ex timore*); l. *Rutilia Polla*, Dig., *De contrahenda emptione*, makes for it, where not to be and not to appear are equal. Lord Petrus de Ancharano also holds this in c. *Deus qui*, above, *De vita et honestate clericorum*. This text makes sufficiently for this, in the verse *cum igitur*, because it says that words are to be taken in effect.

And so this chapter declares the preceding one, which willed that in the prohibition regard be had to the plurality of dignities and curate benefices; and the council used the words "ecclesiastical dignities

and several parish churches" (the preceding chapter); here Alexander III, referring the words of the council, says the Lateran Council decreed "a church or ecclesiastical benefice," etc. And it makes for the question whether he who obtained that he be provided with a benefice by such a rescript can be promoted to a dignity. It seems so, by this way of taking "benefice" broadly from the equation which that text makes, for which the preceding chapter, above, this title, also makes; and below, *De verborum significatione*, c. *Cum tibi*, makes for it. But the contrary is true, because "benefice" in the matter of impetration is taken strictly for a simple, non-curate benefice, as in the last chapter, below, the next title.

Note at *non admitti*, by the contrary sense, that by these words, "I admit your presentation," confirmation seems to be made. Note also at *hoc se posse affirmant, sed efficere contradicunt*, that where deeds are needed words do not suffice. Hence power requires act, according to that of Matthew 7: "Not every one that saith to me, Lord, Lord, shall enter into the kingdom of heaven, but he that doth the will of my Father who is in heaven, he shall enter into the kingdom of heaven." Acts 1: "Jesus began to do and to teach" (dist. 43, c. *Sacrorum*, at the end). Matthew [5]: "But he that shall do and teach, he shall be called great in the kingdom of heaven." James 1: "Be ye doers of the word, and not hearers only," etc.; it adds: "but a doer of the work, this man shall be blessed in his deed"; on which *De poenitentia*, dist. 2, c. *Si enim inquit*, verse *Rursus*. Hence the verse:

Things for things we are wont to give, for words words; For words words, for deeds bring back deeds.

What is noted in the text and gloss of C. 13 q. 1, § *Ad haec* and § *His ita*, makes for it.

Hence from the first part of this chapter joined with the verse *cum igitur* it appears notably that on one of whom it is presumed that he ought not to reside, or it is known for certain that he will not withdraw, on such a one a church ought not to be conferred. But what if those against whom it is presumed wish to give security: ought they to be admitted? Innocent answers yes; and this security ought to be exacted from them when they are suspect, as in c. *Litteras*, above, *De praesumptionibus*; or if this is by custom (below, this title, c. *Ex parte*); or if it is by statute (below, the next title, c. *Significatum*, otherwise *Significasti*), according to Hostiensis; and according to Innocent the promise alone suffices. But Hostiensis, in c. *Tua nos*, above, *De iureiurando*, seems to wish that clerics ought to swear; on which below, this title, c. *Ex parte*. And Johannes Andreae after Hostiensis gathers from this text the argument that if anyone received a church with the intention of keeping it until he obtains a richer one, he is promoted less canonically (*De conditionibus appositis*, last chapter; C. 7 q. 1, c. *Sicut*); for from such a mind follows ambition (below, title 5, c. *Quia in tantum*). Besides, this is against the authority of the Apostle (1 Corinthians 7): "Be ye content with that calling in which you were called"; for which dist. 21, c. 1. Hence just as a carnal marriage contracted for a time is null, as "I contract with you until I find a richer woman," and C. 32 q. 2, c. *Solet quaeri*, so neither a spiritual one. What I noted above, the preceding title, c. *Ioannes*, at "Fourthly I ask," etc., makes for it.

Note at *nisi forte de licentia praelatorum*, that even for study or any other honest cause it is not lawful for clerics to absent themselves from benefices without licence of the prelate; but with licence they can well absent themselves for an honest cause, even from churches requiring residence, as here. But I ask whether prelates inferior to bishops can give such licence. Answer, according to Innocent, Hostiensis and Johannes Andreae, yes, as here in the word *praelatorum suorum*; for words uttered generally are taken generally (*De electione*, c. *Licet canon*, in the Sext; Dig., *De legatis* 3, l. *Non aliter*), and see what Johannes Andreae notes in the said

c. *Licet canon*, in the penultimate gloss, in the *Novella*. And he adds here that the penalty of the non-resident will be imposed by him to whom the removal belongs, and not by one inferior to him (below, this title, c. *Qualiter*, by him). And note this disjunction here, *vel studio litterarum*, which looks to what follows; hence by way of example it is counted as one of the honest causes, etc. For if it looked to what precedes, it would follow that for the cause of study they could be absent without licence of the prelate, which yet is false, as here.

But whether the aforesaid inferior prelates can deprive non-residents or dispense with them: say that if they can institute and remove, they can deprive and dispense; otherwise not, as the gloss and Johannes Andreae note in the said c. *Licet canon*. In the penultimate gloss, on the word *diffugium*, object c. *Pervenit*, above, *De appellationibus*. Solution as in the gloss. Or say, and more truly, according to Philip and Guillelmus, that there a just cause was alleged, for instance a dispensation or something similar, and therefore in doubt the appeal is received; but here no cause is alleged, therefore it is not received, as in c. *Ut debitus*, above, *De appellationibus*. And add that where someone is absent from a benefice by dispensation, for instance on the occasion of study for seven years, or by reason of probation in religion for a year, he ought to serve the church by another at the expense of the benefice, as in the said c. *Pervenit*; and the gloss says this here at the end; c. *Ex eo, De electione*, in the Sext, makes for it; the case is in c. *Beneficium*, *De regularibus*, in the Sext. In the same gloss, at *et qui expresse*, expound "and" for "or": for if it is a curate church or a dignity, the appeal ought not to be deferred to, because it is notoriously deemed to require residence. The same also if it is a simple benefice and it is notorious that by custom it requires residence, or that from the beginning he promised to reside, as here; otherwise it would be different, because the appeal would be deferred to, as in the said c. *Pervenit*; and c. *Cum speciali*, § *Porro*, above, *De appellationibus*, makes for it.

And concerning the treatise and matter of appeal, see the solemn gloss in c. *Ad reprimendam*, above, *De officio ordinarii*, in the gloss *Hoc ideo*; and the *Speculum*, in the title *De appellationibus*, where he makes a notable treatise; and the Archdeacon on C. 2 q. 6, on the summary. And for our case what is noted in c. *Biduum*, C. 2 q. 6, at the end, in the gloss *Ergo qui*, makes sufficiently. And that no one can commit a cause "appeal being removed" except the prince is had in c. *Quaestionem*, at the beginning, above, *De officio delegati*. And it is to be known that the judge from whom [appeal is made], not only within ten days but also after, indeed even after appeal, can revoke the grievance and summon the aggrieved appellant to see the revocation. And the reason is that, although the sentence passes into a judged matter as to the party, yet not as to the judge (above, *De appellationibus*, c. *Cum cessante*, and what is noted there; and in c. *Si a iudice*, *De appellationibus*, in the Sext; and in c. *Venerabilibus*, § *Sed et si*, *De sententia excommunicationis*, in the Sext). And the time for prosecuting an appeal is a year, or for just cause two years (C. 2 q. 6, c. *Tempus autem* and the following chapter, and c. *Ex ratione*, and c. *Sicut*, in the Clementines). And when the year begins to run, the ordinary gloss says there; and whether it runs before the interposition of the appeal, see by Johannes Andreae in c. *Nemo potest*, *De regulis iuris*, in the Sext, in the *Mercuriales*.

Chapter Fraternitati (c. 5)

Summary. 1. No bishop receives another's cleric without letters commendatory, or licence of the Apostolic See. 2. How the Pope calls bishops, kings, princes and others, and cardinals. 3. How bishops are called. 4. How many ways the words *praeterea* and *praeter* are used. 5. What is included

under the name of diocese and diocesan. 6. How the word *usque* is used. 7. Letters commendatory or *pacificae* are given by the bishop; and of how many kinds they are, no. 9. 8. Whether, the see being vacant, the chapter can grant letters commendatory or dimissory. 9. 10. The Pope grants letters commendatory. 11. Where the power of the Pope consists, and for what it is given.

Fraternitati. No bishop ought to receive the cleric of another bishop without letters commendatory from his bishop, or without licence of the Apostolic See. This it says. The same also of a layman: nor can anyone receive a layman, etc. (dist. 71, c. *Primatus*; and in the last chapter, *De temporibus ordinationum*, in the Sext). Note at *fraternitati tuae* that the Pope, writing to a bishop, honours him as a brother. The same above, *De testibus*, c. *Fraternitatis*; C. 7 q. 1, c. *Scias frater* and c. *Quia frater*; and C. 11 q. 1, c. *Fratris*. Indeed not only bishops but also clerics and all the faithful, according to the ancient name, as noted in C. 11 q. 1, c. *Si quis ex fratribus*; although today it is observed otherwise, as in c. *Cum gravi*, where the text of Innocent III says (*De crimine falsi*): "since you ought to know that the Apostolic See holds this custom in its letters, that we call patriarchs, archbishops and bishops brothers, but the others, kings and princes, or others of whatever order, sons, in our letters"; and that chapter elsewhere begins *Quam gravi*, and elsewhere *Cum gravi*. The Pope calls bishops brothers, etc.; see on this what I wrote above, this title, c. 2.

Add that bishops are called most holy legates of Christ, special brothers and fellow bishops of the Supreme Pontiff, as in c. *Si quis suadente*, after the middle, *De poenis*, in the Clementines; the Authentic *De sanctissimis episcopis*, in the rubric and the [preface] [text unclear], makes for it; who are also proved to be columns of the church, says the text in the said c. *Si quis*, and C. 2 q. 7, c. *Accusatio*, and below, *De accusationibus*, c. *Qualiter*, the second. But cardinals he sometimes calls brothers, sometimes sons (*De electione*, c. *Fundamenta*, § *Decet*, in the Sext). Hence when he speaks of cardinals indiscriminately he calls the cardinals brothers, as in the said § *Decet*, and *De officio legati*, c. 1, in the Sext. But if special mention happens to be made of cardinal bishops and of others, then he calls the cardinal bishops brothers and the remaining cardinals sons (above, *De testibus*, c. *Licet*: "our beloved son L., cardinal priest of the title of Holy Cross," etc.).

Note at *praeterea* that this word *praeterea* is sometimes used inclusively, sometimes exclusively, as Johannes Andreae notes in c. 1, above, *De supplenda negligentia praelatorum*. But when it is used exclusively it is taken for a disjunction and for a relative noun of identity, and then there are two words, namely *praeter ea*, as if to say "besides those things"; as the Apostle says (2 Corinthians 11): "Besides those things which are without, my daily instance, the solicitude for all the churches," etc. And of this word *praeter*, considered by itself alone, when it is used inclusively and when exclusively, the Doctors note in c. 1, *De summa Trinitate*, and in c. *Cum ab omni*, *De vita et honestate clericorum*; on which the Archdeacon on C. 13 q. 1, c. *Ebron*. Indeed sometimes *praeter* is used for *contra*, and so they are made equal, as noted in c. *Si cui*, *De electione*, in the Sext, and by the Moderns in c. *Dilecti*, above, *De maioritate et obedientia*, and Dig., *De usu et habitatione*, l. *Plenum*, at the beginning. Of this word *praeter* see fully by Paulus de Leazariis in c. 1, *De summa Trinitate*, in the Clementines.

Note at *dioecesis*: say that under this word "diocese" is sometimes comprehended the territory of the bishop, sometimes [it is taken] for the parish of the cathedral church, sometimes for the whole episcopal province; on which by the Archdeacon on C. 7 q. 1, c. *Episcopum*; C. 7 q. 6, c. *Illud etiam*; and C. 9 q. 2, c. *Episcopi*. And know that under the name of diocesan a prelate inferior to the bishop is not comprehended; see the good gloss which begins *Per dioecesanos*, in Clem. 1, *De foro competenti*, verse

Volumus. But under the name of ordinary even inferiors are understood, as the gloss notes in c. 1, in the gloss *Quid in inferioribus*, *De iure patronatus*, in the Clementines. And what "diocese" comprehends, see the gloss noted in c. 1, *De rerum permutatione*, in the Sext, and dist. 61, c. *Nullus invitis*; and on the division of dioceses, provinces and parishes, the gloss noted on C. 13 q. 1, c. 1.

Note at *usque*, that this word is used exclusively and sometimes inclusively (C. 1 q. 4, c. *Quia praesulatus*; C. 23 q. 5, c. *Non est*, and there the Archdeacon; dist. 5, c. *Ad eius vero*; and as the Archdeacon notes on dist. 23, c. *Psalmista*; and Johannes Andreae in c. *Qui generaliter*, § 4 [text unclear], *De procuratoribus*, in the Sext, and there also by the Archdeacon; and in c. *Cum quis*, *De sententia excommunicationis*, in the Sext; C. 17 q. 4, c. *Diffinivit*; *De consuetudine*, c. 1, in the Sext; above, *De electione*, c. *Ex eo*, the first answer; above, *De privilegiis*, c. *Quoniam*; C. 16 q. 2, c. *Sane*; C. 18 q. 2, c. *Cellulas*). It is also used inclusively (*De foro competenti*, c. *Romana*, in the Sext; *De decimis*, c. 2, § *Sane*; and C. 23 q. 5, c. *Non est nostrum*). And say according to the Archdeacon that when a negative is set before this word, then it includes (below, *De excessibus praelatorum*, last chapter). Johannes Andreae says in the said c. *Qui generaliter*: "I do not grasp these words, because it is always used for *sine* [text unclear], which sounds as 'if not.' Hence when a negative follows, it cannot [text unclear]; nor by force of its proper signification can it be said that it includes. I confess, however, that when it follows a negative resolved into an affirmative, it sounds that he will be able with it."

Note at *commendatitiis litteris*, that these letters commendatory are given by the bishop, and are called letters commendatory or *pacificae*, as noted in dist. 68, § *Inter episcopos*; and of these it is had fully below, *De clericis peregrinis*, c. 1 and the following chapter and c. *Tuae*, where of the matter. And they ought to be granted to the honest only, so that the criminous are not received in others' dioceses (C. 19 q. 2, c. *Duae*); on which in the *Speculum*, *De clericis peregrinis*, verse *Talis episcopis*.

But I ask whether, the see being vacant, the chapter can grant these letters commendatory or dimissory. Distinguish three kinds of these letters. For some are letters commendatory [and] dimissory, by which someone is released from the authority of his bishop with testimonial letters; which the chapter does not grant even when the see is vacant, because it is a certain alienation (dist. 71, c. *Fraternitatem*). But the Archdeacon [says that] where custom gives [it], it can, the see being vacant, not otherwise; for which makes c. *Significasti*, above, *De officio archidiaconi*, and in c. *Cum nullus*, *De temporibus ordinationum*, in the Sext, in the second [text unclear]; and the gloss touches it in the said c. *Significasti*, and C. 9 q. 2, c. *Episcopum*. Others are commendatory for orders, and these can be given by the bishop [or], the see being vacant, also by another to whom belongs

the administration of spiritual things, as in the said c. *Cum nullus*, § 3. Others are commendatory *pacificae*, and these are given by the bishop (*De consecratione*, dist. 5, c. *Non oportet*), and they can also be given by inferiors, according to Johannes Andreae. Conclude therefore that without these letters no one ought to receive another's cleric, namely by retaining him, or binding him to another church (below, title 5, c. *Exposuisti*); but he can well receive one passing through (below, *De clericis peregrinis*, c. *Accedens*; Dig., *De receptis*, l. 1). But he can well give him a prebend, since prejudice is done to no one, according to Petrus de Ancharano.

Note at *non debes recipere*, that one receiving otherwise sins mortally, because he acts against this canon. It is proved in Clem. *Exivi de paradiso*, *De verborum significatione*, § *Item praeterea*, because "ought not" is equivalent to a precept, etc.

Note at *ab apostolica sede mandatum*, that the Pope grants letters commendatory. For he is to be obeyed by all (above, *De rescriptis*, c. *Si quando*; C. 9 q. 3, c. *Cuncta per mundum*; the same dist. 21, c. *Quamvis*). For he obtains the principate of the whole world, as in c. 1, *De statu regularium*, near the beginning, in the Sext, at "existing in any parts of the world whatever," and in the proem of the Sext, at the beginning, at "and willed to obtain the chief magistracy of the whole world." For he is the successor of Peter, to whom, the blessed key-bearer of eternal life, Christ God committed the rights of the earthly and at the same time the heavenly empire (dist. 22, c. 1); the same in c. *Fundamenta*, § *Decet*, and in c. *Ubi periculum*, § *Ceterum*, *De electione*, in the Sext. He is the most singular Vicar of Christ Jesus, as in c. *Quanto* and in c. *Inter corporalia*, above, *De translatione*. See what I wrote above, the preceding title, c. *Cum olim*, on the question whether the Pope can dispense a monk in the vow of chastity; and what I wrote in c. *Ioannes*, above, the preceding title, whether the Pope can dispense a bigamist, etc. And add to what is said here, that the Pope grants letters commendatory: understand if the Pope expresses in the letters that he is another's cleric, according to Egidius and Petrus de Ancharano; c. *Si summus pontifex*, *De sententia excommunicationis*, in the Clementines, makes for it.

Hence also Isidore, *Etymologies* 7, c. 12: "The Pope, supreme pontiff, is the prince of priests, as it were the bridge and way of those who follow. He is called the high priest; he is also called the greatest pontiff. For he makes priests and levites; he disposes all ecclesiastical orders; he shows what each ought to do"; on which dist. 21, c. 1. To him therefore, as to Christ, every knee is bent (Philippians 2: "In the name of Jesus every knee should bow," etc.). Hence also the supreme prince, namely the Emperor, and the other kings of the world do not reckon it unworthy to submit their heads to the same Roman Pontiff, from whom they receive the approbation of the person to be taken up to the summit of imperial highness, and also the anointing, consecration and crown of the Empire, as in c. 1, *De iureiurando*, in the Clementines. For he, as a cornerstone [text unclear] and an immovable rock, holds together the fabric of all Christendom and the mass of the universe (dist. 50, c. *Fidelior*). Hence also the one electing ought to raise up such a column in the Church as he knows will be more profitable to the Church (C. 8 q. 1, c. *Moyses*). He ought both to help and relieve each, who also bears the burden and solicitude of each (C. 8 q. 1, c. *Clemens*). For the Apostolic See itself ought with great diligence to have the care and protection of the souls of all, as in c. 1, at the beginning, *De immunitate ecclesiarum*, in the Sext; the same in c. 1, *De praebendis*, in the Sext. Indeed his sentence makes law as to all, as in c. *Causis*, above, *De sententia et re iudicata*. He can draw a monk out of the monastery against his own will and that of the abbot, and assign him as companion to an ecclesiastical prelate or a prince, or keep him with himself (C. 9 q. 3, last chapter; dist. 8, c. *Quae contra mores*; C. 11 q. 3, c. *Qui resistit*). He can absolve someone from an obligation by which he is bound to a man, from the plenitude of power which he has (C. 2 q. 6, c. *Decreto nostro* and c. *Qui se scit*; argument C. 9 q. 3, c. *Per principalem*; Cod., *De quadriennii praescriptione*, l. *Bene a Zenone*; and Cod., *De precibus imperatori offerendis*, l. *Quoties*), according to Innocent, Hostiensis and Vincentius. On this also in c. *Pastoralis*, *De sententia et re iudicata*, in the Clementines, and there it is said that he has the plenitude of power. He can excommunicate and deprive the emperor, as in c. *Ad apostolicae*, *De sententia et re iudicata*, in the Sext; he also succeeds to the empire when the imperial see is vacant, as in the said c. 1, last §, *De iureiurando*, in the Clementines; he also revokes the sentence of the emperor, in the same place. He can moreover renounce the papacy (*De renuntiatione*, c. 1, in the Sext). He is also called the spouse of the Church, as is Christ; on which there is also text in c. *Ubi periculum*, § *Ceterum*, *De electione*, in the Sext, and in c. *Quoniam*, *De immunitate ecclesiarum*, in the Sext. Likewise the Pope, who is called the

Roman Pontiff, is deemed to have all laws in the chest of his breast (*De constitutionibus*, c. 1, in the Sext). He ought, with perpetual care of pastoral solicitude, to watch over all the nations of the Christian people, to provide remedies for his subjects, to meet their dangers and remove scandals, as in c. *Pastoralis*, *De sententia et re iudicata*, in the Clementines. He ought with perpetual care to turn over how he may lead the erring into the way of truth and gain them for God; with diligent study and studious vigilance he ought continually to watch (*De magistris*, c. 1, at the beginning, in the Clementines). He therefore is to be elected by two parts of the cardinals; otherwise one who conducted himself [as Pope] would be excommunicated (above, *De electione*, c. *Licet*); on whose election [see] the form in c. *Ubi periculum*, *De electione*, in the Sext, and in c. *Ne Romani*, *De electione*, in the Clementines.

And it is to be known that there are some cases which pertain to the Pope, which do not pass with a general mandate, but a special one is required, as dist. 17, c. *Huic sedi*; *De translatione*, c. *Licet*; *De officio legati*, c. *Quod translationem*. These are they, namely: a question of faith (C. 24 q. 1, c. *Quoties*; dist. 12, c. *Praeceptis*). The translation of a bishop or of one elected, namely confirmed, as in the said c. *Inter corporalia*, *De translatione*, and *De officio legati*, c. 3. And the deposition of a bishop or of one elected, namely confirmed (C. 3 q. 6, c. *Quamvis* and c. *Dudum*). The acceptance of the renunciation of a bishop or of one elected, namely confirmed (C. 7 q. 1, c. *Denique*; and in the said c. *Inter corporalia*; and *De regularibus*, c. *Licet*). The exemption of bishops (C. 16 q. 1, c. *Frater*). The restitution of those deposed from order (C. 2 q. 6, c. *Ideo*), or even of the degraded (dist. 50, c. 1 and 2). The judicial definition or interpretation of his privileges (*De iudiciis*, c. *Cum venissent*). The same, according to Hostiensis, if there is doubt about an apostolic rescript, such that it cannot be resolved by another by way of reason (*De officio delegati*, c. 2). The same, according to Hostiensis, of the interpretation of a statute made by a legate whose jurisdiction is ended, and no one has succeeded him. The same, according to the same, of dispensation in cases which by those same statutes are reserved to the Pope. The change of an episcopal see (C. 7 q. 1, c. *Temporis*). To establish anywhere anew an episcopal see (C. 16 q. 1, c. *Felix*; argument *De consecratione*, dist. 1, c. *De locorum*). To subject one bishopric to another, or to divide one into two, or to unite two together into one (C. 16 q. 3, c. *Temporis*; and below, *De excessibus praelatorum*, c. *Sicut unire*; and in the said c. *Quod translationem*, *De officio legati*). The commutation of the vow of Jerusalem, or of Saint James, or of the thresholds of the Apostles, on which in c. *Ex multa*, *De voto*. He alone can grant that someone come against a lawful oath (*De iureiurando*, c. *Venientes*), or even one of which there is doubt whether it is lawful (*De electione*, c. *Venerabilem*); which is understood, according to Vincentius, only in arduous matters; and Thomas, II-II, q. 89. He alone dispenses with irregulars over crimes greater than adultery (*De iudiciis*, c. *At si clerici*). Hence he alone dispenses over homicide, whether voluntary, just or unjust (dist. 50, c. *Miror*). Of this, as because in a case of justice he took part in [the shedding of] blood, or exercised the surgical art, whence death followed, or mutilation of a member, as Innocent and Hostiensis note in c. 1, below, *De clericis pugnantibus in duello*, and below, *Ne clerici vel monachi*, c. *Sententiam sanguinis*. Understand as to office, because as to benefice the bishop can dispense, as in c. 2, below, *De clericis pugnantibus in duello*; who can also dispense where death or mutilation did not intervene, as in the said c. 1. The Pope alone dispenses with a simoniac, whether in an order or in a benefice knowingly acquired by simony (C. 1 q. 1, c. *Erga* and c. *Si quis*; and C. 1 q. 5, c. *Praesentium*). But if unknowingly, then the bishop dispenses, even if he himself was not a partaker in the simony (below, *De simonia*, c. *De simoniaca*; *De electione*, c. *Si alicuius*; and below, *De simonia*, c. *De regularibus*). He alone dispenses with

one who, being suspended, interdicted or excommunicated, damnably intruded himself into divine things, as in c. *Cum aeterni*, *De sententia et re iudicata*, in the Sext, and in c. *Cum medicinalis*, *De sententia excommunicationis*, in the Sext. He alone dispenses with a cleric excommunicated in a council who goes to the judgement of the prince in contempt of the ecclesiastical judge (C. 11 q. 1, c. *Si quis episcopus*). He alone with a bigamist (above, *De bigamis*, c. *Nuper* and the last chapter); on which fully above, the preceding title, c. *Ioannes*, where I wrote abundantly. He alone with a cleric not ordained who ministers, so Hostiensis in c. 1 and 2, below, *De clerico non ordinato ministrante*; but the gloss there and Innocent [hold] the contrary, which seems the milder opinion; but the first is safer; for which also make C. 11 q. 3, c. *Privilegium*, and C. 25 q. 2, c. *Sicut decet*. He alone dispenses with one promoted *per saltum* who ministers knowingly, that he may ascend to a higher order (below, *De clerico per saltum promoto*, single chapter); otherwise the bishop dispenses (dist. 48, c. *Sicut olim*; dist. 52, c. *Sollicitudo*). He alone dispenses with one who received orders furtively, as because he is promoted without the knowledge of his own bishop or without examination (dist. 24, c. *Quando episcopus*); nor do letters of the archdeacon profit him, as in c. *Significasti*, *De officio archidiaconi*; or if besides the knowledge of the bishop he receives on the same day all the minor [orders], or some minor and the subdiaconate, or two sacred [orders] (below, *De eo qui furtive ordinem suscepit*, c. *Cum H.* and c. *Innotuit*). He alone dispenses with those ordained outside the times, or by another's bishop, and ministering before dispensation, according to some (argument *De sacramentis non iterandis*, c. 1; dist. 52, c. *Sollicitudo*). But it is truer that diocesans can (C. 9 q. 2, c. *Lugdunensis*; and in c. *Consultationem*, *De temporibus ordinationum*), unless the exercise had been forbidden to him and afterwards he ministered. He alone dispenses with one who, being excommunicated, received orders (below, *De sententia excommunicationis*, c. *Cum illorum*,

[in] the answer). Alone also if, being an apostate from religion, he received orders, as in the last chapter, below, *De apostatis*. The Pope alone can celebrate a general council (dist. 17, throughout; C. 2 q. 6, c. *Ideo*). He alone can make a general canon (C. 25 q. 1, c. *Ergo*, around the middle); Cod., *De legibus*, l. 1, makes for it. He alone can deprive an ecclesiastical person of his right (C. 6 q. 3, c. *Per principalem*; dist. [text unclear], c. *In memoriam*; below, *De excessibus praelatorum*, c. *Quoniam*). He alone can grant a church or prebend not vacant (below, *De concessione praebendae*, c. *Nulla*; and *De rescriptis*, c. *Eam te*). Likewise a legate, however full a legation he has, cannot [admit] elections to be taken up in any *personatus* whatever (*De officio legati*, c. *Deliberatione*, in the Sext). He alone can absolve one excommunicated by himself (*De electione*, c. *Venerabilem*; and below, *De sententia excommunicationis*, c. *Significavit*). He alone also absolves all partakers in the crime with the one excommunicated by him, as in the said c. *Significavit*, and in c. *Si concubinae*, below, *De sententia excommunicationis*. He alone absolves one excommunicated by his delegate because he would not obey a definitive sentence, if he has stood in excommunication for a year, as in c. *Quaerenti*, *De officio delegati*. The same is of one excommunicated by a legate or delegate whose jurisdiction has expired and no one has succeeded, as in the said c. *Quaerenti* and in c. *Pastoralis*, *De officio ordinarii*. He alone takes cognizance of cases brought to him by appeal or reference (*De officio delegati*, c. *Licet*). He alone ordains to the higher [orders] one whom he ordained to the subdiaconate (*De temporibus ordinationum*, c. *Cum in distribuendis*, at the end, the gloss at *qui manum imposuit*, etc.). He alone grants the pallium (dist. 100, c. *Pallium*), or those who have the privilege of granting, as patriarchs, as below, *De privilegiis*, c. *Antiqua*, in the text and gloss, and there Innocent. He alone always and everywhere uses the pallium (*De auctoritate et usu pallii*, c. *Ad honorem*). He alone dispenses with an illegitimate as to sacred orders and benefices with

cure or *personatus* (*De filiis presbyterorum*, c. *Is qui*, in the Sext). He alone dispenses with a minor, that he be promoted to the care of souls or a dignity, unless he has already completed twenty years; for then, as to a dignity or *personatus* without cure, the bishop can dispense (*De aetate et qualitate*, single chapter, in the Sext). He alone dispenses with one who is not in sacred orders, or is otherwise by law unworthy, that he be promoted to bishop (argument *De electione*, c. *Dudum*). He alone dispenses that someone may have several benefices with cure, or several dignities or *personatus*, even if they have cure, or even in the same church (*De praebendis*, c. *De multa*; *De consuetudine*, c. *Consuetudinem*, in the Sext). He alone can confer the subdiaconal order on the Lord's day and on other principal feasts (*De temporibus ordinationum*, c. *De eo*; dist. 75, last chapter). To him alone appeal is made, the intermediaries being omitted (C. 2 q. 6, c. 2, 3, 4 and 5, and c. *Decreto nostro*; C. 2 q. 7, c. *Metropolitanum*; C. 11 q. 1, c. *Pervenit*). Hostiensis says that a legate seems to have the same privilege (*De officio legati*, c. 1), which he obtains only by custom, as also a patriarch has, as in the said c. *Antiqua*. To the Pope alone the greater affairs are to be referred (C. 2 q. 6, c. *Omnis oppressus*); on this case and those depending on it, see above, the verse "He alone dispenses with irregulars," etc., as in c. *At si clerici*, *De iudiciis*. He alone supplies the defect of a king when the kingdom is vacant (*De electione*, c. *Cum inter universos*, at the end; and in c. *Grandi*, *De supplenda negligentia praelatorum*, in the Sext). He alone supplies the defect of the Emperor (*De foro competenti*, c. *Licet*, § 1). He alone confirms or invalidates the election of the Emperor, as in c. *Venerabilem*, *De electione*, and in the said c. *Ad apostolicae*, *De sententia et re iudicata*, in the Sext. He alone can depose any secular prince useless and negligent concerning the kingdom and justice (C. 16 q. 7, c. *Si quis deinceps*; C. 11 q. 1, c. *Nullus*; C. 32 q. 5, c. *Praeceptum*); and the gloss noted in dist. 40, c. *Si Papa*, on the words *a fide devius*, at the end, says that even the Emperor can be deposed for any mortal sin if he is incorrigible. Hence Pope Zacharias deposed Louis, king of the Franks (C. 15 q. 6, c. *Alius*), and Innocent deposed Otto, as in the said c. *Ad apostolicae*, and the same deposed the Emperor Frederick, whom also Gregory IX and Boniface VIII deposed. He alone pronounces null an election not yet made (*De electione*, c. *Innotuit*). He alone has [the power] to canonize saints (*De reliquiis et veneratione sanctorum*, c. 1); nor is it lawful to venerate anyone as a saint unless he has been canonized by him, as there. And on the form of canonization see the gloss in the single chapter, *De reliquiis et veneratione sanctorum*, in the Sext, and there the Doctors; and dist. 61, c. *Miramur*; C. 12 q. 2, c. *Quatuor*; C. 7 q. 1, c. *Omnis qui gemebat*; and in c. *Venerabili*, *De testibus*. He alone makes what is valid not valid, and conversely (*De excessibus praelatorum*, c. *Tanta*; and *De concessione praebendae*, c. *Constitutus*). He alone is subject to no human law; yet it befits him to observe the laws (*De supplenda negligentia praelatorum*, c. *Licet*; C. 12 q. 1, c. *Pervenit*); l. *Digna vox*, Cod., *De legibus*, makes for it in a like case. He alone dispenses in a marriage contracted in degrees prohibited by the Church, and similar things (in c. *Non debet*, *De consanguinitate et affinitate*; and *De restitutione spoliatorum*, c. *Litteras*). He alone ordains on the same day on which he is consecrated (*De electione*, c. *Quod sicut*, [§] *Praeterea*). He alone can take away civil laws concerning the clergy in those matters in which the danger of the soul is at stake (*De iudiciis*, c. *Novit*, and c. *Clerici*; *De praescriptionibus*, last chapter; *De secundis nuptiis*, penultimate and last chapter; *De foro competenti*, last chapter, in the Sext; *De iureiurando*, c. 2, in the Sext; *De exceptionibus*, c. 2, in the Sext; and *De sententia excommunicationis*, c. *Decernimus*, in the Sext). For in these the laws do not disdain to imitate the sacred canons, as in the said c. *Clerici*, *De iudiciis*, and in the Authentic *Ut clerici apud proprios episcopos*, near the end. He can, before coronation, exercise his office; and whoever impugned his letters would be excommunicated, as in the Extravagant of Benedict XI [text unclear], which begins *Quia nonnulli*.

He alone absolves those who strike clerics enormously, as in c. *Si quis suadente*, C. 17 q. 4; [these] cases noted in these verses are excepted:

To the Pope alone one striking a cleric is sent; Yet except seventeen cases from this: Rule, death, sex, enemy, boy, official, Delicate, and needy, old man, and sick, companion, Doorkeeper, restrained [text unclear], doubtful, common, light blow, weak.

"Rule," that is, a regular (*De sententia excommunicationis*, c. *Monachi*). "Death," that is, in danger of death (same title, c. *Non dubium*). "Sex," that is, women (same title, c. *Mulieres*). "Enemy," that is, one at enmity (same title, c. *De cetero*). "Boy," that is, under fourteen years at the time of the crime (same title, c. 1). "Official," that is, one driving back crowds, and so on (same title, c. 3, § 1). "Delicate," that is, a noble, delicate person (in the said c. *Mulieres*, § 1). "Needy," that is, one who from poverty could not go to the Roman Court (c. *Quod de his*, *De sententia excommunicationis*). "Old man," that is, one who from old age cannot go (same title, c. *Ea noscitur*). "Sick," that is, one who from sickness cannot (same title, c. *Quod de his*). "Companion," that is, one who offends with a companion (same title, c. *Ex tenore*). "Doorkeeper," that is, the keeper of the door of some great lord (same title, c. *Relatum*). "Doubtful," that is, one who doubts whether he struck a cleric (same title, c. *Quod de his* and c. *Quamvis*). "Light blow," that is, a light injury (c. *Pervenit*, same title). "Weak," that is, one who from weakness of person cannot go, as the said c. *Ea noscitur*.

And it is to be known that in all the aforesaid cases where the impediment is not perpetual, if anyone has been absolved, when the impediment ceases he ought to go [to Rome]; otherwise he falls back into the same excommunication, as in c. *Eos qui*, *De sententia excommunicationis*, in the Sext. And understand that he ought to go to him who can absolve him from any excommunication whatever, because in danger of death he can be absolved by any cleric whatever, unless it had been forbidden to him, the cleric, in specie; on which in c. *A nobis*, *De sententia excommunicationis*. But a boy absolved in boyhood, or even afterwards, of a crime committed in boyhood, is not bound to go further; on which in c. *Ea noscitur*, at the end, and in c. *De cetero*, *De sententia excommunicationis*. And the same is also of those absolved by the Apostolic See who had been commanded to present themselves or to make satisfaction to the injured party: for if they do not present themselves as soon as they conveniently can, they fall back into the same sentence, as in the said c. *Eos*, in the Sext. And of all these Hostiensis and the Moderns note in c. *Cum illorum*, *De sententia excommunicationis*.

It is to be known also that one finding a cleric acting shamefully with his mother, daughter, wife or sister, if he struck him, is not bound to go to the Roman Court; but as from the aforesaid, so also from these he can be absolved by the bishop, or by one having equal authority, as was said above in their cases. And of these four it is had in *De sententia excommunicationis*, c. 3, last §, where Innocent says that in these cases he is not excommunicated. And he extends it to ascendants and descendants, but not to collaterals, although the gloss there says it ought to be extended to none. The Doctors vary; it seems safer to agree with Innocent on the extension, but not on the excommunication, lest matter for offending be given, as in c. *Ut clericorum*, *De vita et honestate clericorum*, with similar places.

He alone absolves if death, or mutilation, or shedding of a cleric's blood, or laying of hands on a prelate has intervened, as in the said c. *Cum illorum*, and noted in c. *Religioso*, *De sententia excommunicationis*, in the Sext. And all the aforesaid are understood of any ecclesiastical persons whatever, as in c. *De monialibus* and in c. *Canonica*, *De sententia excommunicationis*, even of novices, as in the said c. *Religioso*. He alone absolves an arsonist, or a breaker, whether of an ecclesiastical or a

profane thing, after denunciation, as in c. *Conquesti* and in c. *Tua, De sententia excommunicationis*. For such men also by natural law ought to be punished capitally, as in l. *Capitalium, § Nonnunquam,* Dig., *De poenis*, and in l. *Aedes*, Dig., *De incendio, ruina, naufragio*; for which C. 23 q. [last] [text unclear], c. *Pessimam*. He alone

[Editor's note in the print:] This much we have seen on the third [book] of the Decretals written by Blessed John of Capistrano, whose commentary also on the rubric and c. 1, *De poenitentiis et remissionibus*, book 5, printed in the fourth Tome of the *Repetitiones in Iure Canonico* last year, is omitted here. There follows, however, [his commentary] on c. 2 of the same title; and the *Summa* on matrimony, very useful and necessary to students of the canons and ministers of confessions, set out amply enough, is subjoined. He also wrote on c. *Omnis utriusque sexus*, but this has hitherto been unknown to us.

On Penances and Remissions, Book V of the Decretals (X 5.38)

Chapter Qui presbyterum (c. 2)

Summary. 1. How one who kills a priest is deprived. 2. In arduous doubts recourse is had to a general council. 3. The determination of a council is to be observed, unless afterwards it is disposed otherwise; no. 8. 4. When a council is not assembled for declaring arduous matters, recourse is had to the Apostolic See. 5. One is deprived of dignity for certain crimes. 6. Whether certain crimes impede marriage to be contracted or dissolve one contracted, and how many they are; nos. 18, 19, 23 and following. 7. When a layman killing a priest is not punished. 9. Every secular business is called "military service." 10. Traders scarcely free themselves from sins. 11. Whether the Church can deprive someone of secular dignity for a crime committed against a cleric, and whether such a crime is ecclesiastical; no. 15 and no. 17. 12. How a bishop and a priest who have intercourse with their spiritual daughters from baptism, chrism and penance, and who commit adultery, are punished. 13. Which are the penitential canons; 80 are set here. 14. A mortal sin, although it requires a seven-year penance, is yet moderated by the judgement of the priest according to the quality of the crime. 16. The Church takes cognizance of sacrilege, usury, the crime of heresy, simony, perjury, adultery and the like. 20. What "to plot" and "plotting" are; no. 23. 21. Plotting against the death of another, against enemies and robbers, is permitted by civil law.

Qui presbyterum. This chapter is short, yet it is divided into two parts; the second at *convictus*. One who kills a priest ought to do penance for twelve years; he is deprived of dignity or military service, and is prohibited from contracting marriage. This it says.

Note first that in arduous doubts recourse is to be had to a general council, as appears from this text. Secondly note that the things determined by a council are to be observed; to which dist. 10, c. *Certum*, where it is said that he who violates the canons does injury to the author and is said to blaspheme the Holy Spirit; to the same C. 25 q. 1, c. *Violatores canonum*. Thirdly note that at a time when no council is assembled for declaring arduous doubts, recourse is to be had to the Apostolic See, as for things pertaining to faith and the like (above, *De baptismo et eius effectu*, c. *Maiores*); add what is noted in c. *Quanto* and in c. *Inter corporalia*, above, *De translatione praelatorum*, and C. 9 q. 3, c. *Cuncta per mundum*, and in the proem of the Sext, with similar places. Fourthly note that for certain crimes one is deprived of dignity, as here and C. 33 q. 1, c. *Admonere*, with similar places. Fifthly note that certain crimes impede marriage to be contracted but do not dissolve it; some sometimes impede, as I will say below, in the last gloss.

In the text at *occiderit*: say, namely, on purpose and with evil mind. But it is otherwise in a lawful case, as because a layman in defending himself killed a priest assaulting him; for all laws and all rights cry out that it is lawful to repel force with force with the moderation of blameless defence, as in c. *Sicut dignum* and in c. *Significasti*, above, *De homicidio*. For then such a killer would not be punished with this penance, although some penance is imposed on him, lest ecclesiastical censure become cheap, as I will say below, the next chapter. A like judgement is also made of one who found a cleric acting shamefully with his mother, daughter, wife or sister, and so found struck or killed him (below, *De sententia excommunicationis*, c. 3, § *Nec ille*).

In the text at *secundum canones*, namely the penitential ones; on which Hostiensis in the *Summa* of this title, § *Ut autem sacerdos*, verse *Qui*, who enumerates many penitential canons; of which I will speak below. And note about what I said above, that the things determined by a council ought to be observed: understand, unless afterwards it is disposed otherwise; as today it is decided that penances are arbitrary, as below, this title, c. *Deus qui*, near the beginning, at "is to be moderated by the judgement of a discreet priest." In the text at *convictus*, namely in court, according to Hostiensis; or better, according to Innocent, the penitentiary will command him that henceforth he not conduct himself as a soldier, but persist in salutary penance.

In the text at *militiae cingulo*, Innocent says that here every secular business is called "military service"; and he says that some understand this of those who left secular business and afterwards return to it (*De poenitentia*, dist. 5, c. *Si qui vero* and c. *Contrarium*). Of which businesses, although some can be done without sin, yet traders scarcely free themselves from sins (*De poenitentia*, dist. 5, c. *Qualitas*, c. *Falsas*, and c. *Negotium*); and I said enough in my treatise, *De usuris*.

Lord Antonius de Butrio notes from this text that the Church can deprive someone of a secular dignity on account of a crime committed against a cleric, and so a crime [against] a cleric is ecclesiastical and to be punished by the ecclesiastical judge. Add that yet secular judges do not observe this; indeed homicides are punished with the penalty of the head (Dig., *Ad legem Corneliam de sicariis*, l. 1 and throughout; Cod., *Ad legem Corneliam de sicariis*, l. *Is qui cum telo*; and Cod., *De episcopis et clericis*, l. *Si quis non dicam rapere*). Divine law agrees (Exodus 21): "He that striketh a man with a will to kill him, shall be put to death." Therefore much more strongly if he killed a priest. Psalm: "Touch ye not my anointed."

The first gloss objects that penance is of seven years (C. 33 q. 2, c. *Hoc ipsum* and c. *Admonere*; and C. 22 q. 1, c. *Praedicandum*). Solution: there is the rule, here a special [case] on account of the enormity of the crime. In the same gloss, at *et sacerdoti*: say [that] to a bishop having intercourse with a spiritual daughter from baptism, chrism or penance a penance of fifteen years is enjoined, but to a priest twelve (C. 30 q. 1, c. *Non debet*); although in the preceding chapter, which begins *Si quis sacerdos*, a penance of fifteen years is imposed also on a priest, and that he serve the Lord perpetually in a monastery. But the following chapter limits the preceding. But for adultery committed otherwise a penance of ten years is imposed on a priest (dist. 82, c. *Presbyter*); and so says the gloss in the said c. *Non debet*. Lord Antonius also adds, for the agreement of Hostiensis and Innocent, on the word *convictus*, that first he is convicted in court, and afterwards in the penitential forum the priest so enjoins. But it is consonant enough in the forum of conscience that, since by his own confession one convicts himself, it suffices for the confessor so to command him, according to Innocent.

In the second gloss, on the word *canones*, the gloss says no more than "namely penitential." I ask, therefore, which are the penitential canons. For Augustine says (dist. 38): "What is necessary for priests themselves to know: the penitential canons," and below: "of all which, if one is lacking, the name of priest will scarcely be able to stand in him." And Pope Celestine in the same distinction says: "It is lawful for no priest to be ignorant of the canons." I answer therefore that the penitential canons are those written below, namely:

The first canon says that a priest, if he commits fornication, should do penance for ten years according to the form handed down (dist. 82, c. *Presbyter, si fornicationem*). The second canon says that a priest knowing his spiritual daughter, namely one whom he baptized, or held at confirmation, or

heard in confession, ought to do penance for twelve years, and if it is public he is to be deposed; but a bishop who committed such things should do penance for fifteen years, and the priest and the woman are to be given over to religion, their goods having been paid out to the poor (C. 30 q. 1, c. *Si quis sacerdos* and c. *Non debet*). The third: if anyone sins against nature, if he is a cleric let him be deposed and given over to religion; if a layman let him be excommunicated and kept away from the assembly of the faithful until fitting satisfaction (above, *De excessibus praelatorum*, c. *Clerici*). The fourth: if anyone has intercourse with beasts, let him do penance for more than seven years (C. 33 q. 2, c. *Hoc ipsum* and the following §). The fifth: if anyone commits incest, he is punished with the same penalty, by the laws alleged immediately above. Add that the vice against nature is graver than to sin with one's mother (C. 32 q. 7, c. *Adulterii malum*). The sixth: if a priest is present at clandestine nuptials, let him be suspended for three years, and if the fault demands it let him be punished more gravely (above, *De clandestina desponsatione*, c. *Cum inhibitio*, penultimate §). The seventh: if anyone violates a simple vow, he ought to do penance for three years (dist. 27, c. *Si vir*). The eighth: if anyone excommunicated celebrates, he ought to do penance for three years and abstain from wine and meat (C. 11 q. 3, c. *De illis*). The ninth: one who unjustly accuses another to death should do penance forty days on bread and water with seven years, if death followed; but if the accused was weakened in a member, the accuser should do penance for three Lents (above, *De accusationibus*, c. *Accusati*). The tenth: whoever knows his spiritual daughter or co-mother should do penance for seven years, and likewise those consenting (C. 30 q. 3, c. *Non oportet*). The eleventh: if anyone marries a woman betrothed to another, let him dismiss her and do penance forty days on bread and water and for seven years (above, *De sponsa duorum*, c. *Accepisti*); and understand "betrothed," namely by words *de praesenti*. The twelfth: one who knew two co-mothers or sisters, whether the wife is living or not, should do penance at least seven years, although he ought [to do] more (C. 30 q. 4, c. *Si pater*). The thirteenth: a voluntary homicide is deposed without hope of restitution, and should do penance seven years (dist. 50, c. *Miror*); or if a cause is present, so that the homicide is presumed rather accidental than voluntary, he should do penance five years (dist. 50, c. *Eos vero*, c. *Si qua femina*, and c. *Si quis voluntate*). The fourteenth: a matricide [should do penance] for ten years according to a rather harsh form believed in (C. 33 q. 2, c. *Latorem*), that he not eat meat nor drink wine, and fast three days in the week until evening, etc. The fifteenth: a wife-killer should do penance for the whole time of his life, and harsher penance is done, because there is imposed on him [more] than on a matricide

[although] it is a greater sin to kill a mother than a wife. But because men are more prone to kill wives than mothers, therefore the laws are made harsher (C. 33 q. 2, c. *Admonere* and c. *Quicumque*); and Dig., *De poenis*, l. *Aut facta*, last §, makes for the reason.

The sixteenth: if anyone kills his own son on purpose, he ought to be induced to do penance for the whole time of his life in a monastery, as in c. 1, above, *De his qui filios occiderunt*; and if he could not be induced to this, a penance of three years is enjoined, one of which he should complete on bread and water, even if sleeping in bed he smothered [him], as in the last chapter, above, *De his qui filios occiderunt*. The seventeenth: if anyone commits perjury, let him do penance forty days on bread and water and for seven years, and never be without penance, namely interior, that is, that he always grieve for the sin (C. 6 q. 1, c. *Quicumque*); dist. 50, c. *Clerico*, makes for it. The eighteenth: for a false measure a penance of thirty days on bread and water is imposed (above, *De emptione et venditione*, c. 2); the same of weights. Hence that chapter begins "that measures and weights be made just," and below: "if anyone for the sake of gain presumes to change just measures and just weights, let him do

penance thirty days on bread and water"; so it was determined in the Council of Mainz. The nineteenth: if anyone did solemn penance and afterwards returned to the vomit, let him do penance ten years (*De poenitentia*, dist. 5, c. *Si quis vero*). The twentieth: one who knew a woman dedicated [to God] or a nun should do penance ten years (C. 27 q. 1, c. *Devotam* and the preceding chapter). The twenty-first: one who sings Mass and does not communicate ought to do penance a year, and meanwhile cease from celebration and so from communion (*De consecratione*, dist. 2, c. *Relatum*); yet no other penance is expressed there. The twenty-second: if a priest wraps a dead cleric in an altar cloth, let him do penance ten years and five months, but a deacon three and a half years (*De consecratione*, dist. 1, c. *Nemo clericus per ignorantiam*). The twenty-third: one who commits sacrilege by violating a church or chrism, or receives the sacred chalice with polluted hands, or commits similar things, should do penance seven years; in the first two let him not enter the church, and until the fourth let him not make an offering, and three days in the week let him abstain from wine and meats, fasting. But other things too are to be considered, which are had in C. 12 q. 2, c. *De viro nefando*. The twenty-fourth: if parents break the betrothals of their children, they are separated from communion for three years, and the children likewise if they are at fault (C. 31 q. 3, c. *Si qui parentes*; and argument *De poenitentia*, dist. 1, c. *Sicut*). The twenty-fifth: one who takes in marriage a woman whom he polluted by adultery should do penance five years (C. 31 q. 1, c. *Si qua vidua*). The twenty-sixth: one who curses God or any of the saints ought to do penance for seven weeks in the manner handed down above, *De maledicis*, c. 2: namely that on seven Sundays, before the doors of the church, in public, while the solemnities of Masses are being celebrated, the blasphemer standing, on the last of those Sundays he have no cloak nor shoes, bound with a strap about the neck; and on the seven preceding Fridays let him fast on bread and water, by no means entering the church; and on each of the aforesaid days let him feed three poor men if he can, otherwise two, or one; and if his means do not suffice even for this, let it be commuted into another penalty. And if he refuses to receive and perform the aforesaid penance, entry into the church is to be forbidden him, and at death he is to lack ecclesiastical burial. And if he is rich, [let him be fined] forty shillings, otherwise thirty or twenty; and if he does not suffice for that, let him be fined with a penalty of five shillings of the usual money, etc. The twenty-seventh: if a priest reveals a confession, by the ancient law he ought to be deposed and for the whole time of his life go on pilgrimage through the world in ignominy (*De poenitentia*, dist. 6, c. *Caveat sacerdos*); afterwards it was determined that, deposed, he be thrust into a strict monastery to do perpetual penance (below, this title, c. *Omnis*, at the end). The twenty-eighth: one who, compelled, commits perjury conditionally, if he is free, should do penance forty days on bread and water, with the following years, yet not on bread and water for the remaining time, but with penance; if he is a serf of the same, let him do penance also for three Lents and the lawful week-days, that is, the fourth and the sixth day (C. 22 q. 5, c. *Qui compulsus*); to which *De consecratione*, dist. 5, c. *Ieiunia*, and dist. 82, c. *Presbyter*. And it is to be noted that the first penance is imposed also on him who ordered the perjury to be done, as in the said c. *Qui compulsus*. The twenty-ninth: one who commits perjury in the hands of a bishop or on a consecrated cross should do penance three years; but if on a cross not consecrated, let him do penance one year; but one who was compelled, and perjured himself unknowingly, and [this] can be known, let him do penance three Lents (C. 22 q. 5, c. *Qui periurat*). The thirtieth: one who knowingly swears falsely, or compels or induces another to swear, should do penance forty days on bread and water with the seven following years, and never be without penance; and others, if they were aware, should do penance likewise; and all such are to be

marked with infamy (C. 22 q. 5, c. *Si quis periuraverit* and c. *Si quis coactus*). The thirty-first: if anyone, compelled to redeem his life, namely by fear of death, or for any cause or necessity, commits perjury, because he loved the body more than the soul, let him do penance three Lents; others judge three years, one of these on bread and water (C. 22 q. 5, c. *Si quis coactus*). But in the aforesaid difference the lesser is to be chosen (dist. 50, c. *Eos vero*; and the fifth gloss in the said c. *Si quis coactus*).

And it is to be noted, according to Augustine in the sermon on the beheading of Saint John, that one who provokes to swearing a man whom he knows will swear falsely sins more than a homicide (C. 22 q. 5, c. *Ille qui hominem*). Nor is the gloss there to be held which says: "do not understand that the perjurer sins more than the homicide"; indeed he even sins more (dist. 13, c. 1); which chapter, however, does not prove this, for it speaks of perplexity, which yet does not excuse from mortal sin, as is treated fully there by the gloss and the Archdeacon. And that one committing perjury sins more than a homicide the Theologians hold expressly on the third [book] of the *Sentences*, dist. 39; and I said enough in the treatise on blasphemy and in the treatise on perjury. Hence the gloss itself in the said c. *Ille qui hominem* adds: "but he is said to surpass him, because he does greater damage; because the damage is greater in the loss of one soul than of a thousand bodies," as Augustine says to Auxentius (C. 24 q. 3); and you have in the said c. *Ille qui hominem*, from the words of Augustine, it is inferred that the homicide kills the body, but the perjurer the soul, and the one provoking to perjury at least two souls, namely his own and [that] of the one provoked; therefore, etc.

The thirty-second: one who in saying the canonical hours and other divine offices departs from the custom of the metropolitan [church] of his own church, deprived of communion for six months, is to remain under penitential censure with the metropolitan to be corrected (dist. 12, c. *De his*). The thirty-third: a bishop who without just cause ordains an unwilling cleric is suspended for a year in doing penance, and ought to be deposed if he does not humbly observe [it] (dist. 74, c. 1 and c. *Ubi didicisti*). The thirty-fourth: a bishop who conceals [the need of] correction of ministers [is punished] for two months, a priest for four; but deacons, subdeacons and other clerics serving cupidity, and not conferring the ecclesiastical sacraments gratis, are to be punished by the judgement of the judge with a fitting penance, namely deposition, the gloss says, and with due excommunication (C. 1 q. 1, c. *Quidquid invisibilis gratiae*; and C. 1 q. 3, last chapter). The thirty-fifth: a sorcerer should do penance forty days, and diviners are punished with a like penalty; which yet is understood if the sin is hidden and the evildoer secular, as in c. 1, above, *De sortilegiis*; who, if it were notorious, is to be deprived also of the communion of the faithful and of the church, as because the Eucharist is denied [him] (*De consecratione*, dist. 2, c. *Pro dilectione*). The thirty-sixth: if a priest looks into an astrolabe to find a theft, he is ordered to abstain from the ministry of the altar, doing penance for a year and more at the judgement of the diocesan (above, *De sortilegiis*, c. *Ex tuarum*); and this if he did it simply, and not so as to invoke demons, as appears in the same place. The thirty-seventh: if any cleric is caught having maliciously, knowingly and deliberately used magic arts, sorceries, incantations and soothsaying or the like, suspended from the honour of his dignity and deposed, let him be thrust into a strict monastery to do perpetual penance (C. 26 q. 5, c. *Non oportet*, c. *Si quis episcopus*, c. *Aliquanti clerici*, and c. *Sortes*, with similar places); and I said enough of the penalties of such men in the treatise on sorcery, part 3. The thirty-eighth: if anything of the consecrated blood drips onto the ground or onto a board, it is to be licked with the tongue, the board scraped; if there was no board, so that the place be not trodden on, let it be scraped off and consumed by fire, and the ash hidden within the altar, and the priest should do penance forty days. If the chalice drips onto the altar, let the minister suck up

the drop and do penance three days; if onto the altar linen, and the drop reached to another [cloth], let him do penance forty days; if to the third, nine days; if to the fourth, let him do penance thirty days; and the linens which touched the drop let the minister wash three times, a chalice being placed beneath, and the water of the washing is to be taken and hidden beside the altar (*De consecratione*, dist. 2, c. *Si per negligentiam*). The thirty-ninth: if anyone through drunkenness or gluttony vomits the Eucharist, let him do penance forty days; clerics, monks, deacons or priests should do penance seventy days, a bishop ninety; but if anyone vomits on account of sickness, let him do penance seven days (*De consecratione*, dist. 2, c. *Si quis per ebrietatem*); and what it says at the end of the sick man is set for caution, as the gloss says there; C. 34 q. 2, c. *In lectum*, makes for it in a like case; for sickness excuses when it is without fault (argument dist. 5, c. *Ad eius*, with similar places). The fortieth: one who kills a priest should do penance twelve years, as appears here in the present chapter. And add that one killing a subdeacon ought to pay 300 shillings, a deacon 400, if a priest 600, one who [kills] a bishop 900, one who [kills] a monk about 400; and on all the days of his life let him serve in a monastery and do public penance for seven years (C. 17 q. 4, c. *Qui subdiaconum* and the following chapter); and the aforesaid pecuniary penalty is to be paid by

the killer of a priest; it pertains to the bishop of that parish, so that he give half to the utilities of the church over which he presided and distribute the other half in alms, as in c. 2, above, *De poenis*.

The forty-first: if anyone with evil design, whether from hatred or for revenge, sets fire, or has it set, or knowingly gives counsel or help to those setting it, let him be excommunicated; and if the arsonist dies, let him lack Christian burial; nor let him be absolved unless first the damage he inflicted has been made good according to the strength of his means, and he swears that he will not set fire further. And the penance is given him that he remain a whole year in the service of God at Jerusalem or in Spain. And if any archbishop or bishop relaxes this, let him restore the damage and abstain from episcopal office for a year (C. 23 q. [last], c. *Pessimam*). C. 12 q. 2, c. *Cum devotissimam*, verse *Si vero incendium*, makes for it, where it is said: let him compound ninefold, but restore the plunder fourfold. But an arsonist of a church or of an ecclesiastical place is excommunicated by the law itself (above, *De raptoribus*, c. *In litteris*); and an arsonist both of ecclesiastical things and of other profane things, after he has been denounced by the bishop, is to be absolved only by the Apostolic See, as in c. *Tua* and in c. *Conquesti*, below, *De sententia excommunicationis*; and I said enough in the treatise on excommunications. But today, as to penance, every arsonist who has voluntarily set fire to anyone's house or threshing-floor should restore all things carried off or burned and do penance three years (above, *De iniuriis et damno dato*, c. *Si quis domum*).

One who communicates with heretics should do penance five years. One who permits a heretic to sing Mass to the subversion of the faith is condemned as a heretic, unless he does penance for ten years. But one who has withdrawn from the Church, fleeing to a heretic, should do penance twelve years: five outside the church, three among the hearers, and two more besides outside communion (C. 24 q. 1, c. *Si quis acceperit* and the following chapter). 43. One who unknowingly knows two sisters, or a mother and daughter, or an aunt and niece, should do penance seven years; if knowingly, he perpetually lacks marriage (C. 34 q. [last], c. *Si quis cum duabus* and the following §). 44. A patron squandering the things of the church should do penance a year (C. 16 q. [last], c. *Filiis*), where the gloss says: that is, for a year he will abstain from the sacrament of the church, if he is a layman; but if he is a cleric he will be deposed (C. 12 q. 2, c. *Apostolicos* and c. *Abbatibus*). 45. One who purifies his

house with magic incantations should do penance five years (C. 26 q. 5, c. *Si quis ariolos* and the two following chapters). 46. One who swears not to make peace with his neighbour should do penance a year and return to peace (C. 22 q. 4, c. *Qui sacramento*). 47. The perjurer, adulterer and homicide regularly should do penance seven years, and the same for fornication, although so harsh a penance is not imposed (C. 22 q. 1, c. *Praedicandum*, with its gloss; and C. 33 q. 2, c. *Hoc ipsum* and the following §). 48. One who knowingly ordains clerics of another diocese without licence of their own bishop is suspended for a year from the conferring of orders (below, *De temporibus ordinationum*, c. *Eos qui*, in the Sext). 49. One who confers the tonsure on an infant, unless he enters religion, or on an illiterate, or on a married man, is suspended for a year from conferring the tonsure (below, *De temporibus ordinationum*, c. *Nullus*, in the Sext). 50. Those who unlawfully promote the unworthy are deprived of the power of conferring the order which they unlawfully conferred (C. 1 q. 1, c. *Si qui episcopi*; above, *De temporibus ordinationum*, c. *Litteras*; dist. 36, c. *Qui ecclesiasticis*); and the one ordained is removed from the clergy (argument dist. 50, c. *Ex poenitentibus*); sometimes he is suspended from celebrating Mass for a year (dist. 55, c. *Nullus*); sometimes he is deposed (dist. 64, c. *Vult*); on which see the good gloss above, *De electione*, c. *Nihil est*. 51. A prelate or judge who excommunicates someone without previous warning is suspended for a month from entry into the church (below, *De sententia excommunicationis*, c. *Sacro*). 52. One excommunicating, suspending or interdicting someone without writing or expression of the cause, or not handing over within a month a copy of the writing if requested, is suspended for a month from entry into the church and from the divine offices, as in c. *Cum medicinalis*, *De sententia excommunicationis*, in the Sext. 53. One who burdens the church committed to him with others' debts, or grants letters or seals of anyone by which the church can be obligated, is suspended from the administration of spiritual and temporal things (above, *De solutionibus*, c. *Quorundam*). 54. A cleric who is a notorious fornicator is suspended as to others (dist. 32, c. *Nullus*, § *Verum* and § *Praeter haec*; dist. 81, c. *Si qui sunt presbyteri*; and above, *De cohabitatione clericorum et mulierum*, c. *Tua nos*, c. *Vestra*, and c. *Quaesitum*, where I treated it fully by thirty conclusions). 55. If the ordainer or the presenter receives a promise or oath from the one to be ordained that he will not disturb him about his provision, the ordainer [is suspended] from conferring and the presenter from the exercise of orders for three years, and the one ordained from the order so received until he has been dispensed by the Apostolic See (above, *De simonia*, penultimate chapter). 56. One who gave ecclesiastical burial to a manifest usurer so dying, or received his offerings, is suspended from the exercise of office until fitting satisfaction is made at the judgement of his bishop (above, *De usuris*, c. *Quia in omnibus*); to which is added c. *Praeterea*, same title, and c. *Quamquam*, same title, in the Sext. 57. One who elects as bishop someone illegitimately born and suffering defect in knowledge or age is suspended from benefices for three years (above, *De electione*, c. *Cum in cunctis*); and this penalty is extended to a compromissary knowingly electing an unworthy man, provided the compromissary is not a bishop or superior; and it is restricted only to the goods which the compromissary has in the church so offended, as in c. *Si compromissarius*, *De electione*, in the Sext. 58. An ordinary or delegated judge who acts against conscience to the grievance of the other party, from hatred, love, favour or bribe, is suspended for a year from the exercise of office; and if he celebrates he is made irregular, from which irregularity he can be dispensed only by [the Pope]; and so it is inferred of any suspended man, because the text says: "if one so suspended damnably intrudes himself into divine things," etc., as in c. *Cum aeterni*, *De sententia et re iudicata*, in the Sext. 59. Chapters, convents, colleges and the individual persons of those who, in cathedral, regular or collegiate churches, seize goods left by

prelates or coming in during the time of vacancy, are suspended from office and benefice until they have fully restored everything (*De electione*, c. *Quia saepe*, in the Sext). 60. Bishops and superior and inferior prelates and any ecclesiastical persons seizing the aforesaid goods: bishops and superiors are suspended from entry into the church, but inferiors from office and benefice, until they have made competent restitution (*De officio ordinarii*, c. *Praesenti*, in the Sext). 61. Those who confirm or consecrate someone elected against whom an appeal was made to the Apostolic See, though the appeal was not presented, if they did not inquire whether any pact intervened about the election, are suspended for a year from the confirmation and consecration of the elect (*De electione*, c. *Provida*, in the Sext); where Johannes Andreae says that if he only confirmed, he is suspended from confirmation only; but if he confirmed and consecrated, he is suspended from both; and the first suspension begins from the first day, and [the second] from the day of consecration (argument above, *De appellationibus*, c. *Super eo*). 62. Those who consent to the election, nomination or assumption of a senator, rector or patrician of the city of Rome without licence of the Apostolic See, both they and their posterity are deprived in perpetuity of all graces and honours which they have from any church (*De electione*, c. *Fundamenta*, in the Sext). 63. If an Italian bishop ordains one from beyond the mountains to sacred orders without letters of the Pope, or of him who can grant letters, he is suspended for a year from conferring orders if he ordained knowingly or with affected ignorance; and the one ordained is suspended without hope of obtaining dispensation from the Apostolic See (*De temporibus ordinationum*, c. *Saepe* and c. *Eos qui*, in the Sext). 64. If a bishop knowingly or with affected ignorance ordains clerics of another parish without licence of the superior, not only of those from beyond the mountains and Italians but also of others, the ordainer is suspended from conferring orders for a year; the clerics of that bishop can freely, while the suspension lasts, be ordained by neighbouring bishops without other licence (*De temporibus ordinationum*, c. *Eos qui*, in the Sext). 65. An abbot, or another having authority to confer orders or the tonsure, conferring as immediately above, is likewise suspended, as Garsias and Johannes Monachus say in the said c. *Eos qui*; what is noted in c. *Nullus*, *De temporibus ordinationum*, in the Sext, makes sufficiently for it. 66. Mendicant religious who receive someone to profession within the year of probation are suspended from receiving to profession, and ought to be gravely punished, as in c. *Constitutionem* and c. *Non solum*, *De regularibus*, in the Sext. 67. One who commits simony is suspended until he is dispensed (C. 1 q. 1, c. *Reperiuntur*; *De simonia*, c. *Tanta est labes*); but today all simoniacs are by the very fact excommunicated, and cannot be absolved except by the Pope, as in the Extravagants of Martin V and Eugene IV; and I said enough in the treatise on excommunication. 68. Any voluntary homicide, even hidden, because he is irregular and consequently suspended, as in the last chapter, above, *De temporibus ordinationum*, and dist. 50, c. *Miror*; add what is noted in c. *Sententiam sanguinis*, above, *Ne clerici vel monachi saecularibus negotiis se immisceant*. 69. One who pursues as an enemy any of the cardinals of the holy Roman Church is deprived of all ecclesiastical benefices, fiefs, honours and dignities, and is excommunicated, etc., as in c. *Felicis*, *De poenis*, in the Sext; and I said enough in the treatise on excommunication. And it is almost similar of those who pursue, banish or capture a bishop, as in c. *Si quis suadente diabolo*, *De poenis*, in the Clementines. And add that the goods of one who has killed a bishop ought to be confiscated to that church in which the bishop held possession (C. 17 q. 4, c. *Si quis deinceps*). 70. The sons and grandsons of the aforesaid pursuing any cardinal are deprived of every ecclesiastical benefice; and if pontifical dignity had been conferred on them, all hope of promotion being wholly taken away,

[promotion] to any dignity or honour, ecclesiastical or worldly, or to rule and every public office, is forbidden to such men, as in the said c. *Felicis*.

Any city other than the City [of Rome] which, within a month at least, has not seen fit to punish those doing such things, or presuming or ordering them to be done, or ratifying the deed, or giving counsel or favour, or afterwards receiving or knowingly defending those so offending, as the enormity of so great a crime demands and the means are at hand, is by that very fact deprived of pontifical and higher [text unclear] dignity; and all those named above are bound by the same sentence, as in the aforesaid c. *Felicis*, at the beginning and end. And the aforesaid offenders ought to go beyond the sea to do penance at Jerusalem for at least three years, nor return thence without special licence of the Apostolic See, as in the aforesaid c. *Felicis*. 72. One celebrating in an interdicted church is suspended from entry into the church; and if, so suspended, he celebrates, he is made irregular (*De sententia excommunicationis*, c. *Is cui*, in the Sext); to which makes c. *Episcoporum*, *De privilegiis*, in the Sext, and above, *De privilegiis*, c. *Quod nonnullis*; and what is noted in c. *Alma mater*, *De sententia excommunicationis*, in the Sext, and in c. *Cum aeterni*, *De sententia et re iudicata*, in the Sext, makes for it. 73. Whoever receive any who call themselves bishops or prelates, or rectors of monasteries by whatever name they are styled, without apostolic letters, are suspended until they are absolved, as in the Extravagant of Boniface which begins *Iniunctae*. For one who says he is privileged ought to show the privilege, as in c. *Cum personae*, *De privilegiis*, in the Sext, and above, *De fide instrumentorum*, c. *Contingit*. And the same is if he departed from the Apostolic See, as whose envoys or legates they call themselves, without having taken the customary oath of fidelity (dist. 97, c. *Nobilissimus*; dist. 63, c. *Lectis*); and Cod., *De mandatis principum*, single law, makes for it. 74. Beneficed religious, or clerics not wearing garments suited to their own order, no reasonable cause existing, are suspended for six months from the receipt of fruits; but the non-beneficed are made ineligible. Even if they wear striped or parti-coloured garments publicly without cause, or a mitre or linen cap, they are suspended for a year from the receipt of the fruits of their benefices; and if they are not beneficed they are made ineligible for the same time, etc., as in c. *Quoniam*, *De vita et honestate clericorum*, in the Clementines; and what is noted in c. *Clerici*, above, *De vita et honestate clericorum*, makes for it. 75. Religious who withhold tithes owed to any churches, unless they desist within a month after request, or if within two months they have not competently satisfied for those things which they presumed to usurp, are suspended from offices and benefices until they have made satisfaction for the aforesaid, as in c. *Religiosi*, *De decimis*, in the Clementines. 76. Religious of the monks' masters [text unclear], who do not wear the due garments, or keep dogs or birds, or permit them to be kept in the monasteries or houses which they inhabit, or have shown personal presence at hunting: if he is an abbot, or a prior not having his own abbot, he is suspended for a year from the conferring of benefices; but if he is another, he is suspended for a year from the administration, if he obtains one; and if he does not obtain one, he is made ineligible for the same time; and many other things are contained in c. *Ne in agro*, § *Porro*, with the following, *De statu monachorum*, in the Clementines. 77. Doctors or masters having to make someone a doctor, and not receiving an oath from the one to be made doctor that he will not wish to spend more than three thousand silver *tournois* in such a solemnity, even if the one conferring the doctorate shines with pontifical dignity, are suspended for six months from conferring the doctorate or mastership, as in c. *Cum sit*, *De magistris*, in the Clementines. 78. A bishop who proceeds unduly in the office of the inquisition of heresy, or a superior, is suspended from office for three years; but inferiors incur the sentence of excommunication by the very fact, whose absolution is reserved to the

Supreme Pontiff, as in c. *Multorum*, *De haereticis*, in the Clementines; and I said enough in the treatise on excommunication. 79. Prelates of religious, by whose sermons ecclesiastical persons suffer some damage, unless they make satisfaction within a month, are suspended until they competently satisfy, as in c. *Religiosi*, *De privilegiis*, in the Clementines. 80. Religious required to preach at the appointed times about paying tithes, or to make [it a matter of] conscience to those confessing, if they have not done so, are suspended from the office of preaching until they have made [it a matter of] conscience, if they had the opportunity of saying it conveniently; and thereafter they will incur the sentence of excommunication if they presume to preach with the aforesaid negligence not purged, as in c. *Cupientes*, *De poenis*, in the Clementines.

These suspensions, therefore, I have inserted here, because they have a likeness to the penitential canons. The priest, therefore, in the penitential forum, having considered the circumstances of persons, will know how to temper rigour of this kind: because although for any mortal sin a seven-year penance would be imposed (C. 33 q. 2, c. *Hoc ipsum*; C. 22 q. 1, c. *Praedicandum*), yet for a reasonable cause it can be moderated by the judgement of the priest according to the quality of the crime of the offender and other circumstances weighed on every side, as in c. *Quaesitum* and in c. *Deus qui*, below, this title; and especially if the sin is hidden (C. 26 q. 7, c. *Tempora poenitudinis*; and *De poenitentia*, dist. 1, c. *Mensuram*). Hence also, because perhaps the present life will not suffice for performing such a penance, let the confessor impose on him an arbitrary penance, yet notifying him of the penance fixed beforehand, and granting him that the remissions of prelates, wherever he is, be made to him and profit him, which otherwise would not profit (below, this title, c. *Quod autem*); and that the alms which he has made be for him for the remission of sins (dist. 82, last chapter; and *De poenitentia*, dist. 1, c. *Medicina*); and that all other goods which he has done and which he is going to do, and all evils which he has suffered and is going to suffer, and which he has patiently endured for God, go to his benefit as penance for the remission of his sins; so that if anything remains to be purged, it may be purged in purgatory, according to the merciful will of the Lord (C. 11 q. 3, c. *Abiit*; and *De consecratione*, dist. 3, c. *Poenitentibus*). And so, according to the discretion and prudence of the confessor, individual things are to be referred to individuals according to the capacity and disposition of the penitents, as he will know them fit and ready to perform due penance with fasts, alms, prayers, pilgrimages, disciplines and other moderate austerities according to the rule of equity, as I will say below in c. *Deus qui* and in c. *Omnis*; and what is noted in *De poenitentia*, dist. 1, c. *In actione* and c. *Iudicet*, and *De poenitentia*, dist. 5, c. 1, with similar places, makes for it.

In the fifth gloss, on the words *militiae cingulo*, the gloss says: this man is deposed from his dignity. Innocent says: which penalty the ecclesiastical judge can impose on a layman on account of a sin committed against an ecclesiastical person. Indeed it is said that such a priest-killer incurs this penalty by the very fact, which is notable. For the ecclesiastical judge, as to enjoining penance, can judge of every crime (above, *De iudiciis*, c. *Novit*; C. 6 q. 1, c. *Illi qui*; C. 22 q. 1, c. *Praedicandum*; C. 22 q. 2, c. *Episcopus*; C. 24 q. 3, c. *Tam sacerdos*; and in the said laws by the gloss and the Archdeacon; and dist. 87, c. *Eos qui*, at the end, where the gloss says that every crime is ecclesiastical); C. 35 q. 6, c. *Episcopus in synodo residens*, where the gloss says: argument that without an accuser the bishop can bring witnesses against someone and pronounce, and the same can be judge and accuser; similar C. 6 q. 2, c. *Si tamen*; C. 11 q. 3, c. *Praecipue*, with similar places. On which enough is noted in c. *Cum sit generale*, above, *De foro competenti*, where the gloss says that sacrilege, the crime of usury, heresy, simony, perjury, adultery and the like pertain to the Church; and of any other sin whatever the

Church can take cognizance, as in the said c. *Novit*, above, *De iudiciis*. And the Archdeacon notes on C. 23 q. 5, c. *Incestuosi*, and C. 26 q. 5, c. *Contra idolorum*, where the punishment of sorcerers and enchanters is treated. And Innocent, Hostiensis, Johannes Andreae and Lord Antonius de Butrio treat it above, *De purgatione canonica*, in c. *Nos inter alios*, where Lord Antonius says in the addition: conclude the truth of this point: if the layman is of the temporal jurisdiction of the church, he is compelled without distinction by the bishop to purgation (*De appellationibus*, c. *Si duobus*); if he is not of the temporal jurisdiction, then if it is done for the end of spiritual peace, or that he desist from sin, no distinction of crimes being had, the bishop can compel him to purgation, because as to this end every layman is subject to the Church, as in the aforesaid c. *Novit*. And so is to be understood what is noted in *De consuetudine*, c. 2, in the Sext; and see Paulus on Clem., *De officio ordinarii*. I have said, after the Archdeacon, on C. 4 q. 1, last chapter, on the gloss; and see the gloss on C. 6 q. 2, c. 1.

In the last gloss, on the word *coniugii*; a similar gloss is in C. 33 q. 2, c. *De poenitentibus*. And that you may have the matter more clearly, say, when it is asked whether any crime impedes marriage to be contracted or dissolves one already contracted: it is to be answered according to the said glosses that there are seven crimes which impede but do not dissolve, which are contained in these verses, namely:

Incest, rape of a betrothed, or death of a wife, Receiving one's own offspring, death of a priest, Doing solemn penance, or taking a nun: All these forbid to be joined in wedlock.

Of incest it appears in C. 32 q. 7, c. *Si quis viduam*, and above, *De eo qui cognovit consanguineam uxoris suae*, c. 1 and 2. Of the rape of another's betrothed it appears in C. 27 q. 2, c. *Statutum*; nor does C. 36 q. 2, c. *Tria*, contradict, for there she was not a betrothed. Of wife-killing it appears in C. 33 q. 2, c. *Interfectores* and c. *Admonere*. Of one who deceitfully receives his own son from the sacred font, so as to deprive his wife of the conjugal debt, it appears in C. 30 q. 1, c. *De eo*. Of one killing a priest it appears here in the present decretal, *Qui presbyterum*, at the end. Of one doing solemn penance it appears in the said c. *De poenitentibus* and in c. *De his*,

and in c. *Antiqui*, same Causa and question. Although in the gloss here no mention is made of one taking a nun as wife, it appears in C. 27 q. 1, c. *Si qui* and c. *Ut lex continentiae*; and the gloss says so in the said c. *De poenitentibus*, toward the end. And some say that if such a one contracts, the marriage does not hold (argument above, same Causa and question, c. *Interfectores*); yet if such men are old and cannot contain, by licence of the bishop they can contract, and the consent of the bishop makes the marriage of such men hold (same Causa and question, last chapter). Others say the marriage holds, although such men are prohibited from contracting, unless it is set in the constitution that if they contract they are to be separated; which I believe true, says the gloss. Say without distinction that the marriage holds even without licence of the bishop or priest, as the text says in C. 33 q. 2, c. *Sed quia timore*; and so Vincentius and commonly all understand it, on account of the suspicion of incontinence, as the Moderns note in c. *In adolescentia* and in c. *Ex litteris*, the third, *De eo qui cognovit consanguineam uxoris suae*; although he acts more cautiously who asks licence of the bishop, or of a priest in the absence of the bishop. In the same gloss, at *alia sunt quae impediunt*:

But when it is asked whether any crimes impede and dissolve [a marriage] already contracted, it is answered that there are three which not only impede [marriage] to be contracted but also dissolve one already contracted. Namely, the first is plotting against the death of another with effect; the second is faith pledged to an adulteress about contracting with her; the third is taking an adulteress

as wife. Of these three the gloss says that they impede and dissolve, in c. *Transmissae*, above, *De eo qui cognovit consanguineam uxoris suae*. Yet the case of the aforesaid is in c. *Super eo* and in c. *Cum haberet*, above, *De eo qui duxit in matrimonium quam polluit per adulterium*. Whether therefore a man kills the husband of some woman so as to take her as wife, or a woman kills the wife of some man so as to take him as husband — and understand "kill" not only by one's own act, but also by counsel, consent, help, favour, mandate, arrangement, or participation of any kind, provided death has followed — such plotting impedes and dissolves the marriage.

It is therefore called "plotting" (*machinatio*), which is a general word comprehending any of the aforesaid cases. For *machinari* is the same as to contrive, to devise, to fabricate, to construct and compose, to bring about, to lie in wait, as Papias says. In whatever way, therefore, someone has arranged or taken part in the death of another, with the aforesaid aim, the marriage is impeded and dissolved, as in the aforesaid laws, and C. 31 q. 1, c. *Si quis vivente*, and above, *De conversione infidelium*, c. *Laudabilem*; even if carnal intercourse did not intervene between such persons, and even if he did not give her faith about contracting marriage, but had this intention in plotting the death, according to what is noted in c. 1, at the beginning, above, *De conversione infidelium*. And to what I said of counsel, consent, etc., what is had in C. 11 q. 3, c. *Qui consentit*, and above, *De homicidio*, c. *Sicut dignum*, and in c. *Ad audientiam*, and in c. *Significasti*, the second, and in c. *Concubinae*, and in c. *Noverit*, below, *De sententia excommunicationis*, comes near enough; and I said enough in the treatise on excommunication. But if someone has plotted the death, but not with the intention of contracting marriage with the widow, he can then lawfully contract, as in the said c. 1, at the end, above, *De conversione infidelium*, and as Innocent notes in the said c. *Super eo*, which elsewhere begins *Super hoc*. And this is to be held for truth, although some have held, and not well, that plotting alone without adultery would not dissolve; but it is clear that it does, by the said c. 1 and the said c. *Si quis vivente*.

For plotting against the death of another, against enemies and robbers, is permitted by civil law (Dig., *De dolo*, l. 1, § *Non fuit*), and is called "good guile," as it were astute prudence. The gloss also, in the proem of the Clementines, says "plottings," as it were astute devices. "For who is the man who, given over to malice alone, does not find something?" as in the Authentic *Ut hi qui*, after the beginning, coll. 6.

Of the other two cases it is to be known that if persons bound by marriage — whether both or either is bound — while a lawful marriage stands, promise each other or pledge faith about contracting marriage after the death of the spouse or spouses, and whether before the aforesaid promise or after, adulterous pollution intervenes, the marriage to be contracted is impeded, and one already contracted is dissolved, as in the said c. *Si quis vivente*, and in the said c. *Super eo*, and in the said c. *Cum haberet*. The same also if they have knowingly contracted marriage in fact and intercourse has followed while the spouse or spouses were living, as in the said c. *Cum haberet*, and in c. *Significasti*, and in c. *Veniens*, and in the last chapter, same title. And note what I said, "knowingly": because if either had been ignorant of the conjugal bond and had contracted marriage with one bound, thinking to contract with one free, if during the life of the spouse [the party] was unaware, and after the death of that spouse it becomes known to her that she contracted with an adulterer, it lies in the power of the ignorant party to seek divorce or to confirm the marriage, as in the said c. 1 and in the said last chapter, same title, with the other laws alleged above. Hence on account of the guile and fraud of the knowing party he is subjected to the ignorant, not only so that she is excused from sin — because the ignorant party does

not commit adultery, which is not committed without guile (Dig., *De adulteriis*, last law; and C. 34 q. 2, c. *In lectum*) — but, what is more, on account of the good faith of such a woman, those begotten are to be deemed legitimate, as in c. *Ex tenore* and in c. *Cum inter*, above, *Qui filii sint legitimi*. And the aforesaid deceiver ought to be compelled to remain in marriage with the deceived woman, as in the aforesaid laws, and in c. 2 [text unclear], above, *De adulteriis* [text unclear].

It is to be known also that if such a deceived woman, after she knew of the death of the spouse, consented to carnal intercourse, the way of seeking divorce is lacking to her (argument in c. *Proposuit* and in the last chapter, *De coniugio servorum*). But if, the first [wife] still living, she was made aware of the matter and consented to intercourse, marriage between them is perpetually impeded (C. 34 q. 2, c. *Si quis virgo*; above, *De secundis nuptiis*, c. *Dominus noster*; and argument in the penultimate and last chapter, above, *De praescriptionibus*).

And it is to be noted that if, the first lawful wife living, he marries in fact a second or a third or more, all unaware, on the death of the lawful wife he can remain in marriage with one of them whom he has chosen. But if after the death of the lawful [wife] he contracted marriage by words *de praesenti* with some other, although he did not consummate it by carnal intercourse, he ought to remain in marriage with her, even if after the death of that first lawful wife he had carnal intercourse with one of those, or even with all of those with whom he had already contracted in fact; according to what is noted by Hostiensis and his followers in the said c. *Veniens*, above, *De eo qui duxit in matrimonium*. There come near in a like case the things written in c. *Bonae memoriae*, the second, above, *De electione*; in c. *Proposuit* and in the last chapter, above, *De coniugio servorum*; and by Innocent in c. 1 and 2, above, *De eo qui duxit*. And the original and radical reason is: because the consent given with those unaware women while the lawful wife was living was null, nor after the death was it ratified with any of them, since it is presupposed that he knew none of them carnally after the death of the lawful [wife] before he was lawfully bound with another (argument Cod., *De nuptiis*, l. *Etsi contra*; and Dig., *De ritu nuptiarum*, l. *Nuptiae*, l. *Eos* and l. *Si quis*, with similar places). And understand what was said above, that he can remain with one of them whom he has chosen: namely if, after the death of the lawful wife, he knows one of them already made certain of the death of that first lawful [wife]; and so she now shows by consent to intercourse that she wishes to remain in marriage with him; he can no longer refuse to remain with her, since after the death of the lawful [wife] he chose to be united with her. And so is to be understood what Hostiensis says, that there is place for gratification [i.e. choice]. Hence Lord Antonius de Butrio, in c. 1, above, *De eo qui duxit in matrimonium*, says that the validation of the marriage arises from new consent only; and this is special in marriage, as in c. *Accessit* and in c. *Attestationes*, above, *De sponsa duorum*. And so the rule "it is not confirmed" (*De regulis iuris*, in the Sext) does not stand in the way, because even if a confirming cause supervenes, what did not hold from the beginning is well confirmed; and it is said to be confirmed not as done retroactively, but as done from the time of the supervening lawful consent; to which Johannes Andreae alleges c. *Primum*, *De desponsatione impuberum*, in the Sext, and refers himself to the said rule *Non firmatur*. And Lord Antonius adds in the said c. 1, saying: from these it appears that if a man contracts with ten ignorant women, on his wife's death he can gratify whom he wills; for she whom he first knew after she was made certain will be the wife, or she to whom he first consented.

[Summa on Matrimony]

And because matrimony has been touched on here, I will briefly cut short [text unclear] the things which pertain to the matter, so that we may have in this title not only by way of a lecture, but also by way of a little *Summa*, the things which are more necessary for the Confessor to know for seeking out the salvation of those confessing. For the theme of what is to be said, therefore, I take that word of the Apostle who says:

Summary. 1. What matrimony is. 2. A man cannot have several wives at the same time, nor conversely. 3. The deflowering of virginity does not make matrimony, but the conjugal pact. 4. Neither of the spouses, after intercourse, can profess continence without the consent of the other. 5. Whence matrimony is derived and named. 6. How matrimony is contracted so that it may be ratified and lawful; and there is a threefold difference in that case. 7. For the being of matrimony among the faithful three things are necessary, and which. 8. When there can be matrimony between the mute and the deaf. 9. How matrimony among the faithful is ratified and lawful

Summa on Matrimony, part 1

[and how matrimony] is contracted; [what] things are attended to, and which. 10. The age necessary in matrimony. 11. One next to puberty, so that he can already beget, and a woman marriageable, lawfully contract matrimony, because in them malice supplies for age. 12. Boys of ten years made their nurses pregnant; no. 14. 13. Solomon and Ahaz begot sons in the tenth or eleventh year. 15. Who are *puerperae*. 16. Whether and when a eunuch can contract matrimony. 17. The twelve conditions impeding or dissolving matrimony. 18. How manifold is error concerning matrimonial consent, and which errors impede it. 19. What is error of person. 20. Love is not of unknown things. 21. Error excuses from sin. 22. Adultery is not committed without guile. 23. That the discipline of the Church may not become cheap. 24. How Jacob and Leah contracted matrimony. 25. What is error of condition. 26. Whether a free man contracting ignorantly with a slave woman, and afterwards manumitting her, can dismiss her on finding she was a slave. 27. Whether a free woman contracting ignorantly with a slave, on discovering the condition of servitude, is compelled to stay with him. 28. Matrimony contracted between a slave and a slave woman, even against the will of the masters, remains ratified. 29. Whether a slave ought to obey his master asking service or his wife asking the debt. 30. Many things are permitted for the sake of avoiding dangers. 31. The children of slaves remain slaves of the master whom the mother serves. 32. The vow of chastity impedes contracting matrimony and dissolves one contracted, and makes one incur excommunication with accomplices. 33. What are the simple and the solemn vow, and whether and how they impede matrimony. 34. Whether boys or girls are bound to the vow of continence or of keeping chastity or virginity. 35. Whether those capable of guile and having the use of reason, vowing religion, can be revoked by their parents. 36. Whether one who simply vows continence, if afterwards he contracts matrimony by words *de praesenti*, can demand carnal intercourse without mortal sin; no. 38. 37. The Pope dispenses for cause against a vow of chastity not solemnized; and whether a bishop also can dispense. 39. The Pope dispenses with a monk so that he may contract matrimony. 40. Whether one who vows simply and contracts sins mortally by demanding [the debt] without dispensation. 41. Whether those under

puberty who have entered religion can be drawn back by their parents. 42. What spouses cannot vow. 43. The solemn vow by religion impedes and dissolves matrimony. 44. How a vow is called solemn through entry into religion. 45. When profession is called express. 46. The express form of profession, and what it is in the order of St Francis; nos. following. 48. The requisites of express profession. 49. No novice ought to be received to profession in the religious orders of mendicants before the year of probation has elapsed. 50. The four orders of mendicants, which. 51. How and when profession is called tacit. 52. One entering religion with the intention of remaining is called tacitly professed; and the example of a certain Brother Nicholas is recited. 53. The threefold habit: namely of profession, of conversion and of probation. 54. The threefold habit of the professed and novices. 55. What habit the novices of the Minors wear. 56. Whether one wearing the habit for a whole year is tacitly professed. 57. The threefold distinction of the habit of novices. 58. In which cases it is not lawful to abandon religion once assumed. 59. The taking of the habit, a vow preceding, induces profession. 60. One who vows and takes the habit at the same time is professed. 61. Whether one professing the substantials of a rule in secular habit, in religious orders not of mendicants, is professed. 62. Whether one wearing beyond a year a habit not plainly distinguished is compelled to remain perpetually in religion. 63. Whether one promising monastic obedience is professed. 64. Several modes of professing. 65. Let the confessor not counsel or consent that those who have simply vowed contract matrimony. 66. What kinship is, and whence so called. 67. The threefold species of kinships. 68. What spiritual kinship is. 69. From which sacraments spiritual kinship properly arises. 70. What catechism is, and of other things to be done before baptism; no. 74. 71. Between which persons spiritual kinship is contracted through catechism. 72. How manifold spiritual kinship through baptism is, and between which persons it is contracted. 73. How kinship through confirmation is contracted. 75. Whether co-parenthood can be contracted through a proxy. 76. Whether a co-parent can take the daughter or sister of a co-parent. 77. Whether a co-parent may marry the widow of a co-parent. 78. Whether one can contract successively with two co-mothers. 79. How spiritual kinship passes from husband to wife. 80. Whether co-parenthood passes from a fornicator to his partner. 81. The genealogy of Christ. 82. Spouses share actions but not passions. 83. How spiritual kinship between spiritual brothers or co-parents impedes matrimony. 84. A bishop confirming and a priest baptizing become co-parents; and whether a bishop is to be called co-parent. 85. Too much familiarity breeds contempt. 86. Monks and religious ought not to contract co-parenthood. 87. Co-parents are bound to instruct their spiritual children. 88. How gravely one not educating his children sins; of many endangered because they did not correct their children. 89. Whether several holding one to be baptized sin. 90. Whether and when a law prohibiting something binds to sin. 91. "It is necessary," and similar words, savour of a precept. 92. What consanguinity is. 93. The prohibition of ascendants and descendants from contracting matrimony lasts to infinity. 94. Examples of a she-camel and horses refusing generative union with their own offspring. 95. Collaterals up to the fourth degree are prohibited from contracting among themselves. 96. The penalty of the incestuous by divine, canon and civil law. 97. Whether one committing incest with a blood relative of his wife, she being unaware, can remain in matrimony with her. 98. What affinity is. 99. How affinity is contracted. 100. To what degree affinity extends. 101. What is [the impediment of] public honesty, and when it is contracted. 102. Seven cases of public honesty to be investigated. 103. To what degree the impediment of public honesty lasts. 104. What legal kinship is and how it is contracted. 105. The difference of adoption and arrogation. 106. Who can adopt and who be adopted.

107. How adoption ought to be done. 108. Whether the adopter is bound to leave [anything] to the adopted, and what in arrogation. 109. How arrogation is to be done. 110. How legal kinship impedes matrimony. 111. Civil kinship has a threefold line. 112. Whether one adopted can contract with the daughter of the adopter, or conversely. 113. Why an illegitimate son is not in the power of the father. 114. Whether adoptive children can contract among themselves. 115. Matrimony is prohibited between the adopting father and the wife of the adopted son, and conversely. 116. Whether legal kinship dissolves matrimony contracted. 117. Whether there can be matrimony between a believer and an unbeliever. 118. Espousals are contracted between a believer and an unbeliever under the condition "if the unbeliever is converted." 119. Whether a Catholic can be joined with a heretic woman. 120. Whether one converted to the faith can dismiss his wife and marry another while the first lives. 121. The difference between matrimony contracted between believers who afterwards turn heretic, and between unbelievers. 122. Whether a Catholic is bound to dismiss a heretic wife. 123. Whether unbelievers contracting in degrees prohibited by divine law can remain in matrimony when converted. 124. Whether a convert can object to a converted wife fornication committed in unbelief. 125. Several effects of crime. 126. Irregularity before baptism. 127. An action is not lost against a husband who had been bound before. 128. Whether an unbeliever killing a believer can contract with the widow of the believer. 129. Force has five species. 130. What fear is. 131. What fear or force excludes consent. 132. Voluntary and involuntary fear. 133. What compulsion is absolute and what conditional. 134. A compelled will is a will. 135. In which cases a free will is required. 136. Marriages ought to be free. 137. A dowry promised or paid through fear does not hold.

Election or collation ought to be free. 139. Whether the alienation of an ecclesiastical thing made through fear is valid. 140. Whether jurisdiction extorted through fear is valid. 141. Whether a sentence passed through fear holds. 142. Whether the authority of a tutor extorted through fear is valid. 143. Whether an absolution extorted through fear holds. 144. Just fear excuses and excludes consent. 145. In which cases fear excuses. 146. Whether an oath extorted by fear is to be kept. 147. The judge by his office compels one who has sworn to pay usury not to seek it back, and compels the holder to restore. 148. Whether a woman taken by force or fear is said to have consented after a promise also extorted through fear; and what if they live together for a year; no. following. 150. Whether captivity impedes matrimony contracted. 151. Whether one contracting in sacred orders is made irregular. 152. Whether irregularity incurred by matrimony contracted in sacred orders can be removed by the bishop. 153. Whether a married man can be promoted to sacred orders. 154. The bond is considered in four ways. 155. In how many ways espousals *de futuro* are contracted. 156. Espousals *de futuro* are contracted through words *de praesenti* by those unqualified by age. 157. Second espousals *de praesenti* prevail over espousals *de futuro*, although contracted earlier, even with intercourse, and they induce public honesty. 158. When affection without effect suffices, and when not. 160. He is to be deemed a bigamist who has in fact joined himself with two different women. 161. He is infamous who contracts with one with whom he cannot by law. 162. [One cannot be dispensed] with a subdeacon contracting in fact with a widow. 163. Espousals *de futuro* are contracted by the giving of earnests; and whether the penalty of them, attached in marriages or espousals, is lawfully demanded. 164. That earnests are lost, what is a legitimate cause. 165. The reason for the difference of earnest and penalty. 166. Whether and to what extent a penal stipulation added in the contract of matrimony is valid as to interest; and what if pledges have been given in the obligation of contracting espousals or matrimony; no. following. 168. Espousals *de futuro* are contracted by

pledging with a ring. 169. What the putting on of the ring signifies between spouses, and why it is put on the fourth finger; no. following. 171. Espousals *de futuro* are contracted in five ways. 172. Whence espousals are named, and what they are. 173. Under the name of espousals man and woman are comprehended before matrimony; but after it they are called husband and wife. 174. Espousals are presumed if the pledging is made by the father; if by the spouses, matrimony; and in how many ways these are presumed, and how invalid ones are ratified. 175. The effect of espousals is principally twofold. 176. Espousals are dissolved in thirteen ways; and which do not hold by law itself; no. following. 178. A bond of matrimony arising from public honesty results from words *de futuro*. 179. The bond is properly said to result from matrimony by words *de praesenti* between lawful persons, every impediment ceasing. 180. One bound by words *de praesenti* before intercourse can pass to religion even against the will of the spouse remaining in the world. 181. Espousals or matrimony having been contracted, carnal intercourse following, with the bridegroom and bride, if the bridegroom afterwards contracts with another by words *de praesenti*, intercourse likewise following, which of these is judged the matrimony. 182. Description of presumption, and which is of law, and which of man, and which of law and by law. 183. The force of proof arising from the power of the parties. 184. Proof of presumption can be urged by the protestation of the parties; and there many things on protestation in contracting matrimony. 185. Voluntary carnal intercourse principally works four effects. 186. The decretal *Is qui fidem*, how understood. 187. Whether a proof having its origin partly from a party, partly from another proof, is admitted. 188. A fiction of law is a species of proof. 189. Presumption of nature, of custom and of fact. 190. In how many ways the law draws the effect of presumption from fact. 191. Whether the decretal *Is qui fidem* is dangerous. 192. Whether those contracting espousals or matrimony *de futuro* without consenting, though intercourse intervened, ought to obey the judge of the penitential or of the contentious forum. 193. The Pope, concerning matrimony not consummated, can dispose as he pleases without offence to God. 194. We believe the canons of the Church dictated by the Holy Spirit. 195. Fraud ought not to protect anyone. 196. One contracting with a woman "if he finds her a virgin": if he has found her [not so], matrimony is presumed. 197. No penalty is called more fitting than that one be punished in that in which he offended. 198. How the Church prohibits something to be done. 199. One who seduces and deflowers an unmarried virgin either endows her or marries her; and what if he deflowers a willing one without treaty of matrimony; no. following. 201. A woman contracting with a second husband, because she believes the first dead, is not always judged an adulteress. 202. When a wife is said to be certified of the death of her husband, so that she may lawfully contract with another. 203. In how many ways the death of a husband can be proved by the wife, and conversely. 204. A wife, when she thought her husband dead, who however was in captivity for 24 years, and having married a second time, in Capistrano's time returned to the first. 205. Whether a woman is to be heard wishing to prove that her first husband lives, who, having alleged the presumption of the husband's death, contracted with a second. 206. Whether the wife of one unwilling to return can contract with another. 207. Whether presumed matrimony results if someone contracted espousals under the condition "if she lets herself be known," and intercourse follows. 208. I espoused the betrothed of Titius, then another; Titius's espousals being dissolved, with which ought I to remain? 209. Whether it is matrimony if it is said, "I consent to you if you kiss me," and the like. 210. Whether the addition of a condition suspends espousals, if the condition is added not from the beginning but after an interval. 211. Someone contracting by words *de praesenti* under the condition "if the father consents":

whether it is matrimony when the father is willing to consent. 212. Four differences of conditions to be investigated in matrimony. 213. The goods of matrimony are three. 214. Conditions which vitiate matrimony. 215. If someone has entered religion under the condition "if it is lawful to use matrimony or have his own goods," whether the entry is valid. 216. Whether an impossible condition vitiates in acts other than matrimonial. 217. Whether a wife knowing her husband an adulterer can lawfully ask and render the conjugal debt without sin. 218. Whether one committing adultery immediately loses by law itself the right of asking the debt. 219. When an adulterer or adulteress is presumed incorrigible. 220. Whether a husband is prohibited in any case from dismissing or accusing an adulterous wife. 221. Whether [a wife] after the death of her husband is forbidden [to contract] with the adulterer. 222. Whether a wife can dismiss her husband for the sodomitic vice, and conversely. 223. All sodomites were killed together on the night of the Lord's Nativity. 224. What impossibility of intercourse is. 225. Two species of impotence for intercourse. 226. How impotence for intercourse induces an impediment in marriages. 227. How impotence for intercourse is proved. 228. The decretal c. 1, *De frigidis et maleficiatis*, on account of its difficulty is variously read by the Doctors. 229. What is required for a separation of matrimony to be made for impotence through frigidity. 230. A widow, or a woman otherwise corrupt when she contracted, if she alleges the husband's impotence that she was not known, the husband saying the contrary, how will it be proved that the husband has lied. 231. When the woman, inspection of the body being excluded, proves the husband impotent with the oath of seven kinsfolk, if the husband wishes to prove himself potent with a like oath, whether he is to be admitted. 232. Whether narrowness of the woman impedes matrimony. 233. When a man contracts knowingly with an unqualified woman, or conversely, whether it is true matrimony. 234. Whether any impotence in a woman renders her unqualified for matrimony. 235. How the impediment of frigidity can be proved before three years. 236. Whether the word of matrons without oath concerning the narrowness of a woman is to be believed, and which ought to be chosen. 237. When a sentence of divorce has been passed for frigidity of the husband or wife and has become final, if afterwards husband or wife are found capable, whether it can be retracted. 238. A sentence is retracted in four cases, and against what is notorious it is invalid; and what if injustice is established by proof judicially made. 239. When a divorce has falsely been passed by sentence on the husband's impotence or the woman's incapacity, whether afterwards, the husband having become potent or the woman capable, the first matrimony is restored, granted that each has contracted a second time. 240. A woman separated for narrowness, if she contracts with a second, and after afterwards has intercourse with the first.

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[and after the first has been asked back] and returned to the first, and is not found capable by him, whether she is to be restored to the second. 241. Accidental impotence for intercourse, perpetual and temporary. 242. Whether and when one castrated or cut can contract matrimony. 243. Whether and when one castrated or cut, after matrimony contracted, can enter a monastery. 244. Whether one castrated after matrimony contracted by words *de praesenti* is compelled to enter a monastery so that the woman can marry, since the matrimony was not consummated. 245. Some eunuchs and cut men have intercourse and emit, though they do not beget; which Capistrano testifies happened in his time. 246. Our Saviour designates three species of eunuchs, and whence so called. 247. One castrating himself with his own hand is made irregular. 248. One having no testicle cannot be made a

soldier. 249. Whether matrimony between a man not begetting and a woman not conceiving holds. 250. Whether a woman rendered unfit for matrimonial embraces on account of a deformity of the natural member can contract; and if she has contracted, whether she is separated. 251. Whether sorcery always is or is presumed perpetual in doubt; and no. 255. 252. Whether sorcery, matrimony not yet consummated, dissolves one contracted by words *de praesenti*. 253. Whether sorcery precedes or follows the contract of matrimony by words *de praesenti*, how it can be known, and who will prove it; no. 257. 254. Whether sorcery is perpetual or temporary, and how it is known. 255. Whether those separated through sorcery, contracting another matrimony, are to be recalled to the first. 256. What is required for something to be called a miracle. 258. Whether espousals *de praesenti*, or a preceding matrimony before intercourse, are dissolved by receiving sacred orders. 259. Whether one seeking separation for impotence for intercourse is compelled to state the cause. 260. From what time the three years begin to run for those seeking separation for impotence for intercourse. 261. If the husband is suspected of having the woman corrupted by another, perhaps on account of a great dowry or inheritance; and what if it is due to the other that they do not dwell together for three years, no. 262; and what if husband or wife says he so abhors the union that he does not find in his heart the will to attempt conjugal intercourse, no. 263. 264. When matrimony has been separated for sorcery that was believed perpetual, if the husband has received a sacred order and has known the separated woman, whether he ought to return to the matrimony, and whether he can demand the debt. 265. One receiving a sacred order before consummation of matrimony, if he does not wish to enter religion and the woman asks the judge that he be compelled to consummation, whether he is compelled to religion or to matrimony. 266. If the husband, after a sentence of divorce has been passed, has entered religion and been made a priest, and afterwards it is established that the Church was deceived in the sentence, whether he is to be restored to the wife seeking him back; and what if the woman does not seek the husband but intends to keep continence, whether the husband can seek her back, no. 267. 268. Whether, when a wife and husband believing the divorce justly celebrated have entered a monastery, on the truth being found of an unjust divorce, one can seek back the other. 269. Clandestine marriages are so called principally in two ways; and whether a rule is given comprehending several cases beyond these said, no. 272. 270. A priest ought not to be present at a clandestine marriage; and whether a layman is likewise prohibited, no. 276; and whether such are dispensed, [no.] 287. 273. A clandestine marriage, lest it be contracted, is to be guarded against. 274. Whether custom impedes matrimony to be contracted or dissolves one contracted. 275. Whether one ordered by the Church to cohabit with another as spouse, who knows an impediment to be present, is bound to obey. 277. Whether clandestine espousals pass into presumed matrimony. 278. Whether the publication of matrimony to be contracted ought to be made in several churches, or whether it suffices in one only. 279. Strangers are not admitted by some bishops to contract without testimonial letters of their bishop or judge. 280. Whether publication in a second marriage excuses the offspring if afterwards another marriage appears publicly contracted with another before this second. 281. What term is to be set for declaring an impediment to matrimony. 282. Who are admitted to denounce an impediment to matrimony upon public proclamation. 283. Whether those present and knowing a marriage clandestinely contracted are admitted to accuse or testify against it in the life, or even after the death, of the contracting parties. 284. Whether the penalty of c. *Cum inhibitio* has place, whatever the impediment may be. 285. If only one of the parents knows of an impediment to matrimony, whether the offspring is deemed legitimate. 286. Why, when no impediment is present

between the contracting parties, they are punished in the matter of clandestine espousal. 288. How one maliciously objecting an impediment to a lawful union is punished. 289. Whether a manifest marriage prejudices a clandestine one. The judge judges as he hears and as the matter is proved. 290. Whether a sister is obliged to matrimony by a promise made by her brother. 291. Whether espousals pass into matrimony by the receiving of gifts, an embrace, a kiss, and the like. 292. Who can forbid matrimony. 293. The mode of proceeding against those coming against the interdict of the Church. Matrimony is a great sacrament in the Church of God. 294. Whether one excommunicated for a time, because he came against the interdict of the Church, is freed on the lapse of the time without other absolution. 295. If an appeal is made from a sentence on a matrimonial cause, whether the judge *a quo* can intervene while it is pending. 296. Which are the times of holidays in which marriages are prohibited, and what is the reason for such prohibition, no. 298. Why spouses are not prohibited from demanding the conjugal debt on those days on which nuptials [may not] be celebrated. 297. Matrimony can be contracted at any time. 299. The commendation of matrimony from five [things], and from many others, nos. 316, 317, 318, 320, and no. 302. 300. Whether matrimony was instituted immediately by God; and no. 314. 301. Matrimony was instituted in the earthly paradise. 302. What paradise is and how interpreted. Where the Nile is thought to flow. 303. How "Today you shall be with me in paradise" is understood. Cherubim is interpreted fullness of knowledge. 304. Whether matrimony was instituted before sin. 305. The twofold institution of marriage. What a *perizoma* [loincloth] is. Whence shame arises, and its description. Honesty is the same as a state of honour. 306. The three goods of marriage; which of them is principal and firmest, no. 309. 307. The twofold good of matrimony. 308. The number of the essential goods of matrimony is taken in three ways. 310. It is not matrimony if contracted with the intention of avoiding offspring. 311. If at the time of matrimony the will of keeping the goods of matrimony was present and was afterwards changed, whether the matrimony ceases; and what if nothing was thought about them, no. following. 313. Whether she is a lawful spouse who is married only for the cause of incontinence. 314. Matrimony was instituted by God alone in paradise and in the state of innocence, and surpasses every sacrament and order in antiquity. 315. What matrimony signifies, and its privilege. 316. The manifold mutual obligation of one to the other from the sacrament of matrimony. 318. The Virgin Mary, before the conception of the Son of God, professed the matrimonial order, and there was a perfect marriage between her and Joseph. 319. The word "until" is taken inclusively and exclusively. 320. The little book *On the Infancy of the Saviour* expressly condemned as heretical. The carnal act outside the bond of matrimony is vile and rotten; in detestation of which many things are related. 321. Blasphemy is graver than homicide. 323. The blessings of those marrying. 324. Whether the blessing is repeated if someone marries a second wife. 325. Which sacraments are repeated and which not. 326. The blessing of spouses, of whom one was blessed before and the other not. 327. Who are called sons of God. 328. Whether to have several wives was sometimes lawful according to the law of nature, and whether by dispensation; no. following. 330. A woman can be made fruitful with a fivefold or sixfold birth, and Capistrano testifies that the wife of a doctor of his bore seven, though none survived, and in parts of Apulia four males; and whence. 331. What the good of the sacrament of matrimony signified in the Old Law. 332. Why simony is not committed in matrimony. 333. Dowry, or donation on account of nuptials, and similar things made between relatives by marriage, do not savour of simony. 334. The grace [text unclear] of the Holy Spirit is not given in the matrimonial act. 335. Whether concubinage is against the law of nature. 336. Whether concubinage can stand without

mortal sin by dispensation. 337. How many kinds of sons succeed in the paternal inheritance. 338. Whether and when the father's offence prejudices the son. 339. Canon law deals more mildly with spurious [children] than civil law. Virginity alone does not save. 340. The *aureola* is owed to three kinds of men.

The office of preaching is not to be committed to laymen. 342. The greatness of the passion is considered in three ways. "Martyr" in Latin is called "witness." How the reward is owed to the martyr. How Lucy's doubled crown is understood. 343. Chastity is called of the mind and of the body, and how it is described; no. 346. 344. A virgin in mind, yet corrupted through violence, does not lose the *aureola* of virginity, according to the theologians. 345. To virgins the hundredfold fruit, to widows the sixtyfold, but to the married the thirtyfold is owed. The description of virginity. The praise of virginity heaps praise on matrimony. 349. The description of woman. 350. What repugnance the illegitimately born have. 351. Harlots are likened to lictors. 353. What grace matrimony confers. 354. Matrimony not only excuses from mortal and venial [sin], but also acquires merit. 355. How many have perished through sexual heat not bridled within the limits of matrimony.

This is a great sacrament; but I speak in Christ and in the Church (Ephesians 5). For he speaks expressly of the sacrament of matrimony from that part where he begins to exhort that wives be subject to their husbands as to the Lord, because the husband is the head of the wife, as Christ also is head of the Church; and to husbands he says, "Husbands, love your wives, as Christ also loved the Church," exhorting individual men and women bound by matrimony to love each other with mutual holiness, and not, like brute animals, to give themselves to lust and to the wanton acts of bodily uncleanness. Concerning this most serene sacrament, then, as to its institution for the propagation of the human race, three things are briefly to be investigated. The first is the demonstration of this sacrament, when he says, "this sacrament." The second is the commendation of the same sacrament, when he says, "is great." The third is the denoting of a higher sacrament, when he says, "but I speak in Christ and in the Church"; as if to say: as from the origin of the world, from the side of the man, namely Adam, the woman, namely Eve, was created, and arose into the sacrament of carnal matrimony for the procreation of a copious multitude of offspring, so in the redemption and renewal of the world, from the side of Christ the Church arose into the sacrament of spiritual matrimony for regenerating a multitude of the faithful unto salvation. Because of which he said above in the same epistle, c. 4: "Put off, according to your former conversation, the old man, who is corrupted according to the desires of the flesh, and be renewed in the spirit of your mind, and put on the new man, who according to God is created in justice and holiness of truth." Concerning which the text of the Decretum says (*De consecratione*, dist. 2, c. *In calice*, § *Item*): from his side, namely Christ's, flowed water and blood: water to cleanse, blood to redeem. Why from the side? Because whence the fault, thence the grace. The fault through a woman, grace through Christ. The gloss says: from a side the fault and from a side the grace, but not from the same side; for example, from the side of Adam was the woman, whence the fault went out; but from the side of Christ, blood and water, whence grace flowed forth; of which John 19: "and immediately there came out blood and water."

Returning, then, to the first, where the demonstration of the matrimonial sacrament was spoken of, three things are briefly to be explored. The first is the definition of matrimony, where it is asked what matrimony is. The second is the derivation of matrimony, where it is asked whence matrimony is

derived. The third is the contracting of matrimony, where it is asked how matrimony is contracted so as to be held ratified and lawful.

To the first it is answered, according to Innocent in c. *Ad audientiam*, Extra, *De sponsalibus*, that matrimony is the joining of a man and a woman, maintaining an undivided manner of life. Yet the text of the Decretum literally so defines it in C. 27 q. 2, [c.] *Sunt autem nuptiae*, or matrimony. A similar definition is set in c. *Illud*, near the end, above, *De conversione infidelium*; to which also Inst., *De patria potestate*, at the beginning; and the notable gloss in c. *Licet*, above, *De translatione praelati*; similar C. 35 q. 1, c. 1. So also the Master of the Sentences defines it in [book] 4, dist. 27, c. 2, saying: "Nuptials, then, or matrimony, are the marital joining of a man and a woman between lawful persons, maintaining an undivided manner of life." From which definition we gather, 2. that neither can one man have several wives, nor one woman several husbands, at the same time: for from the origin of the world one woman is read to have been instituted for one man (Genesis 2), and in c. *Gaudemus*, *De divortiis*. And when "joining" is said, understand namely of minds, and matrimonially; 3. because not the deflowering of virginity makes matrimony, but the conjugal pact, as Ambrose says in the book *On Virgins*, and it is had in the Decretum, C. 27 q. 2, c. *Cum initiatur*. "Maintaining an undivided manner of life": 4. because without the consent of the other neither can profess continence or give himself to prayer; and also that between them, while they live, the conjugal bond remains, so that it is not lawful to be joined to others; and also that each shows to the other in turn what each [shows] to himself. "But by this description only the matrimony of the lawful and the faithful is included" — these are the words of the Master of the Sentences, where above. Concerning which there is a good text of the Decretum, C. 27 q. 2, c. *Sed quaeritur*. And when it is said that neither without the consent of the other can profess continence, understand of matrimony consummated by carnal intercourse: because before such consummation one can well, against the will of the other and while he remains in the world, pass to religion and profess continence, as in c. *Verum* and in c. *Ex publico*, above, *De conversione coniugatorum*, and in c. *Commissum*, above, *De sponsalibus et matrimoniis*; which is true even if the matrimony has been contracted by words *de praesenti*, provided it has not been consummated by carnal intercourse, as in the laws alleged.

To the second it is answered that *matrimonium* is derived from *munium* and *mater*, as it were "the office (*munium*) of a mother," because it grants to women to be mothers. For although the agent is nobler than the patient, and form than matter, as in [book] 3, *On the Soul*, and the man in the office of generation is as the formal agent, while the woman is as the material patient; yet because it is just that all things be named from the end, as in [book] 3, *On the Soul*, and the end of generation is effectually completed in the mother, although it takes its beginning from the father — and it would be little to have a beginning without final consummation and effect — therefore it is more fitting that the office of generation be named from the mother than from the father, and be called *matrimonium* rather than *patrimonium*. For the son is burdensome to the mother before birth, painful in birth, and laborious after birth, since even after birth, up to three full years, the infant needs maternal more than paternal solace, according to what is noted in c. *Ex litteris*, above, *De conversione infidelium*; Cod., *De patria potestate*, l. *Nec filiam*; and there is an excellent gloss in c. *Cum haberet*, above, *De eo qui duxit in matrimonium*; and argument Dig., *De liberis agnoscendis*, l. *Si quis a liberis*, § *Non tantum* — unless the mother were an unbeliever, as in the said c. *Ex litteris*. Add to this Genesis 3: "in sorrow you shall bring forth children." Therefore, for a certain relief of the woman, it is called *matrimonium* rather than

patrimonium, so that what she is burdened with in one respect, she may be relieved of in another, as in the rule *Qui sentit*, *De regulis iuris*, in the Sext.

To the third, namely how matrimony ought to be contracted so as to be held ratified and lawful, it is answered principally that there is a threefold difference in this case. For one is matrimony lawful and ratified, which is contracted between the faithful lawfully and in due manner; another is lawful and not ratified, which is contracted between unbelievers according to their customs; another is ratified and not lawful, which is contracted between the faithful with the due solemnity omitted. These are gathered in c. *Quanto*, § *Si vero*, above, *De divortiis*, at the words: "for although true matrimony exists between unbelievers, yet it is not ratified; but between the faithful it exists true and ratified, because the sacrament of faith, which once admitted is never lost, makes the sacrament of marriage ratified." And it is declared more expressly by the Master of the Sentences in [book] 4, dist. 39, c. 5, when he says: "There are, however, some who assert that there is no marriage between unbelievers, because their union is not ratified, not lawful: it is not ratified, because it can be dissolved; not lawful, because the Apostle says, 'all that is not of faith is sin' (Romans 14)." Yet the Master answers in the same book and distinction, c. 6, saying: "The marital union, then, which is between unbelievers, is lawful marriage but not ratified: lawful, because it is between lawful persons; but not ratified, because it is made without faith. But the marriage of the faithful is lawful" — supply "and ratified" — "if, however, the persons are lawful." Thus the Master.

Concerning this, then, it is to be known that for the being of matrimony among the faithful three things are necessary: two, namely, of necessary being, and one of well-being. These are: the first is substance, the second is form, the third is norm. These two, namely substance and form, are of necessary being, according to what is noted in c. *Tua nos*, near the end,

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above, *De desponsatione*, where it says: "since in it neither the substance of the conjugal contract nor the form of contracting marriage can be found." But the norm is of well-being, according to the tradition of the Church, as will be said below. For the substance of matrimony is consent, as in c. *Cum apud*, above, *De sponsalibus*; the form of matrimony is the expression of consent through words expressing consent *de praesenti*, as in c. *Si inter virum*, above, *De sponsalibus*, and in c. *Licet*, above, *De sponsa duorum*. The norm is called the custom, usage or rite of provinces or peoples, according to what is noted in c. 1, above, *De sponsalibus*. Of these, then, if the first or second is vitiated, namely substance or form, nothing is done, even if the third, namely the custom of the regions, is kept; but if the third is vitiated and the two preceding are kept, nothing stands in the way of the truth of the matrimony, because consent alone makes matrimony (C. 27 q. 2, [c.] *Sufficiat*). Yet words are necessary for the proof of matrimony, or nods or signs expressing consent, as in c. *Tuae fraternitati* and in c. *Cum apostolicae*, above, *De sponsalibus*.

And understand "nods or signs" because matrimony can exist even between the mute, and likewise between the deaf, or between a mute man and a deaf woman, or conversely, provided mutual consent is expressed by evident signs, as in the aforesaid c. *Cum apostolicae* and in c. *Tuae*, and Dig., *De iure dotium*, l. *Mutus*. Although, then, those not keeping the custom of the fatherland sin against the law of custom, yet this matrimony, otherwise lawfully contracted, is in no way vitiated, according to what is

noted in the said c. 1, above, *De sponsalibus*, where the custom of the Franks not kept between a Frank and a Saxon does not vitiate the matrimony. So also the usage or rite handed down by the Church, provided nothing else stands in the way, if it has not been observed, does not prejudice the matrimony, although transgressors of the law of the Church sin mortally (dist. 10, c. *Certum*; dist. 81, c. *Si qui sunt presbyteri*; and C. 25 q. 1, [c.] *Violatores canonum*).

That we may know, then, how matrimony among the faithful is ratified and lawful, so that it may be contracted without crime, three things are briefly to be attended to: namely, the first is the age of the contracting parties; the second is their quality or lawfulness; the third is the authority of superiors. 10. As to the first it is asked what age is necessary in matrimony. It is answered briefly that in the male the age of 14 years is required, but in the female the age of 12 suffices, as in c. *Puberes*, above, *De desponsatione impuberum*, in c. *Ex litteris*, and in c. *Attestationes*, and in the last chapter, and nearly throughout; and C. 20 q. 1, c. *Illud*; and in c. *Ad nostram*, above, *De regularibus*. 11. It is to be understood, however, that if one is next to puberty, or shows puberty by the condition of the body, and the male can already beget and the female is marriageable, because in such malice supplies for age, matrimony is lawfully contracted between them, as in the said c. *Puberes*, and in c. *Continebatur*, and in c. *De illis*, above, *De desponsatione impuberum*, and in c. 1, *De desponsatione impuberum*, in the Sext. Hence Johannes Andreae, in c. *Iordanae*, above, *De eo qui cognovit consanguineam uxoris suae*, in the *Novella*, says in the first gloss, there at the end, and notes according to Goffredus, that even if the woman is far from the age, the matrimony is preserved through carnal intercourse; and he refers to c. *Continebatur*. 12. Gregory also in the *Dialogue* tells of a boy of nine years who made his nurse pregnant, which the gloss also reports in C. 20 q. 1, in the summary. 13. Jerome also, in the letter to Vitalis, reports of Solomon and Ahaz that they are read to have begotten sons in the eleventh or tenth year. 14. He reports also that a certain little woman, when she was nursing a foundling infant, and gave it food and performed the office of a nurse, and the little one, who had reached the tenth year, lay with her, it happened, beyond what modesty permits, that she gorged herself with wine and, inflamed with lust, led the boy to intercourse with obscene motions; the first drunkenness made a habit of the next night and the rest thereafter; and not yet two months had passed, and behold, the woman's womb swelled. What more? By God's dispensation it came about that she who abused the simplicity of the little one against nature in contempt of God was betrayed by him who was not lord [text unclear]. And so he concludes that such a boy of ten years had begotten. It appears, therefore, from the aforesaid, that if malice supplies for age, even before they reach puberty, they are judged for matrimony. 15. For *puerperae* are those who give birth in boyish years, as the text says in the said c. *Puberes*. On the aforesaid I wrote much in c. *Omnis*, below, same title, in the consideration of age, concerning the years of discretion.

It is concluded, therefore, that between whom consent can lawfully intervene, and in whom there is the use of reason, between them matrimony can be contracted. 16. And therefore a madman and one out of his mind, or a fool, or a drunkard, cannot contract matrimony, because they cannot consent, unless they have lucid intervals, or unless the drunkenness has ceased, according to what is noted in c. *Dilectus*, above, *De sponsalibus*, and C. 32 q. 7, [c.] *Neque furiosus*, and in c. *Hi qui*, where the time of the contract of matrimony is attended to: for if they contracted when sane and afterwards madness or frenzy supervened, the matrimony is not dissolved on that account, as in the said c. *Hi qui*; to which make the notes on C. 7 q. 1, [c.] *Quamvis*; C. 12 q. 2, [c.] *Gonsaldus*; C. 27 q. 2, [c.] *Sufficiat*; C. 15 q. 1,

[c.] *Aliquos* and c. *Si quis insaniens*; and in c. *Sicut*, above, *De regularibus*; and in c. *Cum dilectus*, above, *De successionibus ab intestato*.

Of drunkenness, however, understand when it has been so great that it has taken away the use of reason. Hence Ambrose says in the book *On the Patriarchs*, and it is reported in C. 15 q. 1, [c.] *Sane*: "Those who indulge in too much wine do not know what they say, and lie silent as if buried." Hence Lot, made drunk, committed incest with his daughters (Genesis 19). And Augustine, to the sacred virgins, says: "In the drunken there is no reason, no counsel of regenerating life, no memory of things done or read, nor any prudence of diligence in the arts." But if the drunkenness were not so great that it had darkened the use of reason, then if they contracted, the matrimony would hold, as we say of a drunkard baptizing (C. 1 q. 1, [c.] *Quos Iudas*, and there by the gloss and the Archdeacon). And although frenzy and drunkenness seem to regard the quality of persons, yet because the question was about consent, they are fittingly mingled with the preceding.

To the second, then, concerning quality or lawfulness, it is asked whether there is any quality impeding or dissolving matrimony. It is answered briefly that there are twelve principal qualities or conditions which not only impede but also dissolve matrimony already contracted — taking "quality" for the circumstance of any of the cases written below — of which some transgressors bind to mortal sin, as are all the qualities or conditions on account of which matrimony is prohibited from being contracted; some not only bind to mortal sin, but also by the very fact strike with the bond of major excommunication; some bind to nothing, but permit dissolution. Of these there are verses, which many set above the rubric, above, *De sponsalibus et matrimoniis*, as Innocent, Johannes Andreae, Antonius de Butrio and their followers, which are these, namely:

Error, condition, vow, kinship, crime, Disparity of cult, force, order, bond, honesty, If you are related by affinity, if perhaps you cannot have intercourse: These forbid marriages to be joined, and undo them when joined. The prohibition of the Church, and also holiday time, Impede their being made, permit them when made to hold.

The two last positions, therefore, although they impede, yet do not dissolve, namely the prohibition of the Church and holiday time, of which I will speak below on the authority of the superior. But the twelve preceding positions impede and dissolve, according to the declarations which I will append below by way of cases.

The first case, then, is of error, namely of person, when one contracting believes he contracts with one person and contracts with another: for then, because there is no consent there, therefore there is no matrimony. For consent (*consensus*) is the same as the sense together (*simul sensus*) of two or more in the same thing (C. 29 q. 1, [c.] *Consensus*), where the text says: "Consent is the sense of two or more in the same thing. He who errs does not sense, therefore he does not consent," that is, sense together with others. Whence it follows in the text below: "But one error is of person, another of fortune, another of condition, another of quality. 19. Error of person is when this man is thought to be Virgil, and he is Plato. Error of fortune is when one is thought to be rich who is poor, or conversely. Error of condition is when one is thought to be free who is a slave. Error of quality is when one is thought to be good who is bad. Error of fortune and of quality does not exclude the consent of marriage. Error of person and of condition does not admit the consent of marriage." And so it appears that not every error excludes consent: for he who takes as wife a corrupt woman whom he thinks a virgin, or who takes a harlot whom he thinks chaste, each errs, because the one esteems a corrupt woman to be a virgin, and the other reckons a harlot to be chaste; yet on account of this the

matrimony is not dissolved, because such error does not empty consent, as was said above. Moreover it is to be known that error of person and of condition dissolves matrimony not from its own nature but from the constitution of the Church: for likewise the Pope could establish that error of quality would impede, and that no error would impede, as appears formerly, before the constitution of the Church, that there was matrimony between Jacob and Leah, although Jacob thought he had married Rachel (Genesis 29 and 30). And it is to be noted, according to

Hugh and Laurentius, as the gloss says on C. 29 q. 1 at the beginning, that one never errs in the person unless some knowledge was first had of him in whose name another presents himself. Hence if someone offers himself under the name of the King of the Franks to some woman who had heard nothing of him, nor had any knowledge of him by fame or otherwise, and she thinks this man is the King of the Franks, she does not err in the person but in fortune or quality. But if a woman consents to someone, seen or not seen, provided he is known to her by fame or otherwise, and afterwards by error takes another, even if she has been known by him, she will be returned to the first, who likewise consented to her, even if he expressed consent through a messenger, or through a proxy having a special mandate, or in another sufficient way, according to what is noted in the last chapter, *De procuratoribus*, in the Sext. But if he was in no way known to her, although by error she takes another, she will never be returned to the first, because between her and the first there was never matrimony: for toward the wholly unknown we can direct neither love nor consent. 20. Hence Augustine in the *Enchiridion* says: "We can love those not seen who are known to us by fame or otherwise; but the unknown we cannot love." But certainly, although it can be granted that she is not to be restored to the first, yet I do not say that she ought to remain with the second, since there is error there: for to err is to think one thing for another (C. 22 q. 2, [c.] *In quibus*; dist. 38, [c.] *Quamvis*). For nothing is so contrary to consent as error (Dig., *De iudiciis*, l. 2; Dig., *De contrahenda emptione*, l. *Alioquin*; and Dig., *De iurisdictione omnium iudicum*, l. *Si quis per errorem*); therefore, etc. Yet they can, if they wish, contract anew and hold the contracted matrimony ratified (argument from the notes on C. 30 q. 5, [c.] *Aliter*, at the end). And so in such a case there would be no obligation between them, because they were not obliged to matrimony; 21. and they were excused from sin on account of the error until they perceived the error, according to what is noted in c. *Cum apostolica*, above, *De sponsalibus*, and in c. *Veniens*, above, *De eo qui duxit in matrimonium quam polluit per adulterium*. 22. For adultery is not committed without guile (Dig., *Ad legem Iuliam de adulteriis*, penultimate law; C. 34 q. 2, [c.] *In lectum*), where the case is that one sleeping ignorantly, that is, having to do with his wife's sister, whom he thought his wife, is excused from adultery and incest, although he ought to do the penance imposed on him, the gloss says, for greater caution, 23. lest the discipline of the Church be disregarded (C. 23 q. 5, [c.] *Excommunicatorum*; C. 15 q. 1, [c.] *Si quis insaniens*). Similar is the case of one striking a cleric ignorantly, as in c. *Si vero aliquis*, below, *De sententia excommunicationis*; similar of one hiring [himself] to a soldier ignorantly: for through ignorance, because he did not know him to be a soldier, he can demand the wage, although if he had hired knowingly he could not demand it (Dig., *Locati*, l. *Si ignorans*).

A matrimonial error almost similar is made by the Master of the Sentences in [book] 4, dist. 30, c. 1, where he sets two of the aforesaid four errors and says the same, namely that error of person and of condition do not admit the consent of marriage. 24. And he adds of Jacob and Leah that, if consent did not precede, it followed afterwards between them; nor are they judged fornicators from that lying together which preceded the consent, since he knew her with marital affection, and she paid the debt

with wifely affection, thinking herself lawfully joined to him by the law of the firstborn and the commands of her father. And he adds: today also he would be excused to whom, without his knowledge, his wife's sister, entering his bed, submitted herself; who [the sister] is deemed to remain perpetually without hope of marriage; yet he who knew her is excused through ignorance. A similar conclusion is made in the Decretum, C. 29 q. 1, § *His ita respondetur*, where almost literally the same words are written. It appears, therefore, from the aforesaid that, although there has been error in the person, such error removed by subsequent consent will neither impede nor dissolve the matrimony beyond the will of the one erring, because subsequent consent after the error is known will confirm the matrimony (argument in c. 1, above, *De eo qui duxit in matrimonium*, where it is left to the choice of the deceived woman whether she wishes to seek divorce or to remain); similar also in c. *Veniens*, same title, at the words "he could anew hold matrimonially," etc.

The second case, and similar to the aforesaid, is of error of condition: as when someone thinks he contracts with a free woman, who however is a slave, or conversely, if a free woman thought she contracted with a free man who however was a slave. For then there is no matrimony from defect of consent; yet it can be ratified by subsequent consent (C. 29 q. 2, [§] *His ita respondetur*), where the text says: "but it is shown that he is free either to remain or to depart." Similar in c. *Si quis ingenuus*, same Causa and question, where the gloss forms two most beautiful questions, saying: 26. But suppose that a free man ignorantly contracted with a slave woman; afterwards the master manumits her, and he knows her after such manumission, and afterwards he finds that she was a slave at the time of the contracted matrimony: it is asked whether he can dismiss her? And we say yes, because that consent was null. But if her master at that time knew the matrimony was being contracted and was silent, then the matrimony holds, because by that very fact he is understood to have given her freedom, as in the Authentic *De nuptiis*, § *Si vero ab initio*, and in the Authentic *Ut liberi de cetero*, § *Si quis*. 27. And the gloss follows, saying: but suppose that a free woman contracted with one whom she believed free; if afterwards, the condition of servitude being discovered, she nonetheless wishes to stay with him, but he refuses: some say that here there is matrimony on one side and not the other, as above, *De eo qui duxit in matrimonium*, c. 1. But I say that as to this neither is compelled to stay with the other as to the bond of matrimony; but by reason of the faith promised he is well bound to her, and is to be induced to keep it. The same can be said when an adult has contracted with a minor, because as to neither is there matrimony, and as to the bond of matrimony the adult can equally withdraw from the minor as the minor from the adult; but not so as to the faith promised. The gloss alleges nothing, but c. 2, above, *De sponsalibus*, satisfies enough for this, where it is handed down without distinction, even of adults, that those who gave faith about contracting matrimony purely and without any condition are to be admonished and by all means induced to keep the faith given. But if they wish to release each other, lest perhaps something worse come of it — namely that he marry such a one as he holds in hatred — it seems that, after the likeness of those who contracted a partnership by interposing faith and afterwards remit it to each other, this can be tolerated in patience. Similar in c. *Requisivit*, same title; and it is treated better in c. *A nobis* and in c. *Attestationes* and the last chapter, with what is noted there, above, *De desponsatione impuberum*. The gloss also forms the aforesaid questions in the last chapter, above, *De coniugio servorum*, and concludes the same.

And what was said above, namely "if the master knowingly was silent," understand when a free man contracts with a slave woman whom he thought free, the master knowing and being silent; or also if the master himself had given his own slave woman as wife to a free man as though free. For such

silence or pretence prejudices the master so far that by that very fact freedom is understood to have been given by the master to such a slave woman or slave; and such is the case in the said § *Si vero ab initio*. 28. It is to be known, however, that even against the contradiction and will of the masters, marriages contracted between slaves and slave women remain ratified; yet the due and customary services ought no less to be shown to their own masters, as in c. 1, above, *De coniugio servorum*. 29. But suppose that at the same time the master asks service and the wife the debt: which will be obeyed first? It seems that the husband or wife asking the debt is to be obeyed first, because they quickly dispatch themselves of rendering such a debt, as Innocent says in the said c. 1, *De coniugio servorum*; therefore the master seems to act maliciously if he will not give the slave even a small moment to satisfy his wife; hence his malice is not to be indulged (Dig., *De rei vindicatione*, l. *In fundo*). On the contrary it seems that the master is rather to be obeyed, to whom he had first been obliged; therefore he ought not to oblige himself to another to his prejudice, because a thing passes with its burden, as in c. *Ex litteris*, above, *De pignoribus*, and in c. *Pastoralis*, above, *De decimis*, and in c. *Tua*, above, *De iureiurando*. It is to be answered, then, that the doubt is of the concurrence of time, just as the distinction of times opens the concord of the Scriptures. Hence it is said: distinguish the times and you will harmonize the Scriptures (C. 2 q. 1, [c.] *Si peccaverit*; and C. 23 q. 4, [c.] *Si ecclesia*, elsewhere beginning *Si autem ecclesia*, at "all things suit their times"). So from time, place and person we ought to harmonize the canons (dist. 29, c. 1, 2 and 3; and C. 35 q. 3, [c.] *Quod scripsi*; and in c. *Non debet*, above, *De consanguinitate et affinitate*, with similar places). So in a concurrence of time it is expedient to measure the condition of the matter. For where the greater danger is, there one must act more cautiously, as in c. *Ubi periculum*, *De electione*, in the Sext; and in many occurring cases there is danger in delay, as in the last chapter, below, same title, and in [the rule] *Mora*, *De regulis iuris*, in the Sext. 30. For for the sake of avoiding danger many things are permitted which otherwise would by no means be permitted (above, *De officio ordinarii*, c. *Pastoralis*, at the end, with its concordances). Hence Seneca to Lucilius, epistle 24, says that dangers which can happen in turn are to be premeditated. In the aforesaid question, then, two dangers can come together at once: namely one concerning the life of the master, and another concerning the adultery of the woman. Hence if at the same time the danger of both concurred — as that the master, placed in danger of death, needed servile attendance, and at the same moment of time the slave's wife asked the debt of matrimony, granted that she said expressly at that time, "unless you render me the debt at once, I will commit adultery" — because such a request appears indiscreet on her part [text unclear], he can lawfully [text unclear]

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[refuse, because] what is not to be asked ought not by right to be furnished (C. 25 q. 5 [text unclear], § 1, at the end; dist. 18, *De elogiis*; and in l. 2, Dig., *De origine iuris*, with what is noted there). And those who ask indiscreetly hear, "You know not of what spirit you are" (C. 23 q. 4, [c.] *Ecce*), as the Lord said to the sons of Zebedee, "You know not what you ask" (Matthew 20). For as he sins who asks beyond what is owed (C. 14 q. 1, [c.] *Quod debetur*; and in l. 1, Cod., *De plus petitionibus*), so he sins who asks the debt at an unfit time. Hence the wise man said:

Ask what is just, or what seems honourable; For it is foolish to ask what can by right be denied.

And to him from whom more is asked as to time, the delays are doubled, as in c. 1, above, *De plus petitionibus*, and Inst., *De exceptionibus*, § *Hodie*, and *De actionibus*, § *Plus autem*. So, then, is to be

understood the gloss in c. 1, above, *De coniugio servorum*, where the gloss says that if he fears the danger of fornication, the wife is rather to be obeyed than the master, unless perhaps the master asked for his slave in protection of his own person. But that danger to the master ceasing, then, to avoid the danger of adultery, the wife would rather be obeyed, because the delay of a little time could not bring the master so great a prejudice or burden, according to what is noted in the said [rule] *Mora*, *De regulis iuris*, in the Sext, and in l. *Mora*, Dig., *De usuris*, and in l. *Mora*, Dig., *De verborum obligationibus*, and Dig., *Locati*, l. *Si in lege*, § *Sera*, where it is said that the delay of a little time is not harmful. Of which, namely delay, Innocent and Johannes Andreae note enough in c. *Propter sterilitatem*, above, *De locato*, where they treat what delay is, what its effect, how it is made, and how it prejudices; of which Hostiensis also treats more fully in the *Summa*, *De usuris*, § *Ex mora*; and I said enough in the treatise on usury, § "the second case of the third verse is by reason of delay," etc.

It is to be known also that the children of such slaves remain slaves of that master whom the mother serves, because in the condition of status, of freedom or servitude, the offspring follows the mother by common law, according to what is noted in l. *Etiam servorum* [text unclear], Dig., *De statu hominum*; and not unfittingly, because although the offspring has its formal completion from the father, yet it has its bodily substance from the mother. But since servitude is a certain bodily condition, as in l. 1, and in the rubric and text [text unclear], and almost throughout, Dig., *De servitutibus*, therefore it is fitting that in such things, whether in freedom or servitude, the offspring follow the womb. But in those things which pertain to dignity from form, as in honours and nobilities, then the children follow the status of the father, according to what is noted in l. *Placuit*, Dig., *De liberali causa*, even if born of an illegitimate marriage, as in l. *Pactum*, Cod., *De rei vindicatione*, and C. 32 q. 4, c. *Liberi dicti sunt*. Which seems to be referred to the law of the Lombards, which always wills the offspring to follow the worse condition; but the Roman law, with which divine law and the canons agree, considers otherwise as to men and dignities, as above, according to what is noted by Johannes Andreae and the modern followers in the last chapter, above, *De servis non ordinandis*; and in divine law, Exodus 21, where the sons of a slave woman given by the master as wife to a slave remain slaves of the master; of which enough is treated in [book] 4 of the Sentences, dist. 36. But in those things which pertain to the state of salvation, because in such things greater danger is involved, it is rather expedient to consult the offspring, so that while it is in minority it be given to the faithful parent, although up to three years it needs maternal more than paternal solace. But if the offspring has already come to age, it will be able freely to follow whom it wishes, according to what is noted in the last chapter, above, *De conversione infidelium*, and in l. *Nec filium*, Cod., *De patria potestate*; and there is an excellent gloss in c. *Cum haberet*, above, *De eo qui duxit*; and the theologians note it on [book] 4 of the Sentences, dist. 36 [text unclear], which the Master touches in dist. 36, and there Richard; and Lord Antonius de Butrio in c. 1 and in c. *Licet*, above, *De coniugio servorum*.

The third case is of vow: namely if someone has solemnly taken a vow of chastity, whether by express profession or by tacit, made in some approved religious order, according to what is noted in c. *Quod votum*, *De voto et voti redemptione*, in the Sext; or by receiving a sacred order, as in c. *Rursus*, above, *Qui clerici vel voventes*. For such are not only impeded from contracting, but even if they have contracted, the matrimony is dissolved; and, what is more, by the very fact they incur the sentence of excommunication, as in c. *Eos qui*, *De consanguinitate et affinitate*, in the Clementines; nor could they be absolved unless they are first separated from each other. And participants, counsellors, consenters, helpers or abettors, or those knowingly contracting with such, incur the same sentence; and so that

they may obtain the benefit of absolution, they ought to labour effectively that those who so contracted be at once separated: because one participating in the crime with the criminal falls into the same sentence with him, as in c. *Si concubinae clericorum* and in c. *Noverit*, below, *De sententia excommunicationis*.

And it is to be known that there is a twofold difference of vows: for one is the simple vow, another the solemn. A vow is called simple when someone simply vows, whether secretly or publicly; but it is called solemn by the reception of a sacred order, or by tacit or express profession, as above; to which also comes near what is noted in c. *Cum in praeterito*, dist. 84, namely for a sacred order, etc. The simple vow impedes matrimony to be contracted, but does not dissolve one already contracted; but the solemn vow impedes one to be contracted and dissolves one already contracted, as in the aforesaid laws. Yet each breaking a vow, whether he took a simple or a solemn vow, sins mortally, as in the said c. *Rursus*, where the text says that a simple vow binds no less before God than a solemn one. The gloss says: that is, for no shorter time, because each binds in perpetuity, and the breaking of each is mortal sin. To which makes what Moses says, Deuteronomy 23: "When you have made a vow to the Lord your God, you shall not delay to pay it, because the Lord your God will require it; and if you delay, it will be reputed to you for sin." And the Psalm says: "Vow," namely by counsel, "and pay," namely by precept, "to the Lord your God," etc. For what is voluntary from the beginning becomes necessary after the fact, as in l. *Sicut ab initio*, Cod., *De actionibus et obligationibus*; and what once pleased can no longer displease, as in [the rule] *Quod semel*, *De regulis iuris*, in the Sext. Add what Solomon writes, Ecclesiastes 5: "If you have vowed anything to the Lord, do not delay to pay it; for an unfaithful and foolish promise displeases him; but whatever you have vowed, pay. It is much better not to vow than after a vow not to pay what was promised."

Concerning the vow of continence, or of keeping chastity or virginity, it is asked whether boys or girls are bound. It is answered briefly that if they vowed continence before the years of puberty, they are not bound by such a vow, unless they were next to puberty, or unless after puberty they reaffirmed the vow; because before such time they could have no experience of the trouble of the flesh, from which they could not know the difficulty of keeping continence, as Lord Bonaventure says in the declaration of the Rule. Where it is to be noted, according to Thomas, II-II, last question [text unclear], that, since a vow requires full deliberation of mind, which in children before puberty — namely before the fourteenth year in the male and before the twelfth in the female — is scarcely found, although in some it is anticipated and in some delayed according to the diverse disposition of nature: therefore, where the natural disposition for perfect deliberation of mind is lacking, the vow neither obliges nor holds, as in a similar case of the madman appears above, *De regularibus*, c. *Sicut tenor*. Likewise also if someone vows to God something which is not in his own power without the consent of the one having power, he does nothing, as appears of a slave entering religion, or who received orders without his master's knowledge (dist. 54, c. *Si servus*). Hence, because a boy or girl within the years of puberty are in the power of the father or tutor, without their licence they cannot take the vow of religion (C. 20 q. 1, c. 1 and 2), nor a vow of abstinence or pilgrimage (C. 22 q. 4, c. *Tribus*, § 3, *Si pueri*); which some understand if they are under puberty, for whom C. 20 q. 2, [c.] *Si in qualibet*, makes excellently by the contrary sense. Innocent, however, in c. *Scripturae*, above, *De voto et voti redemptione*, says the same is true as to a vow of abstinence and pilgrimage even if they are past puberty, provided they are placed under paternal power (argument Dig., *De pollicitationibus*, l. 2), unless the fathers consent expressly or tacitly; for it suffices that they know and do not contradict (C.

20 q. 2, [c.] *Si in qualibet*). Nor, he says, do c. 1 and 2, C. 20 q. 2, stand in the way, because they speak of the vow of religion, which exempts from paternal power. And he adds: "Likewise we believe that even one under puberty, if he is capable of guile and has made a vow of abstinence or pilgrimage or something else, ought to fulfil it after he has left paternal power, because he obliged himself to God, which he could, just as by crime he obliges himself to the devil, as in c. 1, *De delictis puerorum*. Yet with such one is to dispense and commute easily, because although in some respect they are capable of guile, yet they do not know many things, since they are inexperienced." These are the words of Innocent, where above. There comes to this the authority of divine wisdom, Ecclesiasticus 34, where: "He who has not been tried, what does he know?" — elsewhere the text says, "what kind of things does he know?" — and it is added: "A man experienced in many things will think many things, and he who has learned many things will set forth understanding. He who is not experienced knows few things; but he who has become [deceived] in many will multiply his malice." And the Imperial Law says: a boy does not know what he sees, as in l. 1, Cod., *De falsa moneta*; but that is understood of those not capable of guile.

It is to be noted also that such persons under puberty, capable of guile and having the use of reason, are indeed obliged to God as far as in them lies by their vow, although they can be revoked by the authority of the parents; and if they do not revoke or contradict, the children are to keep their vows. And if above the years of puberty, namely 14 in the male and 12 in the female, they have taken the vow of religion or entered, they can no longer be revoked by their parents, because they have now become of their own right and free from paternal power by the privilege of religion, since they are more strictly obliged to God than to parents, according to what is noted in C. 20 q. 1, c. 1 and 2, where the text says: "But the profession of virginity will be firm from the time when adult age has begun, and that which is usually reckoned fit and perfect for marriage." Where the gloss says, not

understand when the male has begun to reach the fourteenth year, or the female the twelfth, but when it is already at its end. And in the summary of the same Causa the master gloss says: either he who enters a monastery is an adult, or under puberty. If an adult and he enters willingly, he will not be able to leave, as below, same Causa, q. 1, c. *Puellae*, and q. 1, c. 1 and 2; if he enters unwillingly, he can leave (below, same question, [c.] *Sicut*), unless he enters unwillingly on account of some fault (dist. 50, c. *Si ille*; and C. 21 q. 2, [c.] *Placuit*). If one under puberty enters, either he is placed in the monastery by another, or he enters by himself. If he is placed by another and he did not consent, he can go out when he wishes, as in the said c. *Puellae*, and below, same question, c. *Praeses*. But if he consents when he is placed by another, although that consent which is made before the years of discretion does not hold, yet he cannot leave before he comes to lawful age, after the likeness of carnal matrimony (above, *De desponsatione impuberum*, c. *De illis*; and C. 20 q. 1, [c.] *Illud*); but as soon as he has come to perfect age he can go out, as in the said c. *Praeses*, and above, *De regularibus*, c. *Cum simus* — although some have said that in one under puberty the offering of the parent alone suffices for him to be a monk (argument above, *De regularibus*, last chapter; and C. 20 q. 1, c. 1 and 2); but against them is expressly above, *De regularibus*, c. *Cum simus*. But if one under puberty enters on his own authority, he can be drawn out by the father or tutor (C. 20 q. 2, [c.] *Puella*). So says the said gloss, and well.

But I ask: although a simple vow impedes matrimony to be contracted and does not dissolve one already contracted, as in the said c. *Quod votum*, *De voto*, in the Sext, whether one simply vowing

continence, or entry into a religion having a vow of continence annexed, as in c. *Cum ad monasterium*, above, *De statu monachorum*, if afterwards he contracts matrimony by words *de praesenti*, can demand carnal intercourse from his wife without mortal sin? Answer: on this question there are various opinions. For Blessed Thomas, on [book] 4 of the Sentences, dist. 38, says that he cannot know his wife carnally without mortal sin; but after he has known her, it has now become unlawful for him not to render the debt. Hence, although he ought not to ask, yet he is bound to render when asked, whether it is demanded expressly or interpretatively, because it would be too burdensome to the wife if she always had to ask expressly. Lord Antonius de Butrio, in c. *Rursus*, above, *Qui clerici vel voventes*, says that either it has been dispensed that he contract and demand, which can be done, as I said above, c. *Veniens*, and there is no doubt that he can demand, as I said there. And there, namely in the said c. *Veniens*, same title, the same Lord Antonius says, no. 6, that although a simple vow impedes matrimony to be contracted, yet if fornication is feared, licence of contracting can be given by the Church, so that a greater evil may be avoided. And so it appears, he says, that the Church sometimes permits a sin so that a greater may be avoided, and permits someone to sin under hope of pardon, which is marvellous; but he does not sin, since a dispensation precedes; and for caution a penance is imposed. 37. And note that against a vow of chastity *de praesenti* not solemnized the Pope dispenses for cause, and fear and danger to continence is called a lawful cause. And below he says: The fourth [argument] opposes, because it seems that licence should not be given to him against the vow, even granted that it is simple, since it is *de praesenti*; because the Church ought not to open a way to sin, and a simple vow equally binds as to God as a solemn one, as is noted below in the next chapter, which begins *Rursus*. So also in espousals someone is compelled, and the Church does not give licence (above, *De sponsalibus*, [c.] *Ex litteris*); therefore also in a simple vow. The gloss says that the Church does not give licence of contracting directly, but it is a certain comparative permission, lest worse come of it. Some declare that the Church neither grants nor denies; and therefore at the text they understand there "I will grant," that is, show it granted or not denied (C. 33 q. 2, [c.] *In adolescentia*), or, that is, "do not prohibit," according to Innocent. Others say that licence ought not to be denied, nay rather expressly granted; and this because a simple vow does not hold after espousals *de futuro*, as neither does a solemn one after matrimony — understand, namely, consummated by intercourse, as in c. *Commissum*, above, *De sponsalibus*, with similar places. This, however, is false, because a simple vow of continence *de praesenti* has in itself more strength than espousals *de futuro* have. Therefore Hostiensis and the Doctors commonly say that by law licence is not to be granted that they come against the vow; but by dispensation, a lawful cause existing, the Pope can well dispense that one contract against a vow of continence *de praesenti*. And the moving cause for dispensing, namely in the said c. *Veniens*, was, first, the woman's disturbance, because she took the vow not inspired, but did this in fraud, so as not to have the husband whom she had espoused (to this, C. 17 q. 2, [c.] *Consaldus*); secondly, to avoid greater danger, because it appeared she could not contain; thirdly, because she was young and suspect. Hence the Pope took it that she might have what she asked from a less suitable debtor, so that at least in matrimony she might live chastely (dist. 31, [c.] *Nicaena synodus*). And this because in every vow the authority of the Pope is understood to be excepted, as in c. 1, above, *De voto*.

But whether the Pope alone, or also the bishop, may dispense in such a case? Lord Antonius says, in the said c. *Veniens*: 38. Guillelmus [Durandus] in the *Speculum*, title 2, § *Nunc de episcoporum*, verse 155, says that the bishop for cause can dispense that one who simply vowed contract, intending to allege

this decretal; he alleges the next above, namely c. *Consuluit*; the contrary is made by the next decretal, namely c. *Rursus*, and C. 22 q. 4, last §; and see what is noted below, next chapter, namely c. *Rursus*, in the last gloss. Lord Antonius adds: I believe that if the vow is simple *de futuro*, the bishop can do this; if *de praesenti*, although it is simple, the Pope alone can do it. These things are true as to the Church; but as to God, if in taking the vow he did not intend to be obliged, then no dispensation is required, as is noted above, next chapter; because as without consent there is no bodily matrimony as to God, whatever words are uttered, so neither spiritual (above, *De regularibus*, c. *Sicut tenor*); and that he did not consent in this, he is to be believed in the forum of the soul, and licence is to be given to him to contract; yet a penance will be imposed on account of men's opinions, and lest a bad example be taken from it, as above, *De desponsatione impuberum*, [c.] *Duo pueri*; which understand if this was public; otherwise a penance will be given for caution, because it is of good minds to fear fault there where [there is none], etc. And so, understanding the aforesaid c. *Veniens*, it would receive no calumny. And he refers to the gloss on C. 17 q. 1, at the end of the summary, which gloss begins: "It is asked whether it is lawful for anyone to depart from a vow"; and at the end it says that the said c. *Veniens* is understood of comparative permission. And of manifold permission see dist. 3, last chapter, below in the gloss which begins *Tribus modis*; and at the end it says that comparative permission is rather called toleration than permission. And according to this permission the canon says, "what we permit we do not approve" (C. 31 q. 2, [c.] *Hac ratione*); and according to this permission the decretal says that we tolerate many things which, if they were brought into judgement, would be quashed, as above, *De praebendis*, c. *Cum iam*.

40. But what if with such a one, vowing simply and contracting, it has not been dispensed: whether he can demand without mortal sin? Lord Antonius in the said c. *Rursus*, above, *Qui clerici vel voventes*, toward the end, says: some here say that he cannot demand, although he is bound to render (argument above, *De conversione coniugatorum*, [c.] *Quidam* and c. *Placet*), and he ought always to do penance and render with sorrow of heart (argument above, *De eo qui cognovit consanguineam uxoris suae*, c. *Transmissae*, and the penultimate and last chapter). Them the Archdeacon follows in c. 1, *De voto*, in the Sext, where [he treats] this in the last gloss. To this C. 27 q. 1, [c.] *Nuptiarum*, last verse, and c. *De viduis*; C. 27 q. 2, [c.] *Agathosa*. Others hold that he can demand, because the vow is simply dissolved by the supervening of a greater bond; therefore nothing impedes him from demanding; otherwise such matrimony would be too burdensome and dangerous, and it would be to cast a snare, as in the said c. *De viduis*. Argument for this: because, just as no bond of obligation from the first vow remains in one entering a stricter rule, as in c. *Qui post votum*, *De regularibus*, in the Sext, so also here, after matrimony contracted and consummated, the obligation of the vow ceases. Johannes Andreae says a dispensation is necessary as to demanding, which can be made by the bishop by commuting into another good (*De voto*, c. 1), since this case is not prohibited. And he says that a dispensation for contracting would not suffice unless it were also dispensed for consummating, because both oppose [the vow], and the second more than the first: because if he can dispense that one contract, as I said above, next chapter, all the more can he dispense that one use what was contracted. Likewise because he dispenses with an incestuous man that he may lawfully contract (C. 33 q. 2, [c.] *Si quis*, where of this, and c. *In adolescentia*; and above, *De eo qui cognovit consanguineam uxoris suae*, c. *Ex litteris*); through which Johannes Andreae says that in the case of the decretal *Transmissae*, above, *De eo qui cognovit*, he does not sin if he

demands the debt from a wife not related by affinity. And this opinion is held by Johannes Andreae and the Archdeacon (*De regularibus*, c. *Constitutionem*, in the Sext; and *De voto*, c. 1, same book), and Hostiensis here in the *Summa* at the end of the title. And Lord Antonius adds at the end: it could be said that a dispensation is not required for the exaction of the debt when the vow is *de futuro*; if *de praesenti*, although not solemn, a dispensation is required. And granted that the bishop could not dispense for contracting, as in the preceding chapter, he will yet dispense, concerning what has been contracted, for demanding after the contract. And in this Lord Antonius rests and ends. But as to what he says, "if he can dispense that one contract, as I said above, next chapter": certainly there he does not affirm this; nay he says, "I believe that if the vow is simple *de futuro*, the bishop can do this; if *de praesenti*, although it is simple, the Pope alone can do it," as I wrote above; but here at the end he says that a dispensation is not required when the vow is *de futuro*. Therefore it seems that he affirms nothing precisely. Johannes Andreae, however, in the said c. *Rursus*, says: "This, however, I confess, that although [the vow] by no means holds in this case, yet he ought not to demand the debt, but is bound to render (argument above, *De conversione coniugatorum*, [c.] *Quidam*, c. *Placet*), and let him always do penance and [render] with grave sorrow of heart

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render this." And below he says it is fairer that he can demand. And below he says: "Because so solemn an opinion holds the contrary, which Thomas also holds on [book] 4 of the Sentences, dist. 38, art. 3, let us say that a dispensation is necessary in demanding, which, when a just cause is present, can be made by the bishop by commutation into another good, as in c. 1, above, *De voto*." And below, to what he said, that it would be casting a snare, etc., he himself answers that where the man has impeded himself after [text unclear] matrimony, it cannot be that the Church approves anything, and so it does not cast a snare — as if he meant to say that the one vowing and contracting cast the snare on himself by contracting in such a way, and not the Church; therefore let him impute to himself the damage which he suffers by his own fault, as in the rule *Damnum*, *De regulis iuris*, in the Sext.

Richard also, on [book] 4 of the Sentences, dist. 38, art. 7, q. 1, in the response, says: "But the reason why matrimony already contracted after a simple vow of continence is not to be dissolved is that a simple vow of continence is nothing but a promise of oneself to keep continence for God; but the promise of a thing does not transfer the thing promised into the ownership of him to whom it is promised; and therefore after the promise, before the delivery of the thing promised, the one promising remains owner of the thing; and therefore if he gives it to another, the gift holds, although he is bound to make some satisfaction or recompense to him to whom he had previously promised the thing itself." And although he alleges nothing, yet Dig., *De verborum obligationibus*, l. *Stipulatio ista*, and almost throughout the title, and Inst., *De obligationibus*, § *Harum*, satisfy for the aforesaid; and the *Speculator* treats the matter enough in the title *De solutionibus*, throughout, and Johannes Andreae on the rule *Nemo potest*, *De regulis iuris*, in the Sext. Richard adds: "And therefore after a simple vow of continence, if a man gives to a woman, and conversely, power over his body by contract of matrimony, the gift holds, but he is bound to God to amends for breaking the promise." 41. And below, answering the second article, he says that, "although he who contracted matrimony after a

simple vow of continence sins mortally in consummating the matrimony — because after contracting matrimony it is still lawful for him not to consummate it, if he wishes to enter religion — yet after the matrimony is consummated he does not sin by rendering the debt to his spouse, because then the power of his body has been fully transferred to his spouse as to carnal lying together." He means that this bond results from the words of the Lord saying, Matthew 19: "What God has joined, let no man separate"; on account of which the Apostle also says, 1 Corinthians 7: "Let the husband render the debt to his wife, and conversely; the wife has not power over her body, but the husband, and conversely." Richard adds: "But because he made this transfer through his own fault, he ought to render the debt with sorrow, and is bound never to demand." Thus Richard.

It is to be concluded, therefore, for the safer opinion — and because it is supported by weightier authorities and propped by more probable reasons — that unless he has a dispensation before he contracts, concerning contracting and demanding, or after he has contracted, concerning demanding, he can never demand without sin. And it is always to be dissuaded that he contract; and if he has contracted, he is to be counselled to ask a dispensation from the Pope before the matrimony is consummated by carnal intercourse, so that he may lawfully demand. 42. For it appears that in the said c. *Veniens* the Pope dispenses; and commonly it is so observed in the Roman Curia that in a vow of chastity no one inferior to the Pope presumes to dispense unless the Pope himself commits it; nay, even the Pope in a vow of continence scarcely, and with great difficulty, and rarely is accustomed to dispense, as the Doctors note well enough in c. *Cum olim*, and there the gloss on the word *continentiae*, above, *De clericis coniugatis*, and in c. *Cum ad monasterium*, at the end, above, *De statu monachorum*, although there it speaks of the solemn vow. 39. And there is great dispute there among the Doctors whether the Pope can dispense in the vow of chastity annexed to the monastic rule. And although Blessed Thomas, II-II, q. 88, holds that he cannot, since no greater good can be found than the vow of continence — for which Ecclesiasticus 26: "no price is worthy of a continent soul" — yet Innocent and Johannes Andreae, and commonly all, hold that for a just and great cause the Pope can dispense even with a monk. He gives as example: if some part of Christendom is in danger unless a monk becomes king and contracts matrimony and acquires the kingdom for himself and his sons. A similar case could be if some part of the pagans wished to come to the faith of Christ. Of which Johannes Andreae disputes enough on [the rule] *Semel Deo*, *De regulis iuris*, in the Sext, in the *Mercuriales*; and I wrote conclusively in the said c. *Cum olim*.

Concerning the aforesaid question, of one simply vowing and contracting, whether demanding without dispensation he sins: the Archdeacon, in the said c. *Quod votum*, *De voto*, in the Sext, recites Huguccio and others holding that he can lawfully demand. He adds quite beautifully: "But you say that, although there is true matrimony between such persons, yet the one who simply vowed is not absolved from the vow as to the matrimony itself, except in so far as the force of matrimony impels him against the vow" (excellent argument above, *De iureiurando*, [c.] *Quanto*, where it is said that an oath ought to be observed as far as it can; similar in c. *Cum contingat*, at the end, where it is said that oaths which do not redound to another's prejudice, and when observed do not tend to the loss of eternal salvation, are to be kept when freely given without guile). The Archdeacon adds: "But the force of matrimony does not compel him to demand, since that is of free will and liberty, although it compels him to render, since that is of obligation and necessity. Hence it is to be said that he can pay without sin, because he is obliged to this; but he cannot demand without sin, because he would act against what was promised to God, and so would break his first faith, so as to have damnation from

this," as the Apostle says, 1 Timothy 5: "for when they have grown wanton in Christ, they will marry," etc. From which authority the question seems sufficiently settled by the Apostle: "having damnation, because they have made void their first faith" (to this C. 27 q. 1, c. 1 and 2, at "who [made void] the first faith," etc., and there, "because their pledge was held by the Lord," and below, "cannot be dissolved without vengeance"; and same Causa and question, c. *De viduis*, "to be veiled under no blessing"). And by demanding he would act against conscience, and so would build for Gehenna (above, *De restitutione spoliatorum*, c. *Litteras*; and below, *De sententia excommunicationis*, c. *Inquisitioni*; C. 28 q. 1, [c.] *Ex his*; see there). And this Vincentius and Bernard seem to hold, above, *De conversione coniugatorum*, [c.] *Quidam*, and c. *Accedens*, in the gloss at the end, which was the tenth gloss. Of this also [the gloss] notes on C. 27 q. 2, [c.] *Agathosa*, in the gloss *Sed numquid*, where also it is concluded that he cannot demand, although he is bound to render when asked.

And it is to be noted that if a boy or girl within the years of puberty has entered a monastery, even if they have stayed for a year and a day, unless the father consented or ratified it, the father or tutor can recall the boy or girl from the monastery (C. 20 q. 2, c. 1 and 2; and above, *De regularibus*, c. *Si quis autem*), unless the monastery is so remote that notice cannot reach the father or tutor within that time; for then it is fitting that a longer time be allowed (C. 17 q. 2, [c.] *Si quis incognitus*). In such cases, then, paternal power excuses such vowers from transgression of the vows, because what is done with the law permitting does not deserve punishment (Dig., *De iudiciis*, l. *Qui auctoritate*; and C. 22 q. 5, c. *Pueri*). Nor does the father sin by recalling, because he uses his right (argument Dig., *De iniuriis*, l. *Iniuriarum actio*). For the aforesaid laws are founded in the divine law, Numbers 30, where Moses says: "This is the word which the Lord has commanded: If any man has vowed a vow to the Lord, or has bound himself by an oath, he shall not make his vow void, but all that he has promised he shall fulfil. If a woman has vowed anything and bound herself by an oath, being in her father's house and still in girlish age, if her father has known the vow that she promised and the oath by which she bound her soul, and has held his peace, she shall be bound by the vow; whatever she promised and swore she shall fulfil in deed. But if her father, as soon as he heard, contradicted, the vows and oaths shall be void, and she shall not be held bound by the promise, because her father contradicted," etc. 42. There also it is had enough of vows taken by married persons being made void, unless they are made by common consent, or unless they are ratified tacitly or expressly; of which also C. 32 q. 1, c. *Si quis uxorem*, where it is concluded that man and woman are not to be judged unequally; and C. 32 q. 5, c. *Praecepit Dominus* and c. *Christiana religio*; and C. 33 q. 5, [c.] *Manifestum*, and c. *Haec imago*, and c. *Noluit*, where spouses cannot vow abstinence or pilgrimage without mutual consent, much less continence. Hence the Apostle says, 1 Corinthians 7: "Defraud not one another, except perhaps by consent for a time, that you may give yourselves to prayer, and return again together, lest Satan tempt you." But the vow of pilgrimage overseas is excepted, which men or women, if they are able, can make against the other's will, as in c. *Ex multa*, § *In tanta*, above, *De voto*; but the one not vowing can follow the one vowing if he wishes, as in c. *Quod super*, last §, same title. Excepted also is the vow of continence which, after it has been made by common consent with the authority of the diocesan, neither will be able to revoke (above, *De conversione coniugatorum*, c. 1 and the penultimate chapter). And this concerning the simple vow.

But as to the solemn vow through entry into religion, it is clear that matrimony is not only impeded but also dissolved, in the said c. *Quod votum*, *De voto*, in the Sext, and in the other laws alleged above. Nay, more: today such persons, by the very fact, if they presume to contract matrimony, incur the

sentence of excommunication, as in c. *Eos qui, De consanguinitate et affinitate,* in the Clementines. 44. But it is asked when the vow is called solemn through entry into religion. Answer briefly: through tacit profession

or express, made in some approved religious order, as to dissolving matrimony, as in the said c. *Quod votum, De voto,* in the Sext. 45. Again it is asked when profession is said to be made expressly. I answer: properly when the one professing promises in the hand of the abbot or prelate the substantials of the rule which he professes, or in the hand of another to whom the prelate has committed this, as Innocent says in c. *Porrectum,* above, *De regularibus*; to which come the notes in c. *Ad apostolicam,* same title. 46. But what is the form of such profession? I answer, according to the *Speculator* in the title *De regularibus, § Professio*: the form for one professing the monastic rule is this, namely: "I, N., promise to God and his saints and to you, lord abbot or prior, before you and your convent, that I will perpetually keep continence in this house or monastery as far as God permits to my frailty; and I renounce property; and I promise to you the obedience and reverence due according to the rule of this order, and stability and the conversion of my manners." And he says that this profession is made in writing; yet writing is not of the substance, although it is for caution, unless perhaps in some rule it were expressly contained that profession without writing would be null, according to what is noted by Innocent in the said c. *Porrectum*. The one professing ought also to subscribe with his own hand, or make the sign of the Cross if he does not know how to write, where it is of the custom of the monastery, according to what is noted by the *Speculator,* where above.

But in our order the form of profession is this, namely: "I, Brother N., vow and promise to Almighty God, and to the Blessed Virgin Mary, and to Blessed Francis, and to all the saints, and to you, father, to keep for the whole time of my life the Rule of the Friars Minor confirmed by Lord Pope Honorius III, living in obedience, without property, and in chastity." And kneeling before the prelate, the friars standing by, he ought to hold his hands joined in the hands of the prelate. And such profession being made, the prelate, or he who receives him by commission of the prelate, promises him eternal life if he keeps the aforesaid. And by good custom he is received to the kiss of peace by the one receiving him to profession and by the other friars present there. From then, therefore, he is properly to be deemed a regular or monk, because the habit does not make the monk, but regular profession, as in the aforesaid c. *Porrectum* and in c. *Ex parte tua,* above, *De regularibus*. Of the aforesaid form the Archdeacon also notes on C. 20 q. 1, [c.] *Vidua,* and in c. 1, *De regularibus,* in the Sext; and it is noted in c. *Cum in magistrum,* above, *De electione*.

But what is required for express profession? I answer: three things principally, namely: first, deliberation and consent of both, namely of the one receiving and the one professing, as in c. *Ad nostram,* in the last gloss, above, *De regularibus*; second, age, namely above 14 years in the male and above 12 in the female, as in c. 1 and 2, above, *De regularibus,* and in c. *Cum T.,* and in c. *Significatum,* and in c. *Postulasti,* and in c. *Ad nostram,* same title, and in c. *Indemnitatibus, De electione,* in the Sext, there concerning women. Third, quality is required, namely that the one to be received be of proven life, at least through the preceding year, as in c. *Ad apostolicam,* above, *De regularibus,* and C. 27 q. 1, [c.] *Consaldus*. Sometimes, however, two years are established (C. 19 q. 3, [c.] *In monasteriis*), sometimes three years (C. 17 q. 2, [c.] *Si quis incognitus*). Hence, because diverse times are established, it seems to be arbitrary, and so that one can be received at once and the benefit of probation renounced, as the gloss says in the said c. *Ad apostolicam*; and c. *Statuimus,* same title, makes

for it. Yet care must be taken that the unfit are not received, because it is grave to apply the unfit to God's service (C. 19 q. 3, [c.] *In monasteriis*; Cod., *De militari testamento*, l. *Contra publicam*; and the gloss in the said c. *Ad apostolicam*). 49. It is to be noted, however, that in the religious orders of mendicants no novice ought to be received to profession before the year of probation has elapsed, as in c. *Constitutionem*, *De regularibus*, in the Sext. 50. And there are four orders of mendicants approved by the Church, namely of Preachers, Minors, Carmelites and Hermits of St Augustine. To these, then — but more expressly to the Preachers and the Minors — it is strictly forbidden in virtue of obedience and under pain of excommunication that they presume to receive anyone to profession in their order before the year of probation has elapsed; and he who acts to the contrary not only sins mortally and falls into the penalty of excommunication, but is also suspended by the very fact from receiving anyone to profession of the same order, and is to be subjected to the penalty which is customarily inflicted in the order for graver faults; and the one so received in no way remains obliged to the same order, as in c. *Non solum*, *De regularibus*, in the Sext.

Now it is asked how and when tacit profession is said to be made. I answer: principally in three ways. Namely, first, if it is expressly established that the one entering religion had a deliberate intention of leaving the world, being above the age of 14 years, and it is evidently established that he wished to change his life, as the text says in c. *Non solum*, *De regularibus*, in the Sext. This the Archdeacon also holds there. And it is evidently established by the one entering's own confession, as Innocent says in c. *Consulti sumus*, at the beginning, above, *De regularibus*, where he decides this question in terms: that the reception of the novices' habit with the intention of leaving the world induces tacit profession, and solemnizes the vow, and impedes matrimony to be contracted and dissolves one already contracted. It is established also, he says, because when he entered he so testified, namely that he wishes to leave the world and that he wishes to change his life and habit, and renounces the ownership of his goods, and the like. The same Hostiensis holds in the *Summa*, *De regularibus*, and the same Lord Antonius de Butrio in the said c. *Consulti sumus* and in c. *Statutum*, below, same title. 52. Hence he tells of a certain companion of his who entered the order of Monte Oliveto, and while he looked back at Bologna he said: "Stay with God, World; from now on I want no share with you." Lord Antonius says that by those words that companion of his, who was called Brother Nicholas, was tacitly professed. This also Lord Johannes de Fantuciis holds in the said c. *Non solum*, *De regularibus*, in the Sext. It is also proved enough in c. *Beneficium*, same book and title, where the text says: "The benefice of one who enters religion is not to be conferred on anyone within the year of probation, unless his assent is added to it, or it is established that he wished absolutely to change his life, or he made express profession, or knowingly received the habit of the professed."

Innocent in c. *Porrectum*, above, *De regularibus*, following and reporting the opinion of certain persons, says: others distinguish a threefold habit, namely: first, of profession, which has the vow of continence annexed; second, of conversion, which has a simple vow, that is, tacitly annexed, as in c. *Super eo*, above, *De regularibus*, where the gloss also so determines: that those taking the habit of religion with the intention of not returning to the world, no profession having been made there — by the text of that chapter, saying that if they will not keep the austerity of the religion to which they are known to have passed, they are to be compelled to pass to a milder religion. And so it appears that one tacitly professed is obliged to religion in general, although not in particular. And another gloss on the word *votum* says that those who renounced the world in general, no profession of any religion having yet been made, are to be compelled to remain either there or to pass to a milder one, if they so

wish of their own accord, as it says here, and below, same [title], c. *Consulti sumus*, where also the text determines the same: that if he who is converted proposed absolutely to change his life, so as under the regular habit to serve Almighty God henceforth, the text adds in the response that he ought, so that he may live regularly, to pass at least to a laxer rule. The same the text proves in c. *Statuimus*, same title, when it says that novices placed in probation can return to their former state within the year, unless it evidently appears that such persons wished absolutely to change their life and to serve the Lord perpetually in religion, with whom he may renounce that which is known to have been introduced for him. To these also the glosses on the laws already alleged refer.

So also it was determined at Bologna in the Audience of the Rota; and he who made the response to the Supreme Penitentiary, then Lord de Ursinis, in the end concluded that this is so true as God is God. And I saw it, and was the impelling cause of the said determination, because I was asked about this case and gave the response which I wrote above; but because he who asked me would not easily acquiesce, I stirred him to have recourse to the Apostolic See, namely to our Lord Pope Eugene IV, who committed it to the aforesaid Lord de Ursinis, and the determination followed, as I said above.

The third habit we call that of probation, which has no vow annexed, as is proved in the laws already alleged and in c. *Ex transmissa*, above, *De renuntiatione*. For the habit alone does not make the monk, but profession tacit or express, as in the laws already alleged and in c. *Consuluit*, above, *Qui clerici vel voventes*. One taking the habit of probation, therefore, with the intention of trying, can return to the world or to his former state freely within the year, his manners corrected, as in the laws already alleged, as in c. 1, *De regularibus*, in the Sext.

Secondly, tacit profession is made, and is said to be made, by those past puberty if within the year or time of probation they knowingly took and wore the habit of the professed for three days without protestation, in those religious orders in which the habit of the professed is known to be evidently distinguished from the habit of novices, as is gathered from c. 1, 2 and 3, *De regularibus*, in the Sext, and in c. *Ad apostolicam* and in c. *Statuimus*, at the end, above, *De regularibus*, and in the last chapter, *De regularibus*, in the Clementines, where a threefold difference between the habit of the professed and of novices is expressly handed down, when it says: "unless such habit," namely of novices, "shows itself plainly distinguished from the habit of the professed in colour, cut or form." Where the gloss, on the word "colour," says: as that the novices [wear] white or grey; and it follows: among certain nuns profession is distinguished by the black veil from the white; but it is common

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[to have] that distinction of consecration. And on the words "cut or form" the gloss says: 55. as in the order of Minors, where the novices do not have a sewn hood. You may add that, according to the Rule of the Minors, novices ought to wear the *caparo* down to the cord, unless it seems otherwise to the ministers or others lawfully receiving according to God. Hence in the same religion it is customary to attach a certain little piece under the hood, before the breast and behind the back, in the habits of novices. Yet the second gloss on the same Clementine, which begins *Eos qui*, *De regularibus*, says: "Today, however, as to this case we distinguish what the distinction of habit is: whether plain, by one of the three modes here expressed, or hidden, for example by the blessing of the garments, by the person giving, by place and form," etc., as I will say in the following case.

Thirdly, tacit or presumed profession is induced and is said to be made when those past puberty, having assumed the habit of religion, wear it continuously for an entire year: for then such persons are understood to be tacitly professed in the same religion in particular, unless such habit is plainly distinguished in cut, colour and form from the habit of the professed. From which note that it is otherwise if he had worn such a habit so distinguished at the aforesaid age; likewise otherwise if such habit is not plainly distinguished but hiddenly, perhaps on account of the blessing alone. The aforesaid are proved in c. *Eos qui*, *De regularibus*, in the Clementines. Where it is to be noted that formerly the wearing of the habit for a year after puberty induced tacit profession when the habits were undistinguished, as above, *De regularibus*, c. *Ex parte*, and it is noted there in the last gloss; otherwise if the habits had been distinguished by any distinction whatever. But today it is otherwise as to this case, namely of inducing tacit profession by wearing the habit for a year: because not any distinction whatever suffices, but a plain one is required by one of the three modes set in the said Clementine, namely colour, cut or form, for tacit profession to be impeded. Yet it is not impeded if there is otherwise a hidden distinction, perhaps because the garment of the professed is given by the provincial or in chapter, but the garment of the novices not: for the wearing of such a novices' garment for a year would well induce tacit profession; otherwise in the wearing of a novices' garment plainly distinguished, because the wearing of such a garment even beyond a year would not induce profession. These things proceed as to this case, when it is a question of inducing tacit profession from such wearing through the lapse of a year; but as to the other cases of inducing tacit profession we stand by the old law, according to which any distinction whatever suffices. From which the gloss infers that if an adult freely and knowingly receives a habit distinguished by such a hidden distinction, if he persists for three days, he is called tacitly professed, even today, as in the said c. *Constitutionem*, *De regularibus*, in the Sext.

From the aforesaid the gloss on the said Clementine *Eos qui* also gathers that there is a threefold distinction of the novices' habit, considering the habit distinguished, undistinguished, and most undistinguished. The first, namely the distinguished, is subdivided in two ways, because one is plainly distinguished, namely in colour, cut or form; another is hiddenly distinguished, as for example by the blessing of the garments, or by the delivery to be made by the hands of the abbot or provincial, or by place, as for example because the habit of the professed is delivered in chapter or elsewhere separately. The second habit, namely the undistinguished, is so called when between the habit of the professed and of the novices there is no distinction of the aforesaid or similar kinds. But the third habit, namely the most undistinguished, is when chaplains and others, even seculars serving in the monastery, use a similar garment, as do the monks. One receiving, therefore, the habit of novices and wearing it for a year, if it is undistinguished or most undistinguished, or even distinguished but by a hidden distinction, is called tacitly professed if he received it at adult age, namely past puberty, above 14 years. Yet it is not so if he was under puberty and wore the habit of novices plainly distinguished, or even most undistinguished: for in such a case tacit profession is not induced, even if the habit was worn by such a one under puberty beyond a year, as in the said c. 1, *De regularibus*, in the Sext. And according to this understand the saying of Innocent in c. *Ex parte*, and the saying of the Abbot [Panormitanus] in c. *Consulti sumus*, above, *De regularibus*, where he says that the wearing of the novices' habit, if it is distinguished, for however long a time it is done, does not induce profession. Hence the Abbot recounted that he had seen a papal letter of absolution granted to one who had

worn the habit for almost twenty years. To the aforesaid make the notes in the aforesaid c. *Ex parte*, and in the aforesaid c. *Statuimus*, and in the aforesaid c. 1, *De regularibus*, in the Sext.

This, however, is to be soundly understood: that such wearing done by one under puberty beyond a year does not induce tacit profession, namely while the boyish age lasts; but otherwise if he wore it for a complete year after puberty: for then tacit profession would well be induced, unless the habit assumed were so most undistinguished that even seculars living together there used the same habit: for then, if such a most undistinguished habit had been assumed by one under puberty and worn even beyond a year after puberty, tacit profession would not be induced, as in the said c. 1, *De regularibus*, in the Sext. And so holds the gloss, Johannes Andreae, Zenzelinus, Johannes de Lignano and Johannes de Imola on the said Clementine *Eos qui*, although Stephanus holds the contrary there, and not well; because according to him a correction of the aforesaid c. 1, *De regularibus*, in the Sext, would follow from the aforesaid Clementine; which, namely correction of law, is to be avoided as far as possible, as in c. *Cum expediat*, *De electione*, in the Sext, and Cod., *De inofficioso testamento*, l. *Si quando*.

Besides these, Guillelmus gathers certain other cases in the said Clementine *Eos qui* in which it is not lawful to abandon a religion once assumed. The first is when someone first took a vow of entering religion, and afterwards, after an interval, received the habit from one who has power of aggregating to that religion or order, as Innocent notes above, *De frigidis et maleficiatis*, c. *Fraternitatis*, in his gloss on the word *solenni* and on the word *religionem*. 59. For then such reception, whether of the habit of the professed or of the common habit, or where there is no distinction of habits, makes one at once perpetually professed (above, *Qui clerici vel voventes*, c. *Meminimus*), where Innocent says: note that one always professed, provided he makes profession in the hands of him who has power to receive to the profession of another, cannot contract, but is to be compelled to pass to the rule which he professed, as here. We say the same, he says, of one vowing and proposing to keep religion, provided he solemnizes the vow or proposal by receiving the habit, whether of the professed or of the novices, as here and above, *De regularibus*, c. *Consulti sumus*, and in c. *Insinuante*, above, *Qui clerici vel voventes*. But if he takes a vow otherwise, whether of entering religion or of continence, it impedes matrimony to be contracted but does not dissolve one already contracted, as in the said c. *Meminimus*, same title. 60. The second is when in the same context he took a vow and solemnly received the habit with the intention of not changing it, and this is fully established: for then he will not henceforth be able to abandon it, as in the said c. *Statuimus*, and in the said c. *Consulti sumus*, and in the said c. *Meminimus*; and Innocent notes the same in c. *Consuluit*, above, *Qui clerici vel voventes*. 61. The third is when he professes the three substantials of the rule, even in secular habit, in religious orders of non-mendicants only, as in the said c. *Constitutionem*, *De regularibus*, in the Sext, where the text says: "But in other religious orders profession can lawfully be made expressly or tacitly within the year; and when made expressly, even without the secular habit being changed, it binds the one professing precisely to that religion which he has professed." To the same make the notes in c. *Sicut nobis*, above, *De regularibus*. And understand, when it says "in other," namely of non-mendicants. And note that even in the religious orders of mendicants, if profession is made within the year, although it is not made lawfully — because it is prohibited to prelates under pain of excommunication to receive anyone to profession or to the renunciation of the world to be made — yet if not in the hands of a prelate, but they profess by themselves in the ways in which they can tacitly profess, they are well bound to religion in general, although not in particular; and in like manner he will be bound in general if he has been received by the prelate, although the prelate sins and incurs grave penalties, as

in c. *Non solum, De regularibus,* in the Sext, where the text says: "We decree that he who has been so received is in no way bound to our order." Therefore, in that it says "our," it is not excluded that he is bound in general to another order; because he who denies one thing seems to permit and confess the other, as in c. *Nonne,* above, *De praesumptionibus,* and in c. *Cum apostolica,* above, *De his quae fiunt a praelato sine consensu capituli,* where the rule is taken in the contrary sense, that he who grants one thing seems to deny the other. Hence the gloss says, on the words "your order" in the said c. *Non solum*: note that profession made tacitly or expressly within the year of probation does not bind to the order, namely of mendicants, yet binds to religion, as above and in c. *Constitutionem,* same title. In the gloss on the word *licite* Johannes Andreae says: among mendicants also it can be made, namely profession, but not lawfully, as above, next chapter. 62. The fourth is in the case of the aforesaid Clementine *Eos qui, De regularibus*: namely when one older than 14 years has worn the habit in some religion for a year, if the habit is not plainly distinguished, as above; for then he is bound to remain perpetually in the same religion, as in the aforesaid Clementine. For in these cases the Pope feigns that one has precisely consented to spiritual matrimony by presumption of law and by law, just as sometimes he does in a similar case of carnal matrimony (above, *De sponsalibus,* c. *Is qui fidem*). 63. The fifth is of one who promises and professes monastic obedience, as for example because he renounces all his own will and commits all things to the will of the abbot: for then such a promise of obedience would suffice as for profession.

[as in] c. *Non dicatis* and same [Causa], c. *Nolo;* and so Innocent holds in c. *Consuluit,* above, *Qui clerici vel voventes*. Guillelmus, however, on the said Clementine *Eos qui,* at the end — and Johannes de Imola reports it — holds that if in a monastery the custom is that no other express profession is made except that the one professing promises obedience in the hands of the prelate at once on his entry, if in such manner he promises obedience to the prelate he will not be called expressly professed; he alleges c. *Cum ad monasterium, De statu monachorum,* which however, to one looking rightly, does nothing for the purpose. The *Speculator,* in *De statu monachorum,* recounts that Clement so defined it. But the opinion of Innocent is more juridically proved: for if, because [text unclear] someone can profess religion while remaining in his own house, living on the usufruct of his goods, as in c. *Insinuante,* and there fully by the gloss and the Doctors, above, *Qui clerici vel voventes,* then much more if on entering a monastery he promises perpetual obedience to the prelate with the intention of professing, and according to the custom of the monastery he is said to be professed. C. 27 q. 1, c. *De viduis,* the first, satisfies enough, and the said c. *Consuluit,* above, *Qui clerici vel voventes,* where the text says: "she neither entered the cloister, nor professed in the hand of any bishop, abbot or abbess, or upon the altar, or promised obedience" — as though they understand that profession can be made by all those disjunctives. Hence Innocent too, on the word "altar," says: "This profession so made upon the altar then profits and prejudices when it is done by the will of the monks and of the one professing, so that the professional obligation is contracted on both sides; otherwise it would not prejudice. Or say that it always prejudices when afterwards he receives the habit without protestation" (*De regularibus,* c. *Consulti sumus*). If, then, a profession made upon the altar by the will of the monks and the one professing is valid, much more ought a promise of obedience made to the prelate in his hands by way of profession, according to the custom of the monastery, to be valid, as is already presupposed above.

Many things pertaining to religion I inserted in an extended treatment in the larger volume of the treatise on excommunications, in the first excommunication committed or granted to bishops to

absolve, concerning the laying of hands on clerics, at the word "rule"; and very many other things in the sermon on religion; see there. Here, as far as pertains to the purpose, let it suffice to know that if someone has solemnly taken a vow of chastity, whether by express or tacit profession, in some approved religious order (according to what is noted in the said c. *Quod votum, De voto*, in the Sext), or by receiving a sacred order (as in the said c. *Rursus*, above, *Qui clerici vel voventes*), and afterwards has presumed to contract matrimony, by the very fact he incurs the sentence of excommunication, with all knowingly contracting, counselling, consenting, helping, abetting and participating in the same, according to what is noted in the said [c.] *Eos qui, De consanguinitate et affinitate*, in the Clementines; nor can they be absolved except as we said above at the beginning of this chapter on vows. But if someone has been bound by a simple vow, even if after the vow he contracted matrimony with an oath by words *de futuro*, he ought to keep the vow and do penance for the unlawful oath, as in the said c. *Rursus*. But if he first swore and afterwards vowed, although the oath prevails, yet he can enter religion, even if he had contracted by words expressing consent *de praesenti*, provided the matrimony has not been consummated by carnal intercourse (c. *Commissum*, above, *De sponsalibus*; and in c. *Verum* and in c. *Ex publico*, above, *De conversione coniugatorum*). But if after such a simple vow he contracts by words *de praesenti* and consummates the matrimony by intercourse, he has thus sinned mortally, because he acted against the vow, of which enough was disputed above. Yet because a simple [vow] impedes matrimony to be contracted but does not dissolve one already contracted, as in the said c. *Quod votum, De voto*, in the Sext, such a one is obliged to render the debt when asked, yet can never demand without dispensation without sinning mortally, as we discussed abundantly above. 65. Let the confessor, then, be careful never to counsel or consent that those bound by a simple vow presume to contract matrimony, because he would give a cause of sinning, and so would himself sin, by the rule of law saying: he who gives the cause of damage is deemed to have given the damage (Dig., *Ad legem Aquiliam*, l. *Qui occidit*; in c. *Si culpa*, above, *De iniuriis et damno dato*; and in c. *Sicut*, above, *De testibus*, with similar places); according to which the Apostle says, Romans 1: "worthy of death are not only they who do these things, but also they who consent to those doing them"; to which C. 11 q. 3, [c.] *Qui consentit*, with similar places. This caution also Hostiensis gives in the title *Qui clerici vel voventes*, saying: if one who simply vowed asks counsel whether, if he contracts, the matrimony holds, no other answer ought to be given there except that if he contracts against the vow he will sin mortally, etc.

Concerning the fourth principal case, namely of the impediment of kinship, three things principally are to be asked: namely, the first is what kinship is; the second, how manifold kinship is; the third, how kinship impedes matrimony. To the first it is answered generally that kinship is nearness or relationship arising from some sacrament, namely of baptism or confirmation, or from a disposition of law, as from adoption and arrogation. And it is called *cognatio* as it were *simul natio* [birth together]; hence *cognati* are so called because they are joined by the kinship of nearness; and they are not *agnati*, but are held after the *agnati*, because they come through the female sex, Papias says. But *agnati* are called blood relatives descending through males, because they come in place of the born when sons are lacking, as the same Papias says. But it is taken broadly for all related, as above, and will be better declared below concerning the species of kinship. 67. To the second it is answered briefly that there is a threefold species of kinships: namely, the first, as more worthy, is spiritual kinship; the second is carnal kinship; the third is legal kinship.

Concerning the first kinship three things are asked. The first is what spiritual kinship is; the second, from which sacraments it is contracted; the third, between which persons it is contracted; and so consequently from the third it will appear between which persons an impediment arises to matrimony to be contracted, or to dissolving one already contracted. To the first it is answered that spiritual kinship is that nearness which comes from the sacrament of spiritual regeneration. And broadly it is called *compaternitas*, as it were *simul paternitas*; but this properly regards the persons begetting and the regenerated; as to the regenerated persons with respect to those regenerating it ought to be called *confiliatio*, but with respect to the regenerated themselves it ought to be called *confraternitas*. But commonly the regenerators are called co-fathers or co-mothers — namely the ministers of the sacrament or participants in the ministry — and the spiritual children who have been regenerated, and among themselves they are commonly called spiritual brothers or brothers in Christ (C. 30 q. 1, [c.] *Omnes*; and C. 30 q. 3, [c.] *Ita diligere*, and nearly throughout; and C. 30 q. 4, [c.] *Si quis unus ex coniugio*, c. *Qui spiritualem* and c. *Post uxoris*); and it is had enough above, *De cognatione spirituali*, c. 2 and c. *Martinus* and c. *Veniens* and c. *Tua*, and throughout.

To the second it is answered briefly that spiritual kinship is properly contracted from two sacraments, namely from the sacrament of baptism and of confirmation. Yet because, according to the ordinance of holy mother Church, catechism ought to precede baptism, therefore through catechism, as through a part of baptism although by itself separated, spiritual kinship also arises; which, although it impedes matrimony, yet does not dissolve one already contracted, as in c. *Per catechismum*, *De cognatione spirituali*, in the Sext; and C. 30 q. 1, [c.] *Pervenit*; and *De consecratione*, dist. 4, [c.] *In catechismo*, by the gloss and the Archdeacon; and above, *De cognatione spirituali*, c. *Contracto*. Where, although there are various opinions and many views whether matrimony would be dissolved through catechism, today, however, it is settled in the said c. *Per catechismum*, *De cognatione spirituali*, in the Sext, namely that it is not dissolved, as was said above. 70. For catechism is a certain instruction in the truth of God of the Catholic faith to be received, professed and observed, to which faith all are bound.

Through catechism, then, spiritual kinship is contracted, but not dissolving, between the persons written below, namely: first, between the catechist and the catechized boy; second, between the catechist and the catechized girl; third, between the catechist and the parents of the catechized girl; fourth, between the catechized boy and the daughters of the catechist; fifth, between the catechized girl and the sons of the catechist; sixth, between the catechized boy and the wife of the catechist, after the manner of the Greeks — understand, previously known; seventh, between the catechized boy and the concubine of the catechist — understand, according to the sounder opinion; eighth, between the parents of the catechized boy or girl and the wife or concubine of the catechist previously known. But as to the one holding [the child] at catechism it is contracted thus: first, between the woman holding and the boy held; second, between the man holding and the girl held, or conversely; third, between the man holding and the mother of the boy or girl held; fourth, between the woman holding and the father of the boy or girl held, or conversely; fifth, between the boy held and the wife of the one holding, previously known; sixth, between the girl held and the husband of the woman holding, previously known, or conversely; seventh, between the boy held and the concubine of the one holding, previously known; eighth, between the girl held and the concubinary of the woman holding, previously known, or conversely; ninth, between the boy held and the daughters of the one holding; tenth, between the girl held and the sons of the one holding, without distinction,

whether born before or afterwards; eleventh, between the father of the one held and the wife or concubine of the one holding, previously known; twelfth, between the mother of the one held and the husband or concubinary of the woman holding, previously known.

But through baptism spiritual kinship is contracted, namely by baptizing, holding and keeping; and so it is contracted between more persons through baptism than through catechism

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or through confirmation, because in case of necessity even a woman can baptize, and any person whatever, whether believer or unbeliever or heretic, provided he intends to do what the Church intends, as in *De consecratione*, dist. 4, and c. *In necessitate*, and c. *Romanus Pontifex*, and c. *A quodam Iudaeo*; and C. 30 q. 6, [c.] *Super quibusdam*, with similar places. Hence this spiritual kinship is contracted through the sacrament of baptism between the persons written below, namely: first, between the baptizing priest or other man and the baptized girl; second, between the baptizing woman and the baptized boy, or conversely; third, between the baptizing man and the mother of the baptized boy or girl; fourth, between the baptizing woman and the father of the baptized boy or girl; fifth, between the baptized boy and the wife of the baptizing man, previously known; sixth, between the baptized girl and the husband of the baptizing woman, previously known; seventh, between the baptized boy and the concubine of the baptizing man, previously known; eighth, between the baptized girl and the concubinary of the baptizing woman, previously known; ninth, between the father of the baptized and the wife or concubine of the baptizer, previously known; tenth, between the mother of the baptized and the husband or concubinary of the baptizing woman, previously known, as I will declare below concerning concubinage, etc.; eleventh, between the baptized boy and the daughters of the baptizer; twelfth, between the baptized girl and the sons of the baptizer, without distinction, as above.

But as to the one holding at baptism it is contracted thus, namely: first, between the man holding and the girl held; second, between the woman holding and the boy held, or conversely; third, between the man holding and the mother of the boy or girl held; fourth, between the woman holding and the father of the boy or girl held; fifth, between the boy held and the wife or concubine of the one holding, previously known; sixth, between the girl held and the husband or concubinary of the woman holding, previously known; seventh, between the father of the one held and the wife or concubine of the man holding, previously known; eighth, between the mother of the one held and the husband or concubinary of the woman holding, previously known, whether a male or a female is held; ninth, between the boy held and the daughters of the one holding; tenth, between the girl held and the sons of the one holding, without distinction, as above. Nor should you wonder if here there are ten, and above there are twelve: because here I have put wife and concubine in one degree, but above I put them separately for clearer understanding. Of which concubinage also I will speak more clearly below — how co-parenthood passes even through a fornicating act, and so through concubinage, although today reproved, though by civil law it is judged to be permitted.

But as to the one lifting from the sacred font it is contracted thus, namely: first, between the man lifting and the girl lifted; second, between the woman lifting and the boy lifted; third, between the man lifting and the mother of the boy or girl lifted; fourth, between the woman lifting and the father

of the boy or girl lifted; fifth, between the boy lifted and the wife or concubine of the one lifting, previously known; sixth, between the girl lifted and the husband or concubinary of the one lifting, previously known; seventh, between the father of the one lifted and the wife or concubine of the one lifting, previously known; eighth, between the mother of the one lifted and the husband or concubinary of the one lifting, previously known; ninth, between the boy lifted and the daughters of the one lifting; tenth, between the girl lifted and the sons of the one lifting, without distinction, as above.

But through the sacrament of confirmation it is contracted thus, namely: first, between the one confirming and the boy or girl confirmed; second, between the one confirming and the parents of the boy or girl confirmed; third, between the boy confirmed and the sons or daughters of the one confirming; fourth, between the girl confirmed and the sons or likewise the daughters of the one confirming; fifth, between the boy confirmed and the wife or concubine of the one confirming, previously known; sixth, between the parents of the boy or girl confirmed and the wife or concubine of the one confirming, previously known. And in these it is concluded as to the one confirming; of which it is had in c. *Nedum*, *De cognatione spirituali*, in the Sext. But as to the one holding at confirmation it is contracted thus, namely: first, between the man or woman holding and the boy or girl held; second, between the one holding and the parents of the boy or girl held; third, between the boy held and the daughters or sons of the one holding; fourth, between the girl held and the sons or daughters of the one holding; fifth, between the boy held and the wife or concubine of the one holding, previously known; sixth, between the one held and the husband or concubinary of the woman holding, previously known; seventh, between the parents of the boy or girl held and the wife or concubine of the one holding, previously known, granted that the one holding is a man; but if it were a woman, say: eighth, between the parents of the one held and the husband or concubinary of the woman holding, previously known.

It is to be noted that in all the aforesaid cases spiritual [kinship] is contracted with a male just as with a female; therefore I wrote "or conversely." For example, the catechist becomes the spiritual father of the catechized boy or girl, and so the baptizer, and likewise the confirmer, and those holding and lifting in like manner in their degrees, whether they are males or females, actively and passively. The active, then, are called spiritual fathers, but the passive are called spiritual sons; but in the transverse line among themselves they are reciprocally called spiritual brothers. And so the ascending line is considered, which constitutes co-parenthood, and the descending, which constitutes co-filiation, and the transverse, which constitutes confraternity in Christ; and so it is considered by comparison with natural generation. And although other Doctors do not specify so many degrees, since they can be comprehended in brief words — for Lord Antonius de Butrio, in c. *Martinus*, above, *De cognatione spirituali*, enumerates 21 cases of spiritual kinship — I however have distinguished more specifically for clearer and easier understanding, almost by way of a tree, after the likeness of the tree of Johannes Andreae on consanguinity and affinity. But let those who have greater grace and greater wisdom add what is to be added, diminish, supply, emend and correct, until the substance of truth shines limpidly according to the determination of the most holy Roman Church, from whose decrees and decretals, according to the littleness of my poor wit, I have gathered the aforesaid, as can appear to one subtly investigating and searching with diligent examination through the laws written below, namely:

On catechism, through the laws alleged above; and beyond those it is had enough in *De consecratione*, dist. 4, [c.] *Sive parvuli*, with the 17 chapters following, where catechisms, exorcisms, anointings, signs of the cross, exsufflations and other things to be done before baptism are fully handed down; and there the Archdeacon extends and declares enough allegorically and mystically; and dist. 35, [c.] *Ab exordio*; and Johannes Andreae, above, *De Summa Trinitate*, c. 1, near the end, at the verse *Cuius adventus*; and C. 24 q. 3, [c.] *An non*. The Archdeacon says that *catechismus* in Greek means in Latin a flood or washing with waters. And of co-parenthood or spiritual kinship resulting through catechism — that it impedes but does not dissolve — the Doctors treat fully in the said c. *Contracto*, above, *De cognatione spirituali*, and in the said c. *Per catechismum*, *De cognatione spirituali*, in the Sext, and there the Archdeacon and Johannes Andreae in the *Novella*, and Lord Antonius de Butrio and Franciscus de Zabarellis, afterwards made the Lord Florentine, namely Cardinal, in the said c. *Contracto*. Of co-parenthood and spiritual kinship through baptism, it appears in C. 30 q. 1, c. 1, where the gloss says that even if I received the son of a Jewish woman or the son of a heretic baptized, co-parenthood is contracted; of which Johannes Andreae on [the rule] *Ex eo*, *De regulis iuris*, in the *Mercuriales*, in the Sext. Of co-parenthood or spiritual kinship resulting from confirmation, it appears in the said c. *Nedum*, *De cognatione spirituali*, in the Sext, at the end; and by baptism and confirmation matrimony is impeded and dissolved, as in the said c. *Nedum* and in c. *Quamvis*, same title and book.

But I ask whether co-parenthood can be contracted through a proxy. I answer: Johannes Andreae disputes this question on [the rule] *Potest quis*, *De regulis iuris*, in the *Mercuriales*, in the Sext, where he holds with the Archdeacon, against his own Doctor, Lord Marsilius, that as to the effect of spiritual kinship co-parenthood cannot be contracted through a proxy. The same Federicus de Senis holds, *consilium* 15, saying that as to the effect of sponsoring, if a syndic on behalf of a community or a special proxy receives the son of some lord, they are held to keep fidelity to him as co-parents. For a special proxy can also contract matrimony in the name of another, as in the last chapter, *De procuratoribus*, in the Sext. But if the proxy has been revoked before he contracts the matrimony, even if the revocation has not come to his knowledge and that of the person with whom he contracts, nothing is done by contracting afterwards, as in the said last chapter, at the end, *De procuratoribus*, in the Sext. Yet by this argument he does not conclude that co-parenthood passes through a proxy, just as matrimony is contracted through a proxy: because matrimony is a contract which is perfected by consent, but in co-parenthood more things are required, such as immersion, holding, receiving (C. 30 q. 1, [c.] *Omnes* and c. 1; and C. 30 q. 4, last chapter). Therefore he who does not baptize, or hold, or lift cannot be a co-parent. The notes on C. 30 q. 1, c. 1 with the four following, and C. 30 q. 3, c. 1, 2 and 3 and c. *Post susceptum*, and C. 30 q. 4, [c.] *Si quis unus ex coniugio*, and above, *De cognatione spirituali*, c. 2 and c. *Martinus* and c. *Contracto* and c. *Veniens*, and c. 1 and the last, *De cognatione spirituali*, in the Sext, and *De consecratione*, dist. 4, [c.] *Non plures* and c. *Illud* and the following and c. *Qui* and c. *Qualis*, beyond the middle, and c. *Mater ecclesia* satisfy enough; by which laws taken together it is proved that the person's own presence, the offering of the hand, the response, the carrying and the profession are required; all of which are included in the proxy himself, but not in the one appointing the proxy, who is absent. This also the Archdeacon holds in c. 1, *De cognatione spirituali*, in the Sext, for which he alleges l. *Neque* and l. *Post mortem*, § *Neque*, Dig., *De adoptionibus*. To this makes above, *De consecratione ecclesiae vel altaris*, c. *Aqua*, at "because although the bishop can commit those things which are of jurisdiction, those which are of order [are] the bishop's [text unclear]

he cannot entrust to one of inferior grade." Where the gloss on the word "jurisdiction," near the middle, says that the collation of sacraments does not confer by will alone, but there is need of the deed, because a visible anointing is necessary, which is the sign of the interior anointing in the heart (above, *De sacra unctione*, c. 1, at *Responso*). Of this also Johannes Andreae treats enough in c. *Veniens*, above, *De cognatione spirituali*, in the *Novella*, and on [the rule] *Potest quis* in the *Mercuriales*; and Lord Antonius de Butrio in c. *Veniens*, above, *De cognatione spirituali*; and the Archdeacon in c. 1, *De cognatione spirituali*, in the Sext.

But I ask whether a co-parent can take as wife the daughter or sister of his co-father or co-mother. Answer: yes, provided not his own spiritual daughter. The text is in c. *Illud*, C. 30 q. 3; and Johannes Andreae notes it in c. 1, *De cognatione spirituali*, in the Sext; and also C. 30 q. 3, c. *Si quis vero*, where Johannes [Teutonicus], who also defines other questions, says: "Thus you see that a spiritual father can be joined to the sister of his spiritual son, and likewise to the daughter" — understand the daughter, namely of the spiritual daughter [text unclear] — "because that kinship is not extended. Likewise I say that a father can take the spiritual daughter of his carnal daughter; for although spiritual kinship descends from father to son, it does not [ascend] from son to father." And note that the said c. *Si quis vero*, and the said c. *Illud*, and c. *Nam* [text unclear], C. 30 q. 4, are continued and alleged as one chapter; and the text there says "by chance"; yet the gloss says, and well, "the same if on purpose," referring to the aforesaid cases.

I ask also whether someone can take as wife the widow of his co-father, who however was not his co-mother, because she had not been previously known by the co-father. I answer yes; it appears from C. 30 q. 4, [c.] *Relictam*, and c. *Qui spiritualem*, and c. *Sciscitatur*, and above, *De cognatione spirituali*, c. *Martinus*. For example: I contracted co-parenthood with you from a son whom you begot of a concubine at the time when you had no wife; afterwards you took a wife; after your death I can take your widow. Or, your wife, my co-mother, having died, you took another wife; after your death I can take your widow as wife, as in the aforesaid laws, and there by the gloss and the Doctors. 78. I ask also whether someone can at different times contract with two co-mothers. I answer yes. For example: if I took as wife a woman having a co-mother, after my wife's death I can take as wife that co-mother of my deceased wife, because there is no kinship between me and her, as in the aforesaid laws and C. 30 q. 4, c. 1, where the gloss, rejecting contrary opinions, holds this; and the text is in the same Causa and question, c. *Post uxoris obitum*. Hence if your first wife held the son of another before you had intercourse with her, you will be able to have that co-mother of your wife; but if she held after she was known by you, you cannot have that second, because you are co-father [text unclear], etc. 79. And note that someone can become co-father of another in two ways: in one way by the act of the other, who baptizes, holds or receives his son, and so spiritual kinship does not pass from the husband to the wife, unless that son is the wife's son, because then each contracts spiritual kinship; in another way by his own act, as when he lifts the son of another from the sacred font, and so spiritual kinship passes to the wife whom he has already known carnally, but not if the matrimony has not yet been consummated; and this is by way of a certain affinity. Hence by like reason it passes to a woman who is carnally known by fornication, just as to one known matrimonially as a wife, as I will say more broadly below. But if another woman held the son of your wife whom she had by another man, that woman is co-mother of your wife, but not yours, whether she held before there was carnal intercourse between you or after; therefore you will be able to have her. And likewise if your son whom you begot of another woman is received by someone, that receiver is your co-father,

but not your wife's; hence, you being dead, the receiver can contract with your wife left by you, as Innocent and his followers say in the said c. *Martinus*, where the gloss gathers verses to declare this in these words, namely:

She who lifted me or my child from the font — This my co-mother cannot become my wife; But she who lifted my child, not from me, from the font, Her after the death of my [wife] I shall not be forbidden to have.

The aforesaid are also well gathered in C. 30 q. 4, [c.] *Sciscitatur*, and c. *Si quis unus ex coniugio*, and c. *Qui spiritualem*, and c. *Notandum*, and c. *Quod autem*, at the end, at "or the wife of a co-mother be taken," not from the same son with the wife, but from another; but it varies the sex, because it puts in the feminine gender the same case which it put in the masculine in c. *Qui spiritualem*, so that the same woman is permitted to have two co-fathers, etc.; see there.

But I ask whether co-parenthood passes through fornicating intercourse as through matrimonial intercourse. I answer: although various persons think variously — as Johannes Andreae in c. 1 in the *Novella*, *De cognatione spirituali*, in the Sext, reporting the Archdeacon holding there that co-parenthood does not pass from the fornicator to his partner as from husband to wife, because co-parenthood is a spiritual bond; and so he says the argument does not stand in the way that through fornicating intercourse affinity is acquired, because affinity is a bodily bond; and on this he and all his followers make their whole foundation; and Lord Antonius de Butrio reports it in the said c. *Martinus*, but they add nothing except that they report the Archdeacon so holding. Richard also, on [book] 4 of the Sentences, dist. 42, art. 1, q. 3, passes over it weakly, saying only: "But if some become one flesh through fornicating intercourse, co-parenthood does not on that account pass from one to the other, because spiritual kinship is not contracted through a purely bodily thing"; and he says nothing else on this. You see, then, that all holding this side found themselves on this: that spiritual kinship is a spiritual bond, but affinity is a bodily bond. And we also will help them, and let us say that the matrimony between Christ and the Church is represented by the lawful matrimony of husband and wife, according to that of the Apostle, Ephesians 5: "Husbands, love your wives as Christ loved the Church"; and below: "For this cause shall a man leave father and mother and cleave to his wife, and they shall be two in one flesh. This is a great sacrament; but I speak in Christ and in the Church." From these words, then, those holding say that co-parenthood does not pass through fornicating intercourse. God forbid that the matrimony of Christ and the Church be represented by fornicating intercourse! And I do not say to them, "God forbid we do this thing, that we bring a stain upon our glory," as Judas Maccabaeus says (1 Maccabees 9). Yet let them answer me: granted that the matrimony of Christ and the Church is not represented by fornicating intercourse, therefore the baptized born of condemned intercourse do not become co-parents; therefore from the sacrament of baptism and confirmation conferred on such, spiritual kinship is not contracted; therefore neither co-parenthood. Certainly it would be light and ridiculous to say this: for that something happens to be absent from this does not prove it, as in l. *Neque natales*, Cod., *De probationibus*.

And therefore I adhere more, and think one must adhere, to Blessed Thomas Aquinas, saying on [book] 4 of the Sentences, dist. 42, art. 3, q. 2 — whom the Order of Preachers commonly follows — that co-parenthood passes even through fornicating intercourse, because in like manner they become one flesh, as the Apostle says, 1 Corinthians 6: "Do you not know that your bodies are members of Christ? Shall I then take the members of Christ and make them members of a harlot? God forbid. Or do you not know that he who cleaves to a harlot is made one body? For they shall be, he says, two in

one flesh." Behold, the Apostle already understands of the harlot, as of the wife, the word which Adam said, "they shall be two in one flesh" (Genesis 2). To the same C. 32 q. 4, [c.] *In eo*; and C. 30 q. 4, [c.] *Si quis unus ex coniugio*, where the gloss of Huguccio holds this, saying on the words "one flesh": "Therefore through a betrothed *de praesenti* co-parenthood is not acquired, since the canon sets this as the reason, because they are made one flesh. Likewise if this is the cause why co-parenthood is contracted — because he is made one flesh with her — therefore through fornicating intercourse co-parenthood is contracted; for he who cleaves to a harlot is one body with her" (C. 32 q. 4, [c.] *In eo*). For affinity also is acquired through fornicating intercourse (C. 35 q. 2, [c.] *De incestis* and c. *Non eam*; and above, *De eo qui cognovit consanguineam uxoris suae*, c. *Discretionem*). This also Innocent thinks in the said c. *Martinus*, above, *De cognatione spirituali*, saying thus: "Of a fornicating woman some say that if she lifted the son of another from the sacred font, the fornicator can nonetheless take as wife the co-mother of his partner, because a fornicating woman cannot acquire spiritual nearness. Others say that just as carnal affinity is acquired through fornicating intercourse, as in the said c. *Discretionem*, by the same reason spiritual nearness also, especially since the canons place the force in carnal union as to acquiring spiritual nearness." Thus Innocent. To this opinion of Blessed Thomas, then, and of the others of the aforesaid followers, as the milder, one must rather adhere.

Nor does the foundation which those holding the contrary take stand in the way, namely that co-parenthood is a spiritual bond but affinity a bodily bond: because although affinity is contracted by a carnal act, yet the impediment arises originally from a certain spiritual consideration of reason, derived from divine and natural law, for a certain instinct of nature. For although at the beginning it was necessary for a brother to take his own sister as wife, since no other was found in the world, as of Cain and his sister (Genesis 4), yet afterwards by divine law the degrees of consanguinity and affinity were distinguished (Leviticus 18). The divine nature itself, then, which is nature naturing, created, instituted, ordered and taught human nature to live morally and honourably. Hence the Psalmist says, Psalm 93: "Understand, you senseless among the people, and you fools, [be wise at last]

Summa on Matrimony, part 8

He who planted the ear, shall he not hear? Or he who formed the eye, does he not consider? He who chastises the nations, shall he not rebuke — he who teaches man knowledge?" And Baruch 3: "This is our God, and no other shall be accounted of in comparison of him. He found out all the way of knowledge and gave it to Jacob his servant and to Israel his beloved. Afterwards he was seen upon earth and conversed with men." 81. He himself, then, the Lord Jesus, who deigned to converse with men and to suffer punishment for our salvation — did he not also deign to draw his origin from preceding and earlier notorious sinners? As Jerome says on Matthew, c. 1, at "And Judah begot Perez and Zerah of Tamar": Jerome says it is to be noted that in the genealogy of the Saviour none of the holy women is taken, but those whom Scripture reproves, so that he who had come for sinners, being born of sinners — elsewhere, of sinful women — might blot out the sins of all. Hence in what follows also Rahab the harlot and Ruth the Moabitess are set down, and Bathsheba the wife of Uriah. Of which dist. 56, [c.] *Dominus noster*, where it is added: "Our Lord Jesus Christ willed to be born not only of foreigners but also of adulterous unions, giving us great confidence that, in whatever way we are born, yet, provided we imitate his footsteps, we are not separated from his body, of which

through faith we have been made members. And as he is the true high priest and was born of adulterous unions, so in whatever order anyone is born, provided he has perfect faith and fulfils in works what he holds by faith," etc. There the origin of our Saviour is traced in the following §, which begins *Iudas enim*. If, then, he deigned to be born by derivation from adulterous unions, as appears there, how much more will he deign that his matrimony with the Church be represented by fornicating intercourse, if it were necessary to include this — since it is not. For although spiritual kinship is in some way likened to carnal kinship by way of a diverse act, as by way of some denomination, yet it is not likened by way of identity and of complete comparison (C. 30 q. 4, [c.] *Post uxoris obitum*, at "for the kinship of the spirit is not compared to the kinship of the flesh; for one does not pass through union of flesh to union of spirit"). Where the gloss says: lest anyone believe that spiritual kinship is acquired by the husband through the wife as carnal kinship is: because as all the blood relatives of the wife become, through her, related by affinity to the husband, so the co-fathers and co-mothers of the wife would become co-fathers and co-mothers of the husband through her; this it denies here — as if to say, spiritual kinship is not shown by degrees as carnal kinship is; and so it is not a complete comparison, but as it were dissimilar.

Hence Goffredus in the *Summa*, on this passage, says that husband and wife share actions with each other but not passions. "For example," he says, "I have one son by my first wife; you receive him from the sacred font, and by this — I being passive, you acting — co-parenthood is contracted between me and you, which, as it seems, is communicated through me to my second wife; hence you become co-father to me and to my wife, with whom I had previously contracted and consummated matrimony. For if, before I contract with the second, or if after contracting and before I consummate the matrimony, my son begotten of the first wife is lifted from the sacred font, if afterwards I contract, or at least afterwards consummate, this co-parenthood is not communicated to the wife, for the kinship of the flesh is not compared to the kinship of the spirit." Goffredus adds: "Or you may say with Huguccio, Laurentius and Johannes that husband and wife share actions with each other, the matrimony having been consummated by carnal intercourse, as when one of the spouses receives the son of a stranger from the sacred font; but they do not share passions with each other, as when the son of one only of the spouses is received from the sacred font; nor does it matter whether before or after the matrimony is consummated. And the reason of the difference is: because what a part of the body does, it is fair that it be communicated to the other part; but what is done in the person of the son of one only will not be so communicated to the other, because to the other spouse he is found neither a carnal nor a spiritual son." Hence he adds to the verses set above those also written below, namely:

Action makes both co-parents, passion never. Whoever lifts our child, or my child, Let her too be called mine who is joined to me in flesh.

It appears, therefore, from the aforesaid that in sharing actions a preceding carnal intercourse is attended to, according to all, and so a mingling of blood. But they are so joined carnally, and there is a mingling, whether it is by fornicating intercourse as by matrimonial. Therefore, by the fundamental reason and original root of the passing of co-parenthood from husband to wife and conversely, it so passes from fornicating intercourse as from matrimonial, as Blessed Thomas says and the others alleged above. For where there is equal reason, the same opinion ought to be; and where the reason is the same, there the right is the same (above, *De constitutionibus*, c. *Translato*; and Dig., *Ad legem*

Aquiliam, l. *Illud*, § *Sequitur*, with similar places). But the reason assigned by the canon is that they are made one flesh; and it is established enough that they are so made one flesh by fornicating intercourse as by matrimonial. Since, then, the reason is the same in the one as in the other, therefore the right is the same, because of like things the judgement is the same (dist. 4, [c.] *Denique*; dist. 5, [c.] *Ad eius*). Nor does it stand in the way of this opinion that co-parenthood is a spiritual bond: for it is established that through a carnal act — that is, through a union of flesh preceding a subsequent union of spirit — it passes from husband to wife or conversely according to actions, as above, and so to spiritual kinship, that is, to co-parenthood, as in the said c. *Si quis unus*. Therefore this spiritual bond passes through a preceding carnal and fornicating mingling as through a matrimonial one.

Moreover, it is clear enough that the canons do not so much consider the sacrament of matrimony as they consider carnal intercourse, since they expressly determine that not only between a bridegroom and bride *de futuro*, but not even between bridegroom and bride who have expressly contracted matrimony, and solemnly by words expressing consent *de praesenti*, does spiritual kinship pass from husband to wife or conversely, as in the aforesaid laws alleged above. Therefore, since they look to intercourse, it includes fornicating intercourse as matrimonial. Moreover, let it be presupposed that a husband knows his wife as if she were an adulteress and harlot, yet not avoiding offspring, and afterwards he or his wife receives someone from the sacred font: will the spiritual bond of this co-parenthood not pass? Who of sane mind would say not? And yet it is certain that one acting so sins mortally, as is commonly concluded by the theologians on [book] 4 of the Sentences, dist. 31 [and] 32. For Jerome calls such men adulterers, saying, "He is an adulterer who is too ardent a lover of his own wife" (C. 32 q. 4, [c.] *Origo*). Similar C. 24 q. 3, [c.] *An non*, where Pope Nicholas says: "Are you not to be struck with strict vengeance, who are known to have imitated the adultery of Lamech with two wives, and even his outrage?" Where the gloss says: "But how is one said to commit adultery with a lawful wife? Answer: because by adultery he renders her unlawful to himself" (C. 32 q. 1, [c.] *In coniugio*), where the words of Jerome on the Apostle, 1 Corinthians 6, are reported: "But he who commits fornication sins against his own body." Jerome says: "Whoever is placed in marriage, whatever sins he commits do not stain his own spouse; but fornication also defiles the wife, so that she is no longer lawful to her husband, but an adulteress." Hence it appears that even if from the beginning he had consummated the matrimony with such a corrupt and lustful intention, and so with mortal sin, and after once consummating the matrimony never touched her further, or even if there had been a divorce, yet, because they were once made one flesh, spiritual kinship would pass from the husband to the wife and conversely. For it suffices that they were once made one flesh, according to what is noted in the said c. *Si quis unus* and in the said c. *Martinus*, where Pope Clement says, "since according to the word of the Lord man and woman are made one flesh through wedlock"; where the gloss says on the words "through wedlock": that is, through carnal intercourse (C. 27 q. 2, [c.] *Agathosa*). Behold, then, how the canons, the gloss and the Doctors refer to carnal intercourse, and so to the union of flesh, in the passing of such kinship; and so union of flesh follows from fornicating intercourse as from matrimonial, as the Apostle proves where above; therefore, etc. The aforesaid words also, originally written in Genesis 2, the Lord Jesus too repeats, Matthew 19, namely, "they shall be two in one flesh"; he adds, "therefore now they are not two, but one flesh." And if it is said that everywhere it is expressed of marriage, and so of matrimonial intercourse, that they are made one flesh: I answer, by the authority of the Apostle it is inferred enough that even without matrimony

one flesh is made by harlot's intercourse. For he could not say more expressly than the Apostle says: "He who cleaves to a harlot is made one body"; therefore, etc.

Moreover, let it be supposed that someone has no wife, yet has a fornicating concubine whom he keeps openly and with whom he has intercourse at pleasure: since they have now been made one body even by harlotry, as the Apostle says, how co-parenthood could be excused after it has been contracted my understanding can in no way grasp. Let those, then, asserting the contrary beware lest they prepare an incitement to such horrible and unspeakable incests, which they excuse; lest they become advocates for making excuses in sins, to the ruin of their own salvation [text unclear] and of others, excusing crimes and damnably ensnaring themselves for Gehenna. For I knew recently, not a year ago, a certain prelate obstinately contending with me on this point, etc. From the aforesaid it results that all women who have sinned

by mingling of blood with a man baptizing, confirming, holding or lifting become co-mothers; and conversely all men who have had intercourse with a woman baptizing, holding or lifting become co-fathers, and the children spiritual brothers, etc. — saving always the determination of the Holy Roman Church and the judgement of those who think more rightly. 83. And here note diligently that by this kinship resulting from the sacrament of baptism and confirmation not only is matrimony to be contracted impeded, but matrimony already contracted is also dissolved, and so it is necessary that they be separated from each other, as appears expressly in c. *Nedum*, *De cognatione spirituali*, in the Sext. Note also that between spiritual brothers — that is, only between that person through whom co-parenthood comes about and the sons or daughters of the spiritual father or mother — matrimony is in no way permitted, whether they were born before or after; and if it has been contracted, they must be separated, unless they have a dispensation from the Pope. But between other sons or daughters of co-parents it can well be contracted, unless there were a custom to the contrary, namely that matrimony contracted even between such would be taken as a scandal; which custom is to be declared by the metropolitan church. The aforesaid appear in c. 1 and 3 and in c. *Tua*, above, *De cognatione spirituali*; and C. 30 q. 3, [c.] *Super quibus*, and c. *Pitacium*, and c. *Non oportet*, and c. *Post susceptum*, to the end of the question. That matrimony between co-parents is impeded and dissolved appears in c. *Veniens*, above, *De cognatione spirituali*; and generally it is more expressly prohibited between fathers than between co-parents and spiritual brothers (C. 30 q. 1, [c.] *Ita diligere*), where it is written thus: "A man ought so to love him who receives him from the sacred font as a father. Likewise between spiritual sons and spiritual fathers and brothers there is a gratuitous and holy communion, which is not to be called consanguinity but to be held a spiritual nearness; hence I think no marriage of any kind can be made between them, since the laws, to be venerated, do not permit matrimonies to be contracted even between those who are sons by nature and those who are sons by adoption." These are the words of Pope Nicholas to the Bulgarians. And he adds: "If matrimony is not contracted between those whom adoption joins, how much rather ought they to abstain from carnal companionship whom the regeneration of the Holy Spirit binds through a heavenly sacrament. Far more fittingly," he says, "is he called the son of my father or my brother whom divine grace rather than human will chose to be his son or my brother; and we are more prudently kept apart from mutual mingling of the body."

Note also that although some strive to say that the priest baptizing and the bishop confirming do not become co-parents, because it falls on them by office — although they say truly that it falls on them

by office, yet it is false that they do not become co-parents, as appears expressly in the said c. *Nedum*, *De cognatione spirituali*, in the Sext, and in c. [text unclear], above, *De cognatione spirituali*, where it is wholly forbidden that the sons of a priest presume to contract with those baptized by the father, or conversely. The same is true of the sons of the one confirming, as in the said c. *Nedum*, by the text and the last gloss of Johannes Andreae, who at the end says that there are twenty cases prohibited by this kinship, which he says he numbered in the *Summa* of the fourth book; but I have distinguished and numbered them more clearly above, specifying the particular persons, and therefore they are more in number, as you saw above. 85. And note that some say that although the bishop most truly becomes co-father by confirming, yet he is not to be called co-father so familiarly by all without distinction, but only by those whom he himself does not refuse to call co-parents; and this for reverence of the episcopal dignity, lest authority grow cheap. For too much familiarity often breeds contempt, as is noted in c. *Etsi Iudaeos*, in the third gloss, above, *De Iudaeis*; and dist. 86, [c.] *Quando*, where the words of Augustine on the life of clerics are reported, saying: "When the necessity of discipline in restraining morals compels you to speak harsh words, even if you yourselves feel you have exceeded measure, it is not required of you that you ask pardon of your subjects, lest, while humility is kept too much among those who ought to be subjects, the authority of ruling be broken." Where the gloss says: "For he ought to increase his dignity by his talent, because too much familiarity often breeds contempt" (Dig., *De officio praesidis*, [l.] *Observandum*; Dig., *De officio proconsulis*, l. *Nequicquam*, § *Circa*); "which is true among fools," Azo used to say. Therefore it rests in the disposition and discretion of the bishop whom he knows and wishes prudently to call co-fathers or co-mothers. Moreover, it befits him and the baptizing priests, lest by the affection of familiarity it render them as suspect, or slower in judgements, according to what is noted in c. *Insinuante* and in c. *Cum R.*, above, *De officio delegati*.

Moreover, for the reason of avoiding suspicion, lest too much familiarity bring danger and ruin, monks and other religious are forbidden to seek or accept co-parenthoods (C. 18 q. 2, [c.] *Pervenit*; C. 30 q. 1, [c.] *Omnes*, in the gloss; [C.] 16 q. 1, [c.] *Doctos*, and c. *Placuit*; and *De consecratione*, dist. 4, [c.] *Non licet*, and the two following chapters; and C. 18 q. 1, c. 1; and C. 18 q. 2, [c.] *Diffinimus*). Limit this: unless they have been promoted to the care of souls, as in the said c. *Pervenit* and in the said c. *Doctos*. Hence Blessed Gregory, who was a monk [and] cardinal deacon, contracted co-parenthood with the Emperor Maurice, which before would not have been lawful (C. 18 q. 1, c. 1, where the gloss reports this and alleges C. 20 q. 1, c. 2 [and] 3, and C. 16 q. 7, in the ninth action — which chapters, however, though they bear on the matter of the said c. 1, C. 18 q. 1, do not bear on the matter of the said co-parenthood).

Finally note that co-parents or godparents are bound to instruct their godchildren in what pertains to eternal salvation, such as the Creed of God, the Lord's Prayer and the precepts of the law, and the form of confession (*De consecratione*, dist. 4, [c.] *Vos ante omnia*, and c. *Parvuli*, and c. *In baptismate*, and there the gloss; to which below, same title, [c.] *Deus qui*; and above, *De vita et honestate clericorum*, c. *Ut quisque*, where it speaks of curates; to which *De consecratione*, dist. 4, c. *Ante baptismum*, and c. *Ante viginti dies*). For such godfathers are sureties before God for such children, as the text says in the said c. *Vos ante omnia*, and there a good gloss. Hence they are called co-parents (*compatres*) as it were "fathers together"; therefore together with the parents they are bound to instruct. To which serves what is noted in dist. 37, [c.] *Legant*, at the end, where the gloss says that one who does not instruct his sons in the discipline and correction of the Lord is repelled from testimony (C. 6 q. 1, [c.] *Qui crimen*); likewise he cannot be a bishop (dist. 47, [c.] *Necesse est*); indeed he is rather called a dog than

a bishop, and so than a father (C. 2 q. 7, [c.] *Qui neque*). Hence Eli the priest was scourged in one day in the death of his sons and his own (1 Kings [1 Samuel] 4); and David, because he corrected his sons lukewarmly, learned by experience that their youth was ruinous, so that they cut one another down (dist. 47, [c.] *Necesse est*, at the verse *Hinc etiam David*). Of which 2 Kings [2 Samuel] 18, of the death of Absalom, who killed his brother Amnon because he had violated Tamar, the sister of both — but [sister of] Absalom by both parents — and therefore he killed him; and [it was said] Absalom struck all the king's sons and not even one of them remained (2 Kings [2 Samuel] 13). Likewise also Adonijah, brother of Solomon, because he desired Abishag the Shunammite as wife, died by Solomon's command (3 Kings [1 Kings] 2), etc. See in the sermon on the reverence of children toward parents.

Incidentally I was consulted: what if several hold or receive the baptized, and so if there are several co-parents from one creature? He who consulted me said he had heard from a most famous preacher that all sinned mortally except one; and although that one could be understood as the first, whether requesting or requested, yet he did not declare this. I answer, therefore, that although it seems to be forbidden (*De consecratione*, dist. 4, [c.] *Non plures*, and in c. *Quamvis*, *De cognatione spirituali*, in the Sext), yet all are co-parents; and where custom flourishes to the contrary — namely that several receive, as the Italian custom commonly has, and that of almost the whole Roman Church — it is not imputed as mortal. Indeed Johannes Andreae says in the *Novella* on the said c. *Quamvis*, *De cognatione spirituali*, in the Sext: "I think that where custom does not resist, and more strongly if it assists, the fault is light, and so to be lightly pardoned," as in c. *Cum dilecti*, above, *De accusationibus*; therefore, etc. Yet what the Archdeacon says on the said c. *Quamvis* seems to stand in the way, when he says: "They sin, then, if several approach together, because they act against the prohibition of the canon"; and he refers to what he said in c. *Detestanda*, in the gloss at the word *Nota*, *De concessione praebendae*, in the Sext; and he adds, "yet this is observed everywhere." According to Augustine, on the said c. *Detestanda*, he says: "It seems that he sins mortally who knowingly acts against the prohibitions or precepts of the canons" (dist. 19, [c.] *Nulli*, where Huguccio holds this; to the same dist. 48, c. 1, at the end; C. 23 q. 8, [c.] *Quicumque*, and c. *Si quis episcopus*, at the end; C. 23 q. 7, [c.] *Si quis omnem*, at the end; C. 3 q. 4, c. 1 and c. 3; dist. 55, [c.] *Nullus*, at the end; above, *De maioritate et obedientia*, c. 2, where on this Hostiensis; and above, *De treuga et pace*, c. 3; and *De officio ordinarii*, c. *Inter cetera*, last §, at the beginning, where you may see). To this also you may have C. 25 q. 1, [c.] *Violatores*, and c. *Prima*. And note that Johannes and Laurentius said that what is handed down by the Church binds as received, and this he lays down in dist. 5 in the *Summa*. Lord Antonius de Butrio on c. *Non concupiscentiam*, above, *De constitutionibus*, at the end, says that when a law avoids or forbids something, whether it binds to mortal [sin] must be distinguished: because either the mind of the lawmaker is established, that he wills to command and bind to sin, and then it is plain that it binds; or the mind is doubtful, and then either the matter of the law is of precept, and in whatever words it speaks — whether "I ask" or "I exhort" — it is deemed to make it wholly [binding], that it be kept as received, as in c. 2, above, *De maioritate et obedientia*, and [c.] *Quod praecipitur*, and there the gloss. I believe, however, that if the words sound otherwise as a precept, as because they are of the imperative mood, in

[they] induce a snare; or the ancient precept which binds us suffices, although the words are wholly hortatory and of counsel. So I understand the Archdeacon on C. 16 q. 1, [c.] *Revertimini*; C. 12 q. 1, [c.] *Dilectissimis*; and Johannes notes it on C. 11 q. 3, [c.] *Rogo*; and it is noted in c. *Exivi de paradiso*, at the verse *Item praeterea, De verborum significatione*, in the Clementines. Sometimes the matter of the law is simply consultative, and then in whatever words it speaks, whether commanding or ordering or otherwise, it never binds to sin, and is deemed to counsel (C. 29 q. 2, [c.] *Si quis ingenuus*, where the gloss of Johannes on the word *faciat*; C. 31 q. 1, [c.] *Hac ratione*). For the imperative is of precept or not according to the nature of the subject matter, says Johannes on C. 28 q. 1, [c.] *Non solum*; to which bear what is noted in c. *Quemadmodum*, above, *De iureiurando*; and there is a good text in the said Clementine *Exivi*, at the verse *Item praeterea*; to this Dig., *De legatis* 2, l. *Cum pater*, § *Mando*. Sometimes the law issues in an indifferent matter, as being neither of counsel nor of precept but standing equally toward both; and then weigh the words: if they are consultative or hortatory or simple, such as "we decree," "we will," and the like, then they do not induce a precept and contravention does not bind to sin. But if the words sound as a precept, as by saying "we command," "we order," "we bid," "we prohibit," "we forbid," or the like, in a negative matter — because every prohibition has a precept within it, as the Archdeacon says on dist. 56, in the *Summa*, [and] dist. 32, [c.] *Interdixit* — then it binds to sin, as the text says in the said Clementine *Exivi*, at the verse *Item praeterea*. This is true unless the mandate is founded principally on the utility of him to whom it is commanded, for then one acting against it is not bound by sin but only suffers the loss provided by law, as the text says in the said l. *Cum pater*, § *Mando*. But if the words are not expressly preceptive, as words of the imperative mood, then if custom holds that they are of precept in some matter, they bind to sin, as in the said Clementine *Exivi*, at the verse *Item praeterea*, near the end. The same if the words are directed to a person, as Bartolus says on Dig., *De fideiussoribus*, l. *Si quis pro eo* — understand, if custom together with the subject matter necessitates it; and so is understood the gloss on dist. 1, [c.] *Humanum genus*, at the last word, at the end, and the text and gloss on C. 11 q. 3, [c.] *Rogo*. But if custom does not dispose that it be a law of precept, then either the matter in which the law is uttered, circumstances considered, is grave and weighty and universally known, and then in doubt it is presumed to be of precept, because the imperative is of precept (C. 12 q. 1, [c.] *Si privatum*; so I understand the Archdeacon on dist. 4, [c.] *Et si legibus*; and it is the case in the said verse *Item praeterea*); or the matter is light and not universally weighed, and then it is not of precept but of exhortation, as in the said verse *Item praeterea*. And note from the aforesaid that the word *oportet* ("it behoves") savours of precept, as Johannes notes on dist. 50, [c.] *Domino sancto*; the Archdeacon says the same on the said c. *Et si legibus*, dist. 4, and on c. 1, dist. 76, of the word *decernimus*, that it savours of precept. And whether the words of a rule bind to sin through contravention, see the Archdeacon on C. 27 q. 1, c. 1; bearing on this is what is noted by the Doctors on c. 1, above, *De treuga et pace*; and dist. 4, [c.] *Leges*, and last §; and *De consecratione*, dist. 2, c. *Sacerdotum*; and above, *De vita et honestate clericorum*, c. 1 and 2 and the penultimate; and in c. *Cum contingat*, above, *De iureiurando*. Since, then, the aforesaid canon *Non plures*, *De consecratione*, dist. 4, speaks rather indifferently than by precisely prohibiting, and since for the most part custom flourishes to the contrary, one must rather hold with Johannes Andreae that it does not bind to mortal [sin]. To which bears C. 30 q. 4, last c., in the gloss on *de facto*, at the end, when it says: "Yet by custom it is in certain places that both, namely husband and wife, together receive the child from

baptism"; and it is a gloss of Johannes. Huguccio also says that custom is commonly to the contrary, as appears above by the report of the Archdeacon; therefore, etc. And let these suffice for spiritual kinship.

The second kinship is called carnal, which has three species: the first is consanguinity, the second affinity, the third [public] honesty. Consanguinity is subdivided according to a threefold line, as if it were the form of a cross-shaped tree stretching upward, downward and across; just as every natural tree also stretches upward toward heaven, is rooted deep by its roots, and stretches out branches from its sides. So, then, natural nearness is ordered according to a threefold line: the first line is of ascendants, the second of descendants, the third of collaterals. Ascendants are father, mother, grandfather, grandmother, great-grandfather, great-grandmother, great-great-grandfather, great-great-grandmother, and so upward as far as Adam and Eve. Descendants are son, daughter, grandson, granddaughter, great-grandson, great-granddaughter, great-great-grandson, great-great-granddaughter, and so successively to the last man or woman to be born in the world. Collaterals or transversals are brother, sister, the son or daughter of a brother, who are properly called *sobrini*; the son or daughter of a sister, who are properly called *consobrini*, as it were "*sobrini* together"; on which see the gloss on C. 35 q. 3, [c.] *De incestis*, at the word *consobrinae*.

Concerning consanguinity, then, I ask three things principally: first, what consanguinity is; second, to what degree the prohibition lasts; third, what the penalty is of those contracting in prohibited degrees. To the first I answer that consanguinity is the bond of two persons descending from the same stock or stem by carnal connection. Hence they are called *consanguinei*, because they are born of one blood, or of the one seed of a father; but those who are begotten of one mother but not of the same father are properly called *uterini*, as Papias says; but broadly consanguinity is taken for both, as it were "blood together," because they are begotten of the same blood of man and woman. 91. And note that the stem or stock is called that person from whom the blood relatives in the first degree descend, whether man or woman, according to what is noted by Richard on [book] 4 of the Sentences, dist. 40, at the beginning, and by Lord Antonius de Butrio on c. *Quod derelicto*, above, *De consanguinitate et affinitate*, where he says that the stock is called the common person from whom several descend; and the stock today does not make a degree by canon law.

To the second it is answered that the prohibition of contracting matrimony between ascendants and descendants, according to the sounder understanding, lasts to infinity. Hence if Adam were living, he would not find any woman with whom he could lawfully contract matrimony; and so too of Eve. This Johannes Andreae and his followers hold in the apparatus on the tree of consanguinity and affinity; and this is the safer opinion and more agreeable to natural law, which dictates that the generation of offspring ought to proceed and not go back, as appears in trees, plants and herbs, and in water and in time. Nature itself, finally, shrinks from posterity once begotten returning to its begetters in generative mingling. Hence even horses and camels shrink from this. Hence Aristotle, writing on the nature of animals, relates that once in a certain city, when a certain she-camel desired coupling, the herdsman, wishing her to be covered by her own son, covered the son with a cloth over the mother so that he would not recognize her; her son leapt upon her, but sensing that she was his mother, he got down before he coupled with her, and attacked the contriver with kicks and bites and killed him. Likewise he writes of a certain horse of a northern king, the son of a most beautiful mare; wishing to breed another horse from those two, [the king] had the horse's eyes [text unclear] covered so that he

would not recognize his mother; when at last uncovered and perceiving that he had mounted his mother, he turned to flight and killed himself by hurling himself from a high rock. How much, then, ought a rational creature to abhor the incestuous deed, if an irrational one abhors it so much! For such persons are made infamous until they cease from the deed of incest (C. 35 q. 6, [c.] *Si duo*; and in the Authentic *De incestis nuptiis*). 93. But through the transverse line the prohibition lasts up to the fourth degree inclusive, as in c. *Non debet*, above, *De consanguinitate et affinitate*; which understand soundly: for it suffices that one of the parties has passed beyond the fourth degree, although the other has not yet reached the fourth. For example, two brothers proceeded thus: one begot a son, who begot a son, who likewise begot a son, who begot a daughter; this daughter is in the fifth degree. The other brother begot a son, who is in the second degree: can they contract matrimony? It is answered yes, because in whatever degree the more remote differs from the stock, [in that degree he differs] from anyone descending by another line from the same [stock] (above, *De consanguinitate et affinitate*, c. *Quod derelicto*, and last c.). And let these suffice briefly and conclusively on consanguinity.

To the third it is answered that the penalty of those contracting in degrees prohibited by consanguinity or affinity — as also through holy order, or through profession tacit or express made in any of the approved religious orders, whether by a man or by a woman — is incurring by the very fact the sentence of major excommunication, as in c. *Eos qui*, *De consanguinitate et affinitate*, in the Clementines, where prelates of churches are also strictly commanded that those whom they find to have so contracted they publicly announce as excommunicated, or have announced by their subjects, until, humbly acknowledging their error, they are separated from each other and merit the benefit of absolution. And note that all who knowingly arrange, help, foster, counsel, consent to and in any way take part in such matrimonies are bound by the same bond, because one taking part in a crime with the criminal falls under the same sentence, as in c. *Si concubinae clericorum*, below, *De sententia excommunicationis*, and in c. *Nuper*, at the verse *In secunda vero*, same title; and above, *De homicidio*, c. *Sicut dignum*, § *Qui vero*; and in c. *Ad audientiam*, and there Innocent, same title; and C. 11 q. 3, [c.] *Qui consentit*, and there the Archdeacon. Hence the Apostle also, Romans 1, having first noted many crimes, adds, saying: "Worthy of death are not only those who do them, but also those who consent to those who do them." And above

we have said. 95. But by divine law, because such persons commit incest, they are cursed by God and adjudged to death. Of the curse it appears in Deuteronomy 27: "Cursed is he who lies with his father's wife; and all the people shall say, Amen. Cursed is he who lies with any beast; and all the people shall say, Amen. Cursed is he who lies with his sister, the daughter of his father or of his mother; and all the people shall say, Amen. Cursed is he who lies with his mother-in-law; and all the people shall say, Amen. Cursed is he who lies with his neighbour's wife; and all the people shall say, Amen." Of death it appears in Leviticus 20, where it is written thus: "If any man commit adultery with the wife of another and defile his neighbour's wife, let them be put to death, both the adulterer and the adulteress. He who lies with his stepmother and uncovers his father's shame, let them both be put to death; their blood be upon them. He who lies with a male as with a woman, both have committed an abomination; let them be put to death; their blood be upon them. If any man lie with his daughter-in-law, let both die, because they have wrought a crime; their blood be upon them. He who after marrying the daughter takes her mother has wrought a crime; he shall be burnt alive with them, lest so great an abomination remain in the midst of you. He who has intercourse with a beast or cattle, let him be put to death; kill the beast also. The woman who lies under any beast, you shall

kill together with it; their blood be upon them. He who takes his sister, the daughter of his father or the daughter of his mother, and sees her nakedness, and she beholds her brother's shame — they have wrought an abominable thing; they shall be slain in the sight of their people, because they have uncovered one another's nakedness, and they shall bear their iniquity. You shall not uncover the nakedness of your maternal aunt and your paternal aunt; he who does this has laid bare the shame of his own flesh, and both shall bear their iniquity. He who has intercourse with the wife of his paternal or maternal uncle and uncovers the shame of his kindred, both shall bear their iniquity; they shall die without children. He who takes his brother's wife does an unlawful thing; he has uncovered his brother's nakedness; he shall be without children," etc. Many similar things pertaining to the aforesaid are written in Leviticus 18, at "No man shall approach to her that is near of his blood, to uncover her nakedness"; and there intercourse with the wife's sister and with her daughter is also forbidden, when it is added: "You shall not uncover the nakedness of your brother's wife; you shall not uncover the nakedness of your wife's sister, nor of her daughter; you shall not take her son's daughter or her daughter's daughter to uncover her shame, because they are her flesh"; and such intercourse is incest.

By canon law, incestuous persons must do penance for seven years without hope of marriage (C. 2 q. 7, [c.] *Si quis viduam*, with the three following chapters; and C. 35 q. 3, [c.] *Qui propinquam*, and c. *Si quis cum matre et filia*, and c. *De incestuosis*, with the two following chapters, and throughout); and that the incestuous are infamous by law itself, there is a text in C. 35 q. 3, c. *Coniunctiones*, and C. 6 q. 1, [c.] *Infames*. By civil law, those contracting incestuous nuptials were forbidden to make a will in favour of outsiders (Cod., *De incestis nuptiis*, l. *Qui contra legum*, and l. *Si quis*), and the children were illegitimate. Afterwards, however, the penalty was made heavier by the law of the Authentics: for on those who knowingly contracted useless, that is, incestuous nuptials, the penalty of confiscation of goods, both of the dowry and of the rest, is imposed; and they are condemned to exile and deprived of the belt [of office] if they have any, and are beaten if they are of low condition. If, however, they have legitimate and natural children born of a preceding marriage, their property is applied to these, and on account of the father's crime the children become independent, yet so that the father is supported by them; but if there are no such legitimate children, the property is applied to the treasury, the collaterals and ascendants of the one contracting incestuous nuptials being excluded, as in the Authentic *De incestis et nefariis nuptiis*, § *Respondemus*, collatio 2 [text unclear]. But children born of condemned, or nefarious, or incestuous intercourse are not even to be called natural, and are unworthy of all paternal property, so that they are not even supported by the parent, as in the Authentic *Quibus modis naturales efficiantur sui*, collatio 7 [text unclear], last §. And Azo in the *Summa*, Cod., *De incestis nuptiis*, near the end, understands this penalty also of other nuptials prohibited in any way.

Incidentally it is asked whether one committing incest with some blood relative of his wife, the wife however not knowing, can freely remain in matrimony with the same wife. It is answered briefly that he ought to remain in matrimony, unless on preceding admonition they arrange to observe perpetual continence; but if the wife will not, the husband who committed the incest must never demand the conjugal debt, but when it is demanded he is bound to render it with sorrow (above, *De eo qui cognovit consanguineam uxoris suae*, c. *Transmissae*, c. *Discretionem*, and c. *Tuae*, and c. *Iordanae*). In imposing penance, however, the confessor must be discreet, so that he knows how to distinguish the degrees and species of incest — namely whether from spiritual, carnal or legal kinship, according to the

ascending, descending or transverse line, and according to consanguinity, affinity and public honesty; of which incest Thomas treats somewhat in II-II, q. 154. Hence also the Apostle, 1 Corinthians 5, says that the man fornicating with his stepmother, and so incestuous, is to be handed over to Satan for the destruction of the flesh, that the spirit may be saved. Therefore, according to the measure of the sin, etc. (Deuteronomy 25).

Concerning the second species, which is affinity, three things likewise are asked: namely, what affinity is; second, how it is contracted; third, to what degree it extends. To the first it is answered that affinity is a nearness of persons arising from carnal intercourse, lacking all parentage; so says Papias. Or thus, according to Goffredus in the *Summa, De consanguinitate et affinitate*: affinity is the relation of one person to another arising from carnal intercourse; and they are called *affines* as it were "approaching to the boundaries (*fines*) of another." The Master of the Sentences, in [book] 4, dist. 41, reporting Gregory, says that affinity is the parentage which pertains to the husband on the side of the wife, or on the side of the husband to the wife; and there Richard says (art. 1, q. 1, in the response) that affinity is a nearness arising from carnal union through the medium of consanguinity, lacking all parentage. From which it follows that properly, before the consummation of matrimony, affinity is not contracted, although something similar is contracted which is called the justice of public honesty, of which we are about to speak below. This definition the Archdeacon also follows on C. 35 q. 3, [c.] *De propinquis*, and C. 35 q. 1, [c.] *Cum igitur*, on the gloss *Hic est*; and through that whole Causa affinity is treated. 99. To the second it is answered that from the very definition of affinity it can appear how affinity is contracted, when it is said "arising from carnal intercourse"; from which it follows also that affinity is contracted even from fornicating intercourse, as appears expressly in C. 30 q. 4, [c.] *Si quis unus ex coniugio*; C. 32 q. 4, [c.] *In eo*; C. 35 q. 3, [c.] *Nec eam*, and c. *De incestuosis*; and above, *De eo qui cognovit consanguineam uxoris suae*, c. *Discretionem*, and c. *Tuae fraternitatis*, at the end, same title, and c. *Iordanae*, same title. And it is proved by the authority of the Apostle, 1 Corinthians 6, when he says, "he who cleaves to a harlot is made one body." And so commonly all hold, theologians as well as canonists, provided a mingling of blood has taken place, as Richard says where above; and there is a text in the Decretum, C. 35 q. 3, [c.] *Extraordinaria*.

To the third it is answered that affinity today lasts up to the fourth degree inclusive, the ancient determinations having been removed, just as consanguinity, as in the said c. *Non debet*, above, *De consanguinitate et affinitate*, and in the last c., same title; and understand up to the fourth degree only in the first kind of affinity. For example, John contracted matrimony with Mary: all John's blood relatives are related by affinity to Mary in the same degree in which they are blood relatives of John himself, and all Mary's blood relatives are related by affinity to John in the same degree in which they are blood relatives of Mary herself; but the blood relatives of both parties have no affinity among themselves, as in c. *Quod super his*, above, *De consanguinitate et affinitate*. But Mary being dead, although John can take no woman of Mary's consanguinity as wife, yet he can well take a woman who was formerly the wife of someone of that same consanguinity of Mary, and conversely, as in the said c. *Quod super his* and in the said c. *Non debet*, above, *De consanguinitate et affinitate*; and C. 35 q. 3, [c.] *Equaliter*; C. 35 q. 5, [c.] *Porro*; and so says Johannes Andreae on the tree of consanguinity and affinity.

Concerning the third species, which is called the justice of public honesty — and so it makes a species by itself, because it is neither consanguinity nor affinity properly, but a certain honesty introduced by the Church — three things briefly are to be asked: namely, first, what the justice of

public honesty is; second, when it is contracted; third, to what degree it lasts. To the first it is answered: the justice of public honesty is a nearness arising from betrothal, drawing its force from the institution of the Church on account of its honesty; so says Richard on [book] 4, dist. 41, art. 1, q. 5, in the response; and the canonists treat it in c. *Iuvenis* and in c. *Ad audientiam*, above, *De sponsalibus*. To the second it is answered: the justice of public honesty is contracted when a boy and girl between whom matrimony is being negotiated can give some mutual consent to a betrothal *de futuro* between them, which is commonly believed to be possible around the seventh year about to be completed or already completed, according to what is noted in c. *Ubi non est consensus*, and in c. *Litteras*, and in c. *Accessit*, and in c. *Continebatur*, with similar places, above, *De desponsatione impuberum*. Hence, a betrothal having been contracted between those over seven years, the justice of public honesty has arisen between them; but before seven years, because the betrothal is null, since they have no consent — for betrothals have customarily been accepted after the seventh year, as in the said c. *Litteras* — therefore neither does the justice of public honesty arise, as in c. *Ex sponsalibus* and in the following chapter, *De sponsalibus*, in the Sext. 102. And that you may have the matter more clearly, say

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with Lord Antonius de Butrio on the said c. *Iuvenis*, above, *De sponsalibus*, that seven cases are to be investigated concerning the matter. The first, when a betrothal has been contracted *de futuro* only between persons unfit by age for betrothal, and no handing over or other act has followed; and from such a betrothal public honesty is not induced unless it is otherwise ratified, as in the laws alleged above. The second case is when a betrothal *de futuro* has been contracted between unfit persons and afterwards has been ratified tacitly or expressly upon the passing of the lawful age for a betrothal *de futuro*; and here public honesty is induced, as in c. *Sponsam*, *De sponsalibus*. The third case is when a betrothal *de futuro* has been contracted between persons unfit by age for betrothal, and beyond this an attempt [at intercourse] has intervened, and this is established; and I well believe that by the reason of the letter of the said c. *Iuvenis* public honesty is induced: because, since an attempt is present, it is doubtful to no one that it is not honest that a blood relative should have the woman attempted by his blood relative, nor that he himself should have a blood relative of the woman attempted. This Hostiensis and Goffredus hold on the said c. *Iuvenis*, because she could be known, though prematurely (Dig., *De iniuriis*, l. *Si stuprum*); and because it is easier to suffer than to act. Hence in the said c. *Iuvenis* it treats of a girl under seven, who could suffer, although not with mutual pleasure; therefore it follows that the boy was such as could act, and so know the girl. The fourth case is when she is near seven, because she has five and a half years and more, and has contracted a betrothal or a matrimony *de praesenti*, and is capable of guile for a betrothal, and this is established; and public honesty is induced according to the Doctors on c. *Iuvenis*; and Hostiensis holds it in the *Summa*, *De sponsalibus*, § *Quis sit eius effectus*, at the verse *Nam effectus*; and the Archdeacon and Johannes Andreae touch it on c. 1, *De desponsatione impuberum*, in the Sext, at the word *maiores*, where Johannes Andreae says that Johannes the Glossator holds this on C. 30 q. 2, in the *Summa*, and Goffredus in the *Summa*, *De sponsalibus*, § *Et nota*. Which is reasonable enough according to the Archdeacon when malice supplies for age and the woman was attempted, as in the said c. *Iuvenis*. For if one near seven understands more than perhaps older persons have been accustomed to understand, why will that consent not be valid? And if malice supplies in matrimony, why should it not supply in a betrothal?

Nor does what he alleges about profession, through c. [text unclear], above, *De regularibus*, stand in the way, because it is special in religion, on account of its austerity, that malice does not supply for age, as there. The fifth case is when she is not near seven and has contracted a betrothal *de futuro*, and it is doubtful whether she was attempted; and if some deed intervened through which it is probably doubtful whether she was attempted, I well believe, from the reason of that decretal *Iuvenis*, that public honesty is induced. The sixth case is when a woman at an age not fit for betrothal has contracted matrimony *de praesenti* and has been led to the husband's house; here there is a probable doubt whether she was attempted. This doubt pending — because she could have been attempted, even granted a thousand times that she was not known — I believe that from this matrimony, because she could be called wife, and from this doubt, because she could have been attempted, there arises a certain public honesty, which in this case arises not from a true or fictitious betrothal, nor from true matrimony, but from an invalid betrothal *de praesenti* on account of the doubt of attempt; from which, as from a true betrothal, arises a certain public honesty impeding matrimony, and because in fact she could be called spouse. And this that decretal *Iuvenis* intends; for which reason Lord Antonius says that those understanding there that an attempt was present and was established, though there was doubt about intercourse, speak against the text there, when it says "perhaps he attempted"; therefore there the attempt was doubtful, not intercourse alone. Hence even if it were established that that woman was a virgin, public honesty, which arises from the mere doubt of attempt, would not on that account be hindered; and because it is unseemly that he should have her who could, though improperly, at least in fact have been a spouse — although some with Hostiensis think the contrary there through the last c. [text unclear], same title. And Lord Antonius says this because public honesty arises from marriage, since she could have been a spouse if she was known (above, *De desponsatione impuberum*, c. *De illis*); and therefore he wished to incline to what is more certain; and because there would be doubt of peril of the soul if sentence were given for a second matrimony against the first matrimony. From this also Lord Antonius says that if it were established that no attempt had intervened, supposing the matrimony as to its words contracted between persons fit by age for betrothal, the determination of that decretal *Iuvenis* would have no place. The seventh case is when an attempt outside the natural [manner] was present, and not with marital affection; and such would induce neither affinity nor public honesty. Therefore if some infant, not under colour of matrimony or betrothal, had attempted a girl, and this were proved, if she was not known and this is established, matrimony would not be impeded by that decretal *Iuvenis*, according to the Doctors; to this C. 35 q. 3, [c.] *Extraordinaria*; and by these they resolve the contraries noted in the last gloss of the same c. *Iuvenis*. The Archdeacon, however, held that mere attempt does not induce public honesty, through the last c. and through c. *Iuvenis*, above, *De desponsatione impuberum*. Johannes Andreae does not hold this, but says that public honesty is founded on the consent of betrothal and is not induced by an effort at intercourse — indeed not even by intercourse, which, betrothal being lacking, although it can induce affinity, does not induce public honesty. Yet he admits that if a mere effort at intercourse follows a betrothal, it strengthens public honesty, as in the said c. *Iuvenis*, as though the consent appears more strongly. Hence he says that an effort induces public honesty in one case only, namely when both infants, or one, contracted a betrothal which does not hold; for if after infancy they consent to an effort and intercourse, we have public honesty, but not inasmuch as it would be intercourse or an effort at intercourse, but inasmuch as they have a sign of consent, as in c. 1, *De desponsatione impuberum*, in the Sext.

Where Johannes Andreae forms the question: when both infants, or one, contracted through words *de praesenti*, and after infancy it appeared that they remained in the same will, so that the betrothal was ratified; afterwards they complete puberty, and otherwise [than] through intercourse it appears that the will lasts: will it be matrimony or only betrothal? The letter here, says Johannes Andreae himself on the said c. 1, *De desponsatione impuberum*, in the Sext, speaks of words uttered by one under puberty; it seems absurd, therefore, to extend it to words uttered by an infant, since those were null from the beginning, as in [c.] 1, [at] *Responsio*; c. 1 and 2, *Responsio, De regularibus*, in the Sext, bear well on this. And on c. 1, *De desponsatione impuberum*, in the Sext, the same Johannes Andreae says that a betrothal *de futuro* in the words and mind of the contracting parties does not pass into matrimony through embraces, kisses and the like, as in c. 1, above, *De matrimonio contracto contra interdictum ecclesiae*; nor is it any wonder, he says, since they do not pass even through an effort at carnal intercourse, as above, *De sponsalibus*, last c. But that betrothal which in the words and mind of the contracting parties is *de praesenti*, yet by interpretation of law is *de futuro*, does well pass into matrimony, apart from carnal intercourse, through kisses, embraces and the like intervening after the time of puberty, as in the said c. 1, *De desponsatione impuberum*, in the Sext; for in both cases consent strengthens what it was doing.

[104.] To the third it is answered that the impediment of public honesty lasts thus up to the fourth degree inclusive, like affinity, and only in the first kind. For example, if a betrothal has been contracted between children above seven, or through parents or other relatives with the children consenting or ratifying tacitly or expressly, and the boy dies, no one of the consanguinity of that boy, unless he has passed the fourth degree, can take as wife that girl who was the betrothed of his blood relative; or conversely, if the girl dies, that boy who was her betrothed can take as wife no one of the consanguinity of the betrothed who has not passed the fourth degree, as in c. *Continebatur*, at the end, above, *De desponsatione impuberum*, and in the said c. *Iuvenis*, and in c. *Ad audientiam*, and in c. *Sponsam*, above, *De sponsalibus*, and in c. *Litteras* and in c. *Accessit*, above, *De desponsatione impuberum*.

Concerning the third kinship, which is called legal, three things also are to be asked: the first is what legal kinship is; the second, how it is contracted; the third, how it impedes. To the first it is answered that legal kinship is a certain civil nearness introduced by law, through which someone, although he is not by nature a son or grandson or further, or a brother or relative by affinity, yet is reputed so civilly, almost imitating nature (Dig., *De adoptionibus*, l. *Adoptio*, and l. *Nec ei*, § 1, and l. *Naturalis*, with similar places); so also Lord Antonius de Butrio intends, above, *De cognatione legali*, on the rubric. To the second it is answered that legal kinship is contracted in two ways, namely through adoption and through arrogation, and so the species of legal kinship is twofold. 105. For one stands in the name of the genus and is called adoption; the other passes into a special name and is called arrogation (Dig., *De adoptionibus*, l. 1, at the end), where it is also declared that he is arrogated who is independent (*sui iuris*), but he is adopted who is in the power of another; to which accedes the said l. *Naturalis*. Hence the verses:

I arrogate one who is his own, and he must needs be mine; I adopt one who is another's, nor does he cease to be his father's.

The adopted is so called as it were "chosen by love," that is, chosen as son or grandson, etc.; on which Isidore, *Etymologies*, book 10, c. 1. The adopted, therefore, does not pass into the power of the adopter, but remains in the power of the natural father, unless the adoption is made by the paternal

or maternal grandfather; for then, because the rights of blood and the civil rights concur together, he passes into the power of the grandfather and adopting father (Dig., *De adoptionibus*, l. 1 [and] 2). And such an adopted person, even by anyone at all asking to adopt, has the right of succeeding on intestacy, as in the *Institutes*, *De adoptionibus*, § 1. But the arrogated passes into the power of the arrogating father and acquires almost every right which a legitimate and natural son has, as in the said l. 1 and 2, and in l. *Si arrogator*, Dig., *De adoptionibus*, and Cod., *De adoptionibus*, last l. 106. But I ask: who can adopt? I answer: a male who is independent and a father of a family, and able to

beget naturally. I say this because if he were accidentally impeded he could adopt (Dig., *De adoptionibus*, l. 2). Nor can one younger than sixty years adopt unless a just cause intervenes (Dig., *De adoptionibus*, l. *Si pater*, last §). Nor can a woman adopt except by rescript of the prince, in consolation for sons lost in war for the commonwealth (Cod., *De adoptionibus*, l. *Mulierem*; dist. 56, [c.] *Ismael*). But anyone can be adopted, male as well as female, provided he is so much younger than the adopter that he could be his natural son (Dig., *De adoptionibus*, l. *Adoptio*). And Lord Antonius says on the rubric, above, *De cognatione legali*, at the end, that the adopter must be older by eighteen years, so that it is wholly certain that he could have begotten him; and it is necessary that the adopter be such that he could beget another, at least in fact. From which he infers that a father, as to patrimonial matters, can adopt, by argument [from] and against *Institutes*, *De adoptionibus*, § *Illud*, and Dig., *De adoptionibus*, l. *Si pater*, last §, and the following l. 107. But according to Hostiensis, adoption must otherwise be made by authority of a magistrate, and the authority of any magistrate suffices (Dig., *De adoptionibus*, l. *Si pater*; Cod., *De adoptionibus*, last l.; *Institutes*, *De adoptionibus*, § 2 and 3). But if it is made without the authority of a magistrate — as when someone simply receives another as son at home, by himself, secretly or before some witnesses — it is worth nothing and the adoption is null (Cod., *De adoptionibus*, l. *Non nudis*). And no one can be adopted unless present and willing (Dig., *De adoptionibus*, l. *Nec absens*). 108. But is the adopter bound by necessity to leave anything to the adoptive son? It is answered no, except as much as he wishes (Cod., *De adoptionibus*, l. 1 [and] 2); and this because the adopted does not pass into the power of the adopter, as was said above. It is otherwise with the arrogated, who passes into the power of the arrogator; and if the arrogated has sons or grandsons, both he and the sons and grandsons with all their goods pass into the power of the arrogator. 109. And arrogation, to be lawful, must be made by authority of the prince; nor does the authority of a lesser [magistrate] suffice (Cod., *De adoptionibus*, last l.; *Institutes*, *De adoptionibus*, § 2 and 3). And from then on the arrogator is bound to leave a fourth part of all his goods, whether in a testament or in emancipation, as in the said l. 1 [and] 2.

To the third it is answered that legal kinship impedes matrimony to be contracted and dissolves it once contracted, according to the truer opinion of the Doctors on the said c. 1 [text unclear], above, *De cognatione legali*; Dig., *De ritu nuptiarum*, l. *Per adoptionem*; and C. 30 q. 3, [c.] *Ita diligere* — between persons standing within a threefold line. 111. For in imitation of natural generation this civil kinship has a threefold line. The first is between ascendants, that is, between adopters and adopted, or arrogators and arrogated, and the sons and grandsons of the adopted or arrogated; and this always impedes and dissolves, even if the adoption is dissolved by death or by emancipation of the adoptive [son] (Dig., *De ritu nuptiarum*, l. *Nam adoptator*, and l. *Adoptivus*, and l. *Quin etiam*; and in the said c. *Ita*

diligere). 112. The second is between collaterals, that is, between natural or legitimate sons and adoptive ones; and this impedes while the adoption lasts and not beyond (C. 30 q. 3, [c.] *Post susceptum*; Cod., *De adoptionibus*, penultimate l., § *Adoptantis*; Dig., *De adoptionibus*, l. *In omni*; and Dig., *De ritu nuptiarum*, l. *Per adoptionem*). And yet a great dispute is made about this case. For some say that today there is no impediment between the sons of the adopter and the adopted woman, or conversely, because the adoptive son does not pass into the power of the adopter, as was said above. So they say of an illegitimate [son] with an adoptive [daughter], because the illegitimate is not in the father's power (*Institutes*, *De nuptiis*, last §) — although it is true that an illegitimate cannot be joined to a spiritual child, as was said above of spiritual kinship. Others say the contrary, namely that an adopted son cannot contract with the daughter of the adopter, because although the adoptive does not pass into the power of the adopting father, he nonetheless acquires some rights which are dissolved with the adoption (Cod., *De adoptionibus*, penultimate l., § *Si autem*). The said c. *Unicum*, above, *De cognatione legali*, proves the same, and other laws speaking of the matter, because they speak without distinction, with no difference between adoption and arrogation; and where the law does not distinguish, neither ought we to distinguish (Dig., *De legatis* 3, l. *Non aliter*); and the gloss on the said c. *Unico*, above, *De cognatione legali*, thinks this. Innocent, however, holds the first side; but Hostiensis and Guillelmus [Durand] in the *Speculum*, same title, at the beginning, hold the second. The second opinion, however, seems safer, namely that between illegitimates also, not only between legitimates, matrimony is impeded while the adoption lasts, since the laws do not distinguish; C. 30 q. 3, at the beginning, bears on this. 113. Moreover, that an illegitimate is not in the father's power was introduced in detestation of the crime of the father and mother themselves — not because there is no bond of sonship for him, but because there is a presumption that the son is like the father in crime, since the father and mother conceived him in sin; so that he could say more than David, "For behold, I was conceived in iniquities, and in sins did my mother bring me forth" (Psalm 50). Hence the political law says (Dig., *De aedilicio edicto*, l. *Quod si nolit*, § *Qui mancipia*): "The son is often wont to be like the father." Dist. 56, [c.] *Si gens Anglorum*; C. 6 q. 1, [c.] *Qui crimen*; dist. 37, [c.] *Legant*, bear on this.

But whether matrimony can lawfully be contracted between the adoptive children themselves: the gloss on the said c. *Unico*, above, *De cognatione legali*, says yes, because it does not find it prohibited; therefore it seems to be granted (above, *De sponsalibus*, c. *Cum apud*; on which above, [c.] *Inter corporalia*; and Dig., *De collegiis illicitis*, l. 3; and there see pro and contra in the said c. *Inter corporalia*). Lord Antonius on the said c. *Unico*, and the Doctors commonly there, *De cognatione legali*, agree with the gloss that the adopted can contract among themselves, since it is not found prohibited. 115. The third line, which also can be referred to ascendants and descendants, is a certain legal and civil kinship in the manner of affinity between the adopting father and the wife of the adoptive son, and so between the adoptive son and the wife of the adopting father; and this also, according to the Doctors, impedes for all time (Dig., *De ritu nuptiarum*, l. *Nam adoptator*, and l. *Adoptivus*; *Institutes*, *De nuptiis*, § 1 and 2; and the modern Doctors on the said c. *Unico*, above, *De cognatione legali*, where Lord Antonius alleges for this Dig., *De ritu nuptiarum*, l. *Adoptivus*, § 1). For the wife of the adopter seems as it were a stepmother to the adopted himself, and the wife of the adopted as it were a daughter-in-law to the adopter himself, by a certain fiction of law; therefore, etc. To which the said l. *Adoptivus*, first response, and Dig., *De ritu nuptiarum*, l. *Qui rem*.

And because there is dispute among the Doctors whether legal kinship dissolves a contracted matrimony, granted that it impedes [one to be contracted] — that you may have clearer knowledge of the said c., according to Lord Antonius on c. *Unico*, above, *De cognatione legali*: some say that it does not dissolve but impedes; they are moved because the impediment is temporal. The *Speculum* follows this opinion, same title, at the beginning. Huguccio says that it dissolves, notwithstanding that the impediment is temporal; just as it is a temporal impediment that a woman is married to another, so that today I cannot contract with her, although tomorrow I may, her husband having died; this impediment nonetheless dissolves, namely if I contract with her while her husband lives, as above, *De sponsa duorum*, throughout. The text also in the said c. *Unico*, above, *De cognatione legali*, says that between the adopted and the daughter of the adopter nuptials cannot stand. Some restrict this so that it dissolves only when the wife or daughter of the adopter has been married; but because in the canons we do not have it expressed of several species, it seems truer that by the reason for which it is expressed of these, by the same reason it is to be understood of others also (arg. above, *De constitutionibus*, [c.] *Translato*). For the rubric *De cognatione legali* is placed generically, so that it seems to be understood that not only the two species aforesaid are included under it, but also all things which pertain to the rubric. But holding that it dissolves, a ready remedy is at hand, namely to dissolve the adoption, that is, through emancipation. And Johannes Andreae says that by this letter, namely in the said c. *Unico*, *De cognatione legali*, when it says "nuptials cannot stand," the adoption being removed, the matrimony remains valid without new consent; to which the *Speculum*, same title, at the beginning. For since the text in the said decretal says that as long as the adoption lasts nuptials cannot stand, therefore the adoption being dissolved by emancipation, as in Dig., *De ritu nuptiarum*, l. *In omni*, this impediment also will be dissolved (*Institutes*, *De nuptiis*, § *Sed quae*); for when the cause ceases, the effect ceases (above, *De renuntiatione*, c. *Post translationem*; and above, *De iureiurando*, c. *Et si Christus*, at the end; and dist. 61, § *His omnibus*, at the end); to which Dig., *De ritu nuptiarum*, l. *Per adoptionem*. But the emancipation must be made before a competent judge, and with his authorizing it will dissolve this bond, namely of legal kinship (Cod., *De emancipationibus liberorum*, l. 1 and last); for just as it cannot be contracted without the authority of a judge, so neither can it be dissolved (below, *De regulis iuris*, c. *Omnis res*). This is true except for the adopter himself, in whom even when the adoption has ended the prohibition lasts (Dig., *De ritu nuptiarum*, l. *Qui rem*). Likewise there is a perpetual impediment between the adopter and the wife of the adopted, and between the adopted and the wife of the adopter (Dig., *De ritu nuptiarum*, l. *Adoptivus*, first response), and I have said above. And let these things said suffice on legal kinship.

There follows [the last word] of the first verse, on the impediment of crime; of which, since we spoke above almost at the end of the gloss, it would be superfluous to repeat here. We have, then, five principal cases in the first verse. The sixth principal case impeding and dissolving, in the first word of the second verse, is, then, on disparity of worship. Concerning this impediment three things too are principally to be asked: the first is whether matrimony can stand between a believer and an unbeliever; the second, whether it is lawful for a Catholic to contract with a heretic woman, or conversely; the third, whether a Catholic is bound by precept to withdraw from a heretic wife. 117. To the first it is answered that it is forbidden by divine law that a believer contract with an unbeliever, or conversely. Exodus 34: "Beware lest you ever join friendship with the inhabitants of that land" — namely of the Amorites and Canaanites, who were unbelievers — as follows in the text, "which may be your ruin"; and below: "Nor shall you take of their daughters a wife for your sons, lest after they

themselves have committed fornication they make your sons also commit fornication with their gods." Similarly Deuteronomy 7, Moses repeats, saying: "You shall not make a covenant with them, nor show them mercy, nor make marriages with them. You shall not give your daughter to his son, nor take his daughter for your son, for she will turn away your son from following me, that he may rather serve strange gods." Between such, therefore, it is decreed that there is no matrimony (C. 28 q. 1, § *Ex his*, and c. *Cave*). 118. There [text unclear]

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is a betrothal, however, under condition, namely that if the unbeliever is converted to the faith, it can well be contracted (C. 28 q. 1, c. *Non oportet*; and on [book] 4 of the Sentences, dist. 39). Hence the Decretum says: "If a Jewish woman with a Christian, or a Christian woman with a Jew, or a Jew with a Christian, is mingled in carnal companionship, whoever has committed so great a wrong, let him be forthwith separated from the Christian assembly" (C. 28 q. 1, last c.), where it reports this as handed down from the Council of Narbonne. Between unbelievers themselves, however, matrimony is legitimate, although not ratified (C. 28 q. 1, last c., § *Non negat*), of which I spoke above.

To the second it is answered that although believers or Catholics knowingly contracting with heretics sin, yet the matrimony is not on that account to be dissolved; as appears in the like case of one falling into heresy or passing over to the error of unbelief or incredulity, for whom it is not lawful to pass to second vows while the first spouse lives, because through heresy supervening after matrimony, or through passing over to the error of the gentiles, matrimony already contracted between believers, which was legitimate and ratified, is not dissolved between them, according to what is noted in c. *Quanto*, above, *De divortiis*, and by the theologians on [book] 4 of the Sentences, dist. 39, and there Richard. 120. For although, if one of two unbelieving spouses is converted to the Catholic faith and the other is unwilling to cohabit with him — either in no way, or not without blasphemy of the divine name, or so as to draw him into mortal [sin] — the one who leaves may, if he wishes, pass to second vows, according to what the Apostle says, 1 Corinthians 7: "If any brother has an unbelieving wife, and she consents to live with him, let him not put her away. And if any woman has an unbelieving husband, and he consents to live with her, let her not put away her husband. For the unbelieving husband is sanctified by the believing wife, and the unbelieving wife is sanctified by the believing husband; otherwise your children would be unclean, but now they are holy. But if the unbeliever departs, let him depart; for a brother or sister is not under bondage in such cases" — on which there is enough in the Decretum, C. 28 q. 1, [c.] *Si infidelis*, and above, *De divortiis*, c. *Gaudemus* — yet it is not so with heretics, who have the character of the baptismal sacrament, as in the said c. *Quanto*, above, *De divortiis*, where the gloss gathers verses on the words "insult to the Creator," saying:

Forsake one who spurns you, or wishes to blaspheme, Or draws you, a believer, into mortal crime; For then without delay the former bonds are broken.

In the preceding case, therefore, of the converted unbeliever: if he has contracted, as was set forth, he does not sin; but the one who leaves — that is, who will not be converted to the faith — if he has contracted, sins, as the gloss and Doctors say on the said c. *Quanto*. But in the case of heresy, both the Catholic and the heretic man or woman passing to second vows sin mortally, and the matrimony does not hold while the spouse survives, even though a heretic man or woman; although in this case a

greater insult to the Creator appears, as the text says in the said c. *Quanto*, § *Si vero*. For believers sin more by apostatizing than unbelievers by remaining in unbelief (C. 32 q. 4, c. *In eo*). For the Apostle Peter says: "For it had been better for them not to have known the way of justice than, after knowing it, to turn back from that holy commandment which was delivered to them. For that of the true proverb has happened to them: the dog is returned to his vomit, and the sow that was washed to her wallowing in the mire" (2 Peter 2). It is said "better," however, briefly, that is, it is a lesser evil not to know the way of the Lord than to go back after knowing it (*De poenitentia*, dist. 4, [c.] *Si refugientes*, where the gloss says "better, that is, a lesser evil"; and above, *De apostatis*, [c.] *Quidam*; and the gloss so alleges in c. *Quemadmodum*, above, *De iureiurando*). But another reason can be given in a matrimony contracted between believers who afterwards turn heretic than can be given in the matrimony of unbelievers. For that, although it was legitimate, was never ratified, as we said enough above; but the matrimony of believers, which is legitimate and ratified, having a lawful subsistence and the foundation of sacramental virtue and of faith, more reasonably persists in hope of bringing back the one erring and in expectation of his returning to his senses, to Catholic truth, as much as can be hoped, just as one who was always an unbeliever is converted to the faith. Therefore "if the unbeliever departs, let him depart," says the Apostle where above, as if to say: let him impute it to his own faithlessness if the spouse has passed to second vows; which he means when he says, "is not under bondage," etc. But it is otherwise with a heretic who has obtained the baptismal character. For just as for carnal fornication a spouse can be put away, but another man or woman cannot be brought in, as the Lord says, Matthew 19: "Whoever puts away his wife, except for fornication, and marries another, commits adultery; and he who marries her that is put away commits adultery" — which understand also conversely, because in such a cause [the law] does not judge unequally (C. 32 q. 1, c. *Si quis uxorem*; and C. 32 q. 5, c. *Praecepit Dominus*, and c. *Christiana religio*) — so also for spiritual fornication, that is, for a lapse into heresy, a Catholic man can be separated from a heretic woman, or a Catholic woman from a heretic man, as to bed and dwelling, without hope however of marrying another while the heretic spouse lives, according to what is noted on C. 32 q. 7, c. *Omnes causationes*; and C. 28 q. 1, c. *Idololatria*, and c. *Non solum*, where the text says: "He who makes an idol commits fornication"; and below: "If she does not do penance, depart from her and do not live with her; otherwise you too will be a partaker with her of the same sin." Where the gloss on the word "depart" says: this chapter is to be understood, according to Huguccio, of two believers, one of whom falls into heresy, between whom matrimony had been ratified; and it is neither dissolved by the other's falling, nor can [he] contract.

To the third it is answered that a Catholic man is bound by precept to withdraw from a heretic woman, or conversely, if the heretic man or woman persists in the notorious crime of heresy, as is fully noted in c. *Quemadmodum*, § *Illud autem*, above, *De iureiurando*; and the gloss so holds on the said c. *Non solum*, C. 28 q. 1. But if he wishes to correct himself and do true penance, it is not lawful for the wife to put away the husband; indeed, if she has put him away, she is to be compelled to return to the husband, since he has returned to the faith — unless, having been separated by judgement of the Church, she had entered religion, according to what is noted in c. *De illa* and in c. *Quaesivit*, above, *De divortiis*, and in last c., above, *De conversione coniugatorum*, and C. 27 q. 2, c. *Agathosa*. For just as a spouse, a sentence of adultery having been given against the [other] spouse, can lawfully enter religion, as in the said c. *Agathosa* and in the said last c., *De conversione coniugatorum*, so also, a sentence having been given of spiritual fornication or adultery, that is, of heresy and the like, since

the matrimony was separated by judgement of the Church, the wife will not be compelled to go back to the husband returned from heresy; yet it rests in her choice to return if she wishes, provided she is not bound by religion. And so the said c. *De illa* must be understood at the end, when it says: "But if she withdrew from him by judgement of the Church, we say that she is in no way to be compelled to receive him."

But I ask further: if unbelievers have contracted matrimony in degrees prohibited by divine law, can they, converted to the faith, lawfully remain in matrimony? Answer: no, because in such a case the matrimony could be neither legitimate nor ratified, as the gloss says on the said c. *Gaudemus*, *De divortiis*, and there Johannes Andreae and Lord Antonius de Butrio; and in c. *Litteras*, above, *De restitutione spoliatorum*. And so it concludes that in cases prohibited by divine law the Pope does not dispense in such matrimonies; but in cases prohibited by canon law, and so by positive law, he can well dispense, as is noted on the said c. *Gaudemus*, first response, where the first gloss gathers some persons whom it was forbidden to marry according to the divine law, namely: mother, stepmother, sister, granddaughter, paternal aunt, maternal aunt, the wife of a paternal uncle, and the wife of a brother, and daughter, and stepdaughter; of whom originally Leviticus 18, and above, *De restitutione spoliatorum*, [c.] *Litteras*; and of the punishment of those acting against it, Leviticus 20; and I spoke above of the penalty of those contracting in prohibited degrees. And Hostiensis on the said c. *Litteras*, *De restitutione spoliatorum*, holds the same, namely that in impediments introduced by divine law the Pope cannot dispense, as in c. *Cum inferior*, above, *De maioritate et obedientia*; to which bear C. 32 q. 5, [c.] *Si Paulus*, and C. 30 q. 3, [c.] *Pitacium*, and above, *Qui filii sint legitimi*, last chapter.

Further I ask whether one converted to the faith can object against a converted wife a fornication committed in unbelief. The gloss touches this on the said c. *Gaudemus*, on the words "he could object." Lord Antonius says there that it seems not, because every sin and the consequence of sin is blotted out in baptism (dist. 26, [c.] *Deinde*; C. 32 q. 1, [c.] *Quod autem*). The gloss sets a twofold understanding. One is that the husband can repel the wife on account of adultery committed after baptism; hence it expounds "or after she was converted to the faith of baptism." But this understanding destroys the letter. The other understanding, then, is of adultery committed before conversion; and then say that in a crime three penal things are to be weighed, namely the criminal penalty, the civil penalty and the spiritual penalty. These last two ought [to be removed] by baptism, and so the laws alleged above speak. The criminal penalty is not removed by baptism; hence for a crime committed before, one can be punished criminally. Nor is the civil penalty removed, to the advantage of the party; for it suffices for the baptized to have the spiritual advantage from baptism without another's disadvantage. And because from such adultery, namely committed before baptism, the husband is stained, and the one committing the adultery, that is, the wife — although, then, the one committing the adultery is washed, yet that is not removed which was acquired by the other spouse from that defilement (C. 32 q. 1, [c.] *In coniugio*). Hence the husband can accuse the adulteress after however great a penance (C. 33 q. 2, [c.] *Admonere*), nor is he compelled to receive her, as in the said c. *Gaudemus*, above, *De divortiis*; and because it would be unjust that baptism should remove a benefit belonging to another — just as in freedom [conferred] it removes a crime committed against oneself but not against another (Dig., *De his qui notantur infamia*, penultimate l., and l. *Athletas*, § *Pomponius*). To which bear what is noted on c. *Gaudemus*, in the second [response], above, *De conversione coniugatorum* [text unclear]; and that the writer of the lecture of Lord Antonius meant to allege when he alleged c. *Gaudemus*, above, *De divortiis*, for what was said above, that the

husband is not compelled to receive an adulterous wife even after penance; and the gloss also alleges that on the said c. *Gaudemus*, above, *De divortiis*.

It is to be noted, however, in this passage, according to the Doctors on the said c. *Gaudemus*, above, *De divortiis*, that several effects can follow from a crime. A certain effect is called the criminal penalty, as above, which is not blotted out by baptism; hence one can be accused and punished for a crime committed before baptism. A certain one is an effect of sin, namely irregularity; and here note that either the irregularity is founded on sin, and this is blotted out by baptism as a consequence of sin — as if someone commits homicide not by way of justice, even if the homicide is notorious (dist. 25, [c.] *Poenitentia*, and § 1; and it is noted above, *De homicidio*, c. *Presbyterum*; and Innocent notes it on the said c. *Gaudemus*, above, *De divortiis*) — or it is an irregularity which is not founded on sin, as if a judge justly pronounced someone to be killed; for

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then irregularity is not a consequence of sin, nor is it always a consequence, as infamy is; and this is not removed by baptism. On which Johannes Andreae refers to the *Speculum*, title 2, § *Iuxta*, penultimate verse, and says it is to be seen what is noted there; there the *Speculum* recites opinions and concludes nothing; lastly it refers to the *Summa* of Hostiensis, title *De homicidio*, § *Qua poena*, and the following §; and so Hostiensis refers himself to the said c. *Gaudemus*, *De divortiis*. A certain effect of sin or crime is infamy, and this is blotted out by the removal of sin through baptism, as in the said c. *Gaudemus*, *De divortiis*, and dist. 26, [c.] *Deinde*. A certain effect of sin is that by which someone is bound to another, and this is not removed by baptism, as in the said c. *Deinde* and in c. *Acutius*, same distinction. So also one who is baptized is held to a pecuniary penalty on account of a preceding crime (arg. Dig., *De operis libertorum*, l. *Iurato*; Dig., *De liberatione legata*, l. *Aurelio*, § *Gaius*). 126. So too, if someone enters religion, I do not by this lose the action which belonged to me before; indeed I will act against the monk who possesses my goods (arg. *Institutes*, *De acquirenda possessione*, last §). From this he infers that by baptism the right by which the adulteress was bound is not removed, so that the husband can reclaim [text unclear]; because by baptism sins are forgiven, but not laws, as in the said c. *Acutius* and the said c. *Deinde*.

But are sons born of an illegitimate matrimony — though not ratified — contracted by unbelievers who are afterwards converted to the faith, to be reputed legitimate? Answer: yes, provided the matrimony was contracted in degrees not prohibited by divine law, as in c. *Gaudemus*, above, *Qui filii sint legitimi*. But what if they were born of a second wife while the first, repudiated according to the law of the Jews (Deuteronomy 24), was still living? Answer: public utility urging it, after the faith has been received the offspring are reputed legitimate, as in the said c. *Gaudemus*, above, *Qui filii sint legitimi*, and in the said c. *De infidelibus*, above, *De consanguinitate et affinitate*. For the Church tolerates this by a certain pious dispensation, so that such unbelievers may more easily be led to conversion to the Catholic faith, as the gloss says on the said c. *Gaudemus*, above, *Qui filii sint legitimi*. But is offspring born of a matrimony illegitimate on account of an impediment to be deemed legitimate? It seems not, as in c. *Referente*, above, *Qui filii sint legitimi*; on the contrary it seems yes, as in c. *Ex tenore*, same title. Solve as the gloss says on the said c. *Ex tenore*: for sometimes they contract in the face of the Church, both parents being ignorant of the impediment, and then the children are [legitimate]; sometimes one knowing and the other ignorant, and still they are legitimate, as in the said c. *Ex*

tenore — and this is true in any impediment which the parties cannot renounce; otherwise if they can, as in the impediment of servile condition, because then the offspring will be legitimate without distinction; sometimes both or one is ignorant and they contract matrimony clandestinely, and then they are illegitimate [as in the said c. *Referente*]. Some, as Goffredus, restrict this to the impediment of consanguinity; but in this impediment or another — I say this one, namely of one contracting with a second [wife] while the first lives, or another — even if the matrimony was clandestine, they say the offspring will be legitimate, because the decretal *Cum inhibitio*, above, *De clandestina desponsatione*, makes mention only of the impediment of consanguinity. Vincentius says the same, that that decretal *Cum inhibitio* is penal, therefore not to be extended (arg. Dig., *Soluto matrimonio*, l. *De viro*; and c. *Odia*, *De regulis iuris*, in the Sext). Johannes Andreae holds the contrary, because the same reason [applies] in any canonical impediment: since a canonical impediment occurs, the offspring is not favoured unless the matrimony was contracted in the face of the Church, as in the said c. *Ex tenore*; and that constitution *Cum inhibitio* is favourable in another respect, because introduced on account of the peril of souls; therefore its penalty is not to be restricted but extended, that perils may be avoided and that parents despising the mandate of the Church may be punished in the offspring (arg. Dig., *Soluto matrimonio*, l. *Certum*). But neither do legitimate sons always succeed unless they are free, as in c. *Tanta* and what is noted there, above, *Qui filii sint legitimi*. Or the matrimony is not clandestine and at least one of the spouses is ignorant of the impediment, and so long the sons are legitimate. And the gloss on the said c. *Ex tenore* says this is true even if the sons are conceived or born when the suit has already been moved, provided he was conceived or born before the sentence, as in c. *Cum inter*, above, *Qui filii sint legitimi*, and the said c. *Cum inhibitio*. And note that the aforesaid have place also in offspring born of concubinage or fornicating intercourse: if at the time of the offspring's conception or birth matrimony could stand between them, namely the concubinaries or fornicators, a matrimony afterwards following between them, the offspring born before is judged legitimate, as in the said c. *Tanta*, above, *Qui filii sint legitimi*, and in c. 1, same title; *Institutes*, *De nuptiis*, last §; and in the Authentic *Quibus modis naturales efficiantur legitimi*, § *Si quis igitur dotalia*, collatio 7; and Cod., *De naturalibus liberis*, l. *Si quis*; and *Institutes*, *De hereditatibus quae ab intestato deferuntur*, § *Nec non*. And they are deemed legitimate universally as to all things, even as to orders and dignities, because by the subsequent matrimony every cause of the preceding baseness has been removed, as the gloss says on the said c. *Tanta*; to which Cod., *Quod metus causa*, l. 2; and Dig., *De condictione ob turpem causam*, l. *Si ob turpem*.

But incidentally I ask: if an unbeliever kills a believer in order to receive as wife the widow of the deceased, and the unbeliever himself comes to baptism, will matrimony stand between such persons? Answer: it seems yes, because the penalty and every stain of sin is blotted out in the act of baptism (dist. 26, [c.] *Deinde*, and c. *Acutius*, and c. *Imago*; and dist. 100 [text unclear], c. 1). The contrary seems [proved] by c. 1, above, *De conversione infidelium*, where a Saracen who killed a Christian by the contrivance of the Christian's wife, so as to receive her as wife, cannot contract with her, and if he has, they must be separated. The solution according to Johannes Andreae on the said c. 1, *De conversione infidelium*: there both contrived the death, and so both contracting parties were at fault, and then matrimony cannot stand between them, as in the said c. 1; and a contrivance followed by death suffices, without adultery; and Hostiensis intends this there; c. *Quanto*, above, *De translatione praelatorum*, and c. *Quia frustra*, above, *De usuris*, bear on it. For it is absurd that through the laws treating of matrimony help should be given to him through whom scandal is established to have been

inflicted on them (above, *Ne clerici vel monachi*, c. 1; and last c., above, *De immunitate ecclesiarum*). But if one of the contracting parties contrived the death, the other not knowing, and adultery did not intervene, Johannes Andreae says the matrimony is impeded but not dissolved (C. 31 q. 1, [c.] *Si quis vivente*; and in c. *Super eo*; elsewhere on this; and in c. *Significasti*, *De eo qui duxit [in matrimonium quam polluit per adulterium]*). Hence he says himself: "If I killed my wife in order to contract with Bertha, and afterwards contracted, you who say the matrimony is to be separated without adultery, give me an express law"; and he says one must apply the rule given by Hostiensis on c. 2, above, *De cognatione spirituali*, namely that wherever the masters by their rules dissolve matrimony and do not adduce an express law, if you find someone writing the contrary, adhere to him (arg. above, *De testibus*, c. *Licet ex quadam*, at the end). The determination of the said c. 2, above, *De cognatione spirituali*, satisfies enough, by way of a similar case, the question written above, where co-parenthood supervening between spouses, knowingly or ignorantly, does not dissolve the marriage. And according to the aforesaid, Johannes Andreae says, must be understood what is said in the *Summula* on matrimony, "this crime," etc.; and these can be added to what I wrote above at the end of the gloss on matrimony to be dissolved by crime.

The seventh principal case in which matrimony is impeded and dissolved is force, or violence, or fear; of which in c. *Cum locum* and in c. *Consultationi*, above, *De sponsalibus*. Concerning this case three things are asked: namely, first, what force or fear is; second, what kind of force is required; third, whether captivity impedes. To the first it is answered that force is the onset of a greater thing which cannot be repelled (Dig., *Quod metus causa*, l. 1 [text unclear]). Hence Papias says: force consists in this, that it is considered what each thing can effect. But Isidore says: force is the right of power through which a cause or thing is either increased or extorted. Hence force is divided into two species: for one is called private force, the other public force. Private force is if someone before judgement, with armed men, has driven or forced someone from his own [property]. Public force is if someone has refused, beaten or bound one appealing in a cause before the people or a judge or king. Of these Isidore treats, *Etymologies*, book 5; and Dig., *Ad legem Iuliam de vi privata* and *De vi publica*; and Dig., *Quod vi aut clam*; and Dig., *De vi et de vi armata*, throughout; and Cod., *Unde vi*, etc. 129. But force or violence has five species: for one is compulsive force, another ablative, another expulsive, another disturbing, another disquieting; of which there is matter in c. *Ad audientiam*, *De his quae vi metusve causa fiunt*. For formerly it used to be said, "What has been done by force or for the cause of fear I shall not hold ratified" (Dig., *Quod metus causa*, l. 1); but because the moderns delight in brevity, "force" has been taken away and it is said "for the cause of fear." For although force induces a necessity which is contrary to the spontaneous will, yet whatever is done by atrocious force seems also to be done through fear, because force includes fear in itself and is superior to fear (Dig., *Quod metus causa*, l. 1). Hence one kind is called compulsive force, which induces the action *quod metus causa*, as in the said l. 1 [and] 2, Dig., *Quod metus causa*, and throughout, and Cod., same title, throughout; and above, *De his quae vi*, the said c. *Ad audientiam*, and throughout. Another is called ablative force, which induces the action *vi bonorum raptorum*, concerning movables only (Dig., *De vi et de vi armata*, l. 1, § *Si fundus*, and § 2; and *Institutes*, *Vi bonorum raptorum*, § *Sed nedum*). Another is called expulsive force, which induces the interdict *unde vi*, concerning immovable things only, and those which adhere to immovables; and of these it is treated in Cod., *Unde vi*, throughout, and especially in l. *Si quis in tantam*. Another is called disturbing force, which induces the interdict *uti possidetis* and is given in immovable things; but in movable things the interdict *utrubi* is given, when two contend that they possess. Another is called

the attempting force, which induces the interdict *quod vi aut clam*, as when someone does not allow another to use his own thing in quiet, or to plough or do something else, or when another, against his will, wishes to build something on his [land], or perhaps has already built; nor does it distinguish in this interdict whether he did it justly or unjustly (Dig., *Quod vi aut clam*, l. 1). And let these suffice for the understanding of what force is.

But fear is the trembling of the mind on account of a present or future danger (Dig., *Quod metus causa*, l. 1). And note that although it is not necessary that the danger be present, yet it requires that the fear be present, at least on account of a future danger; and therefore it suffices to suspect and fear that force will be inflicted (Dig., *Quod metus causa*, l. *Metum*, first response). And fear (*metus*) is so called as it were *mentis motio*, a "moving of the mind," because it holds the mind. 131. To the second it is answered that fear or force excluding consent must be such as can fall upon a constant man, as in c. *Veniens*, above, *De sponsalibus*, at the end, and in c. *Consultationi*, at the end, same title; and Dig., *Quod metus causa*, l. *Metum*. Yet a lesser fear excuses a woman than a man (arg. C. 32 q. 6, [c.] *Indignantur*; and above, *De homicidio*, [c.] *Sicut dignum*, first response); and so says the gloss on the said c. *Cum locum*, at the beginning, above, *De sponsalibus*, where Lord Antonius de Butrio says that a lighter fear affects the mind of a constant woman than of a man. For the consent which is required in matrimonies must have the quality of full liberty and seriousness, since the contract alone is the efficient cause of matrimony (C. 27 q. 2, [c.] *Sufficiat*; and in the said c. *Cum locum*, above, *De sponsalibus*). 132. From which it is to be known that in which human

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[human] [actions], among the principles of operations, there is the voluntary and the involuntary. A voluntary operation is one whose moving principle is from within, in the one operating; an involuntary operation is one whose principle moving the organic parts is from without. For if I do something willingly, the principle of the operation is within me, in the will to operate; but if I do something unwillingly, it is from without, as when I am snatched away by the wind; and in this I do not say I act, but suffer; and to this neither praise nor blame, neither penalty nor reward is attributed. But if the principle is from within, in this there is praise and blame; and this the legislator considers, namely Innocent III in c. *Sacris*, above, *De his quae vi*, and likewise other legislators. The voluntary is twofold: one is voluntary simply, and this is when the principle is wholly a matter of choice at the time of operating; another is voluntary in a certain respect, whose principle is from within at the time of the operation, some cause preceding, which ceasing, the man would not choose to operate — as when he operates on account of fear: because he wills to operate, and so the principle is from within, although, the fear ceasing, he would simply not choose to operate. This too the legislator considers in penalty and in reward. So says the Philosopher at the beginning of *Ethics* 3; upon which saying the said decretal *Sacris*, above, *De his quae vi*, is founded, as Lord Antonius de Butrio says there. From which it is to be noted that a certain fear is precise, wholly impelling a man's operation as with some principle of will annexed in the one operating, and this one is worthy of pardon and not punishable. A certain fear is causative, standing as a primary cause for the impulse of the will, and so in the operation moving the principle of the will in the one operating; and this one is punishable; but because the principle is not wholly in the one operating, the operation is not ascribed so much to the one operating, and so it lightens the penalty somewhat.

Concerning this I ask what absolute coercion is and what conditional is. Answer: absolute coercion is that whose principle is outside the one operating, not annexed to but totally excluded from the will of the one operating, and so by laying on of hands or detention. Conditional is that whose impelling principle is from without before the time of the operation, but at the time of the operation is from within the one operating, because something preceding moves him to will; as he who, to lighten a ship, throws goods out of the ship: he does not will this simply, but a preceding cause impelling him, that is, a preceding danger, he wills it then, so as to avoid worse. So says the Philosopher at the beginning of *Ethics* 3; or fearing death, or mutilation of limbs, confiscation of goods, the violation of daughters, or something similar, I do something. 134. And this is what the laws say, that a coerced will is a will (C. 15 q. 1, [c.] *Merito*; and l. *Si mulier, § Metu*, and *§ Si dos*, Dig., *Quod metus causa*; and C. 23 q. 4, [c.] *Displicet*; and C. 23 q. 6, [c.] *Iudex*; and dist. 74, [c.] *Consuluit*). In these chapters there is an argument that matrimony holds although coercion intervenes; to which C. 22 q. 4, [c.] *Inter cetera*; and Dig., *De ritu nuptiarum*, l. *Si patre*. But this is not true, as above, *De sponsalibus*, c. *Iuvenis*, and c. *Cum locum*, and c. *Consultationi*; and C. 31 q. 2, c. 1 [and] 2. Hence it is to be known that there are certain things in which the bare will of someone is required, and it is not required with the quality of liberty; and in such things fear does not vitiate by law itself, because a coerced will is a will, as in the said c. *Merito*. There are certain things in which a free will is required, and so not simple but with the quality of liberty; and then a coerced will, although it is a will, yet is not free; therefore it vitiates (C. 15 q. 6, [c.] *Auctoritatem*; C. 22 q. 4, [c.] *Inter cetera*; and C. 33 q. 5, [c.] *Notificasti*, and there by the gloss of Johannes). 135. The cases in which a free will is required the gloss sets out on c. *Abbas*, above, *De his quae vi metusve*, and on the said c. *Notificasti*, where the gloss of Johannes says that where in an act a direct will is required, fear vitiates the act; understand "direct," that is, free. The first case, then, in which a free will is required is that of matrimony, as in the said c. *Cum locum*, and c. *Consultationi*, and c. *Gemma*, and last c., above, *De sponsalibus*. For in a matrimonial cause, whatever fear intervenes, through one's fault or without one's fault, matrimony contracted through fear does not hold, nor is he who does this bound even if he swears, says the gloss on the said c. *Abbas*. 136. For matrimonies ought to be free, because unwilling nuptials have been wont to have ruinous outcomes, as above, *De sponsalibus*, c. *Requisivit*, and Cod., *De sponsalibus*, last l., at the end. The gloss means to say that the accessory oath then draws [the act] to the nature of the principal, and so does not bind by law itself; for it is a rule that the accessory follows the nature of the principal. 137. Hence it is that a dowry promised or paid through fear does not hold, because it is accessory to the matrimony (Dig., *Quod metus causa*, l. *Si mulier, § Si dos*), where it is said that if a dowry is promised through fear, no obligation arises; for if the principal does not hold, neither does the accessory (Cod., *De legibus*, l. *Non dubium*; and above, *De foro competenti*, c. *Si diligenti*). Lord Antonius de Butrio says on the said c. *Abbas*: what the gloss says of the oath, by the following c., which begins *Ad aures*, same title, I do not believe; because that, namely the oath, binds, as is said there, although a remedy exists against it, that is, that he ask absolution from an oath given through force, which is safer, as in c. 2 and 3, above, *De iureiurando*. But for the gloss the rule *Non est obligatorium*, *De regulis iuris*, in the Sext, satisfies enough; for it can well be said that it is against good morals that matrimonial consent be extorted by fear and violence, because where fear and coercion intervene, it cannot be called consent, as in the said c. *Cum locum*; and the gloss so says on the said c. *Abbas*. 138. I think Lord Antonius says the same in spiritual matrimony: that an election or collation made through fear is null by law itself, because in such things free consent is required, as in c. *Quisquis* and in c. *Ubi periculum*, *De electione*, in

the Sext. And not only in contracting but also in removing, fear vitiates by law itself in dissolving the bond of matrimony, because spiritual matrimonies, like carnal, ought to be free both in dissolving and in contracting; to which c. *Frequens* and c. *Requisivit*, above, *De sponsalibus*, where it is the case. Lord Antonius says: unless it is sworn, because then the oath binds well. C. 22 q. 4, [c.] *Inter cetera*, does not stand in the way, because otherwise there was not sufficient fear there; or what is said there, that the matrimony is firm and stable, must be understood by way of counsel and not of precept; or there the fear was not proved.

The second case, then, is in a dowry promised through fear, as I said above, by the said § *Si dos*. 139. The third case is in the alienation of an ecclesiastical thing through fear (C. 15 q. 6, c. [1]; above, *De iureiurando*, [c.] *Pervenit*); and the gloss on the said c. *Abbas* assigns the cause: because even if a prelate spontaneously handed over things of the Church, the handing over would be null without solemnity, of which C. 12 q. 2, [c.] *Sine exceptione*. Johannes the Glossator on the said c. 1, C. 15 q. 6, holds the contrary, namely that by the handing over of an ecclesiastical thing through fear the Church loses the direct ownership. Others, as Huguccio and his followers, hold with the gloss on the said c. *Abbas*; to which the text in the said c. 1, C. 15 q. 6, satisfies, where it says "no prejudice or harm to them," etc.; to which C. 2 q. 6 [text unclear], c. 1; above, *De renuntiatione*, [c.] *Super hoc*, and what is noted there. And Johannes Andreae follows this opinion of Huguccio as truer on the said c. *Abbas*, by the aforesaid canons and by the reason of the gloss there; Johannes Andreae holds the same on c. 1, *De rebus ecclesiae non alienandis*, in the Sext, and there the Archdeacon, whatever Vincentius may have held on c. *Ad sedem*, above, *De restitutione spoliatorum*. Lord Antonius de Butrio says on the said c. *Abbas* that if the alienation is made through fear with the other solemnities excluded, or any of them, it is plain that the alienation is null, but not by force of the fear, but on account of the defect of solemnity. But if the alienation is made with due solemnity and through fear, as in the said c. *Abbas*, where the things of the Church were less usefully alienated, it could well enough be said that the opinion of Johannes would proceed: the alienation would hold, and the Church would lose the direct ownership, although by law itself it would transfer the useful [ownership] (Dig., *Quod metus causa*, l. *Metum*, § *Sed nolenti*; and it is noted above, *De renuntiatione*, c. *Super hoc*). And this opinion pleases Lord Antonius. The fourth case is in a vow, because that depends on the free will of the one vowing, since it is a thing of vow and not of precept, and there is free choice in vowing (C. 32 q. 1, [c.] *Integritatis*; and above, *De voto*, c. *Licet*); and Christ chose for himself a voluntary soldier (C. 15 q. 1, [c.] *Non est*). And the Apostle says, 2 Corinthians 9: "For God loves a cheerful giver." 140. The fifth case is in jurisdiction extorted through fear (Dig., *De iudiciis*, l. 1 [and] 2). And the gloss sets this case among others on the said l. *Si mulier*, § *Si dos*, Dig., *Quod metus causa*; but it speaks more strictly there, because it says that it fails in the prorogation of jurisdiction; and so speaks the text which the gloss alleges on the said c. *Abbas*. But that gloss amplifies more when it says "in jurisdiction extorted through fear." 141. From which it follows that if a sentence is given through fear, it is null, as Hostiensis holds on the said c. *Abbas*, alleging C. 11 q. 3, [c.] *Iniustum*; the same Goffredus in the *Summa*, *De his quae vi*. Johannes the Glossator on C. 11 q. 3, [c.] *Quatuor*, holds that it is not null, but to be annulled by the help of an exception; and he holds the same on the said c. *Iniustum*; and the same there the Archdeacon. But the same Johannes changed his opinion on C. 25 q. 1, [c.] *Omne*, where he holds that it is null. Lord Antonius on the said c. *Abbas* says that if the sentence was given through fear with solemnity excluded, it is plain that it is null; and if it was given with the solemnities observed and through fear, it can still well be said that it is null, because the act of sentence depends on the

free choice of the one sentencing, as in the Authentic *Ut iusiurandum quod praestatur ab his*, at the beginning, collatio 2, and in c. *Iudicet*, C. 3 q. 7. 142. The sixth case is, according to the gloss on the said c. *Abbas*, in the giving of authority (Dig., *De auctoritate tutorum*, l. 1, penultimate and last §); for the authority of a tutor extorted through fear is null, as the said gloss says. 143. A seventh case is added according to the Doctors: in absolution from excommunication and suspension and the like; for absolution extorted through fear is null, as was said above, *De sententia [excommunicationis]*; and what is more, one extorting such an absolution, or a revocation, by force or fear, incurs the sentence of excommunication by the very fact, as in c. *Absolutionis*, *De his quae vi metusve causa fiunt*, in the Sext. An eighth case is added in the act of testifying in a testament, which witnesses hold against their will; of which above, *De his quae vi*, c. *Sacris*; and Dig., *Qui testamenta facere possunt*, l. *Qui testamento*, last §. The ninth: wherever peril of the soul is concerned (above, *De iureiurando*, c. *Si vero*); because against the soul no oath or promise is binding, as in the said c. *Non est obligatorium*, *De regulis iuris*, in the Sext.

But which are those things that may induce a just fear, causing excuse and so excluding consent? Say that they are seven, according to the gloss on c. *Cum dilectus*, in the penultimate gloss, on the word "death," above, *De his quae vi*. For the text says there: "notwithstanding the violence which he alleged was inflicted, since it contained neither fear of death nor torment of the body, and therefore ought not to have fallen upon constant men." 145. The gloss says: not only in these two but also in several other cases fear excuses. Sometimes fear of words (arg. dist. 7, [c.] *Fuerunt*; and C. 23 q. 8, [c.] *Convenior*; and Dig., *De acquirenda hereditate*, l. *Qui in aliena*, last §). Sometimes fear of things (dist. 5, [c.] *Presbyteros*; and above, *De his quae vi*, c. *Abbas*). Sometimes, on account of fear for liberty, I cannot demand what I stipulated for the cause of burdening liberty (Dig., *Quarum rerum actio non datur*, l. 1, § *Quae onerandae*). Sometimes fear of a judge (C. 2 q. 1, [c.] *In primis*), or of some powerful person (Cod., *Quod metus causa*, penultimate and last l.). Sometimes fear for status, or honour, or for oneself or one's children, and fear of violation (Dig., same title, l. *Isti quidem*). Sometimes not only the fear of present danger,

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but even the suspicion of fear of a future danger excuses (Dig., *Locati*, l. *Habitatores*, last §; and Dig., *Ad legem Aquiliam*, l. *Si quis fumo*, last §). Sometimes fear of death or of torment of the body alone seems to excuse, as in the said c. *Cum dilectus*, and Cod., *De transactionibus*, l. *Interpositas*, § 1. Hence it seems it must be left to the judgement of the judge whether words, or threats, or the power of a man are a just cause of fear, as in Dig., *Ex quibus causis maiores*, l. 3, and arg. Dig., *Quod metus causa*, l. *Non est verisimile*; to which bears Dig., *De verborum obligationibus*, l. *Continuus*, § *Cum ita*. So too Innocent gathers after the gloss on the said c. *Cum dilectus*, above, *De his quae [vi]*, saying: a just fear is of death and of torment of the body, of hunger, of violation, of status, or of all one's goods, and perhaps of a great part; and he alleges, beyond the laws aforesaid, Cod., *Quod metus causa*, l. *Metum*, and Cod., *Sine iussu principis*, l. 1, § *Item verbum*.

And as to what I said above about an oath extorted by fear, whether it ought to be kept: he argues first that it should, by argument from C. 22 q. 5, [c.] *Qui compulsus*, and c. *Si quis coactus*; and above, *De iureiurando*, c. *Si vero*. An argument to the contrary in the said c. *Abbas* and in c. *Ad audientiam*, same title; and above, *De restitutione spoliatorum*, c. *Sollicite*; and C. 15 q. 6, [c.] *Auctoritatem*. Solution: some say that an oath extorted by fear binds no one, and therefore the praetor said, "What has been done

by force or for the cause of fear I shall not hold ratified" (Dig., *Quod metus causa*, l. 1). Others say that if he who swears has the intention of binding himself, he is bound; otherwise not (argument above, *De baptismo*, c. *Maiores*). Others say that although the oath was extorted by fear, yet it must be kept, because although fear intervened, yet he willed (C. 15 q. 1, [c.] *Merito*). "We distinguish," says Innocent, "between an oath which by its nature is evil and basely sworn, which does not bind, as is noted above, *De electione*, [c.] *Venerabilem*, and that which is not evil by its nature, but only basely sworn, that is, extorted by deceit or fear." Here, however, namely on c. *Ad aures*, above, *De his quae vi*, where Innocent notes these things, he says: "Here, however, we treat only of oaths basely, that is by deceit or fear, extorted; and we say that an oath extorted by fear not to reclaim one's own things is binding to this extent, that he ought to keep it until he is absolved by the bishop; but he ought to be absolved and afterwards claim; and so the decretals speak, above, *De iureiurando*, [c.] *Si vero*, and c. *Verum*. And [the bishop] will learn before he absolves whether there was a fear which would fall upon a constant man" (Dig., *Quod metus causa*, l. *Metum*). And he adds: "Yet the judge should always, as much as he can, take care that no one comes directly against an oath. 147. Namely, if he swore to pay usury, let him pay, but afterwards reclaim it (above, *De iureiurando*, c. *Debitores*, [and] c. *Ad nostram*). And even if he had sworn not to reclaim, the judge could by his office compel the holder to restore (above, *De iureiurando*, c. *Ad nostram*, second). He could also denounce him [to the Church] for penance; and if he had sworn not to denounce, he ought not to keep it, because it is against the Gospel rule, namely Matthew 18, 'If your brother sins against you,' etc. (C. 2 q. 1, [c.] *Si peccaverit*). But as long as he can otherwise conveniently provide, the bishop should not come to absolution from the oath, although I do not reckon it against law if he absolves, the other ways being omitted." Thus Innocent on the said c. *Ad aures*. Add what Isidore says in the *Synonyms*, book 2: "In evil promises rescind faith; in a base vow change the decree; what you have vowed unwarily do not do. Impious is the promise which is fulfilled by crime." These are had in C. 22 q. 4, [c.] *In malis promissis*; and there through that whole question it treats of this matter. And the *Speculum* notes it in the title *De officio legati*, § *Nunc ostendendum*, at the verse *Item Papa*.

As far, then, as pertains to our purpose: if a woman, induced by just fear, said she consented to a husband, and on this added an oath also extorted by fear, if she cannot be induced to keep the oath and consent to remain in the matrimony, let her ask absolution from the oath. And if she never consented, even if she was carnally known — yet also through fear, because she never had opportunity of protesting or fleeing while the just fear lasted — even by such force there will never be matrimony, according to what is noted in the said c. *Consultationi*, above, *De sponsalibus*, and in c. *Ad id quod*, same title, where the gloss thinks that if she cohabited for a year she confirms the matrimony. 149. Lord Antonius says solemnly at the end: note, however, that in order for cohabitation to induce confirmation of the matrimony it must be spontaneous; for if it were fearful it would not suffice, because fear would not purge [it] while the same fear was present. Let those proving, then, be careful to conclude that she cohabited voluntarily; otherwise, since she was led [to his house] through fear, if it were not otherwise proved, I would well presume that from the preceding fear she cohabited fearfully, unless something extrinsic were proved through which it would appear that she did not cohabit fearfully — unless the cohabitation had been long, because by this decretal, namely *Ad id quod*, it would be believed enough from this that she had opportunity of fleeing in so great a time; for the text says there "for a year and a half." But the gloss on those words says, "and so through the patience of the following time the proximate cause was removed through the subsequent consent,"

and alleges concordant places; therefore the gloss thinks that such a woman afterwards consented. And therefore Lord Antonius says that where the will of the one cohabiting appears, so great a delay is not required; indeed, a cohabitation of a moment after she had opportunity of fleeing will induce matrimony; and so he says the Doctors are to be understood on the said c. *Ad id quod*, although Hostiensis says it is to be left to the judgement of the one judging as to the time of cohabitation for presuming consent. Hence the gloss says there that, granted such consummation of matrimony and such consummation [text unclear], from such cohabitation so great a presumption arises that proof to the contrary is not admitted, alleging c. *Is qui*, same title, namely *De sponsalibus*; and *De conditionibus appositis*, c. *De illis*; and Dig., *De ritu nuptiarum*, l. *In uxorem* [text unclear]. And the gloss gathers two verses, namely:

Flee when you can, lest you be thought to have consented; But if you have remained, then you will be his forever.

To the third it is answered that captivity impedes an act depending on free consent, and so impedes matrimony (C. 31 q. 2, c. 1 [and] 2). Yet one must distinguish: for either the coercion of captivity is ordered to the end of obtaining something other than the consent in the act about which the question is — as when one captured for the extortion of money contracts matrimony — and the matrimony is not vitiated. Hence it is that such a captive can appoint a proctor, and consequently contract matrimony either by himself or through a proctor, as in last c., *De procuratoribus*, in the Sext; and Dig., *De minoribus*, l. *Papinianus exuli*. And therefore, if he contracts for the advantage of a third party with this pretext, that he not be detained, the contract is valid (l. 1 [and] 2, Cod., *Si quis aliquem testari prohibuerit*). Or the contract is for the advantage of the one detaining, and then, if he is detained justly, the contract is valid (l. *Si mulier*, at the beginning, Dig., *Quod metus causa*); if unjustly, the contract is not valid for the end for which he is detained; but if the end of the detention and his contract do not coincide, then the contract is valid, as Innocent and Lord Antonius say on the said c. *Cum locum*, above, *De sponsalibus*. To which accede what is noted by Butrigarius on l. *Qui in carcere*, Dig., *Quod metus causa*, and by Bartolus on l. *Qui a latronibus*, Dig., *De testamentis*, and Dig., *De verborum significatione*, l. *Quandoque*; what is noted in c. *Accedens*, above, *De procuratoribus*, and in c. *Veniens*, second, above, *De sponsalibus*, also bears on it. And let these things said of force or fear suffice.

The eighth principal case is order, which was touched on above, *De voto*; but for the present let it suffice to know briefly 151. that one standing in sacred [orders], as a subdeacon and above the subdiaconate, is impeded from contracting; and if he has contracted it must be dissolved (dist. 32, [c.] *Si quis eorum*, and c. *De illo*; and in c. 1 [and] 2, and in c. *Rursus*, and throughout, above, *Qui clerici vel voventes*). And what is more, if he contracts in fact, he causes in himself an irregularity, as for a grave crime, so that he cannot be promoted to higher [orders] nor minister in those received, in respect of which he sinned; and so in sacred orders repugnant to matrimony. But it is not so as to minor orders, because in respect of them he did not sin, since one placed in minor [orders] can well contract matrimony, as in c. 1 and 2 and almost throughout, above, *De clericis coniugatis*. Of the said irregularity it appears in c. 2, above, *Qui clerici vel voventes*, when the text says: "Since you grant that he be promoted to higher orders, if he will not pass over to religion, you are to permit him neither to minister in the subdiaconate nor to be promoted to further orders; in minor orders, however, he will be able to minister." 152. From which text it appears clearly enough that such irregularity can be removed by the bishop; similar above, *De clericis coniugatis*, c. *Sane*, and above, *De apostatis*, c. 2. Hostiensis, however, says that by rigour of law the bishop does not dispense unless such a one enters

religion, as in the said c. 2, above, *Qui clerici vel voventes*; but by equity he dispenses with him if he is a true penitent, and the bishop does not use this equity except when such a one enters religion, as in the said c. 2. Or I say: if he knew the wife, the bishop does not dispense; but if he did not know her, the bishop can dispense. The gloss, however, on the said c. 1, above, *Qui clerici vel voventes*, first argues that the bishop can dispense, as in the said c. *Sane*; afterwards it states an argument contra, above, *De bigamis*, c. *Nuper* — but that is understood of him who in secular habit had one wife by law and in sacred order contracted with another; with him, then, as with a bigamist, there can be no dispensation. An argument contra below, same [title], the next c.; but in the said next c., namely c. 2, above, *Qui clerici vel voventes*, the gloss gives the reason of the difference between a true penitent and one not a true penitent, or one against whom there is a presumption of his incontinence; and with such one should not dispense, since for the hope of return they do not fear to indulge the desires of wicked action (dist. 50, c. 1, and c. *Ut constitueretur*). Lord Antonius on the said c. 2, above, *Qui clerici vel voventes*, says: "Hold which you will; you say that it is safer to ask dispensation from the Pope, but more equitable that the bishop can dispense"; and so Innocent understands there, the said c. 1 and 2; what is noted in c. *At si clerici*, above, *De iudiciis*, and in c. 1, above, *De clerico percussore*, satisfies enough. It is to be known also, as I said above, that those placed in sacred [orders], if they presume to contract matrimonies, are excommunicated by the very fact, as in c. *Eos qui*, *De consanguinitate et affinitate*, in the Clementines; of which I spoke enough above, *De voto*; see there.

Concerning this, I ask incidentally whether a married man can be promoted to sacred orders. It seems not (dist. 32, [c.] *Si qui vero*, and c. *Seriatim*; and above, *De clericis coniugatis*, c. 1 and 2, and almost throughout). An argument contra in the Extravagant of John XXII which begins *Antiquae*, in which it is decided that sacred order, if it supervenes after matrimony, in no case dissolves it, but only dissolves afterwards

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it [matrimony] contracted. Solution: say that a married man, by common consent and agreement of the wife, she equally taking a vow of perpetual continence, can pass to religion; and consequently, if he is not a bigamist and no other lawful impediment stands in the way, he can be promoted to sacred orders. It appears expressly in C. 27 q. 2, c. *Si quis coniugatus*, and the following c., where it is written thus: "If husband and wife have agreed between themselves to part for the sake of the religious life alone, let it in no way be done without the consent of the bishop"; and so they must, with the bishop's consent, vow perpetual continence by an equal vow. Raymond also says that if the husband was ordained with the wife consenting, or knowing and not contradicting, if he is a cleric of the Western Church, prejudice is done to the wife, so that she will have to be continent henceforth, and her husband having died she cannot contract with another (dist. 28, [c.] *Quia sunt culpae*, with the two following chapters; and dist. 32, [c.] *Seriatim*). The gloss disputes this enough on the said c. *Quia sunt culpae*, and better on the following c., which begins *Si se cuiusque mulier*, on the word *separentur*, where the gloss asks, saying: "It is doubted concerning the wives of those to be ordained, how they ought to vow and give licence. It seems by word alone, as above, same [distinction], [c.] *De his*, at the end, where the text says: 'so that when, being of advanced age and placed in marriage, renouncing by equal consent, they have promised [to abstain] from the works of the flesh, they may aspire to sacred orders.'" But the gloss on the said c. *Si se* contradicts, alleging for the contrary above, *De conversione*

coniugatorum, c. *Sane*, and dist. 34, [c.] *Fraternitatis*, where it is said that the wife of one to be promoted shall enter a monastery. Likewise by another reason: because the company of clerics surpasses the company of monks, since scarcely does a good monk make a good cleric (C. 16 q. 1, [c.] *Legi*); and to this bears above, *De conversione coniugatorum*, c. *Coniugatus* — indeed there is an express case there, where the text says: "No married man is to be promoted to sacred orders unless he has been released by his wife professing continence." It follows in the said gloss: "But he is not received as a monk unless the wife is converted (C. 27 q. 2, [c.] *Agathosa*). Say that it is not necessary that she be converted, but only that she vow continence, unless there is suspicion of her (above, *De conversione coniugatorum*, c. *Cum sis praeditus*); and it is special in that decretal *Sane*, *De conversione coniugatorum*, in the wife of a bishop." To this bears c. *Consuluit*, above, *Qui clerici vel voventes*. And the gloss on the said c. *Seriatim*, at the end, dist. 32, says: "Of this wife of one promoted, say that by the very fact that she gives him licence she is understood to vow," etc.; dist. 77, [c.] *Quicumque*, bears on it. It is clear and appears openly enough in the said c. *Coniugatus*, by the text, the gloss and the Doctors, and especially by Lord Johannes Andreae and Lord Antonius de Butrio after Innocent and Hostiensis. Yet the condition and quality of the persons must be attended to, lest suspicion of the incontinence of either should sprout; which ceasing, the husband and wife may profess perpetual continence in the hands of the diocesan or his vicar, when both wish to remain in the world — that is, the husband, rightly, Catholicly and solemnly ordained to sacred orders, even up to the priesthood inclusive, intends to remain a secular priest, and the said woman intends to remain in her own house and with her offspring if she has it, both mutually intending, the vow now preceding, to observe perpetual continence until death. Hostiensis distinguishes concerning age, whether the woman is young or old. Johannes Andreae distinguishes whether the woman is young and suspect, or young and not suspect; and this is the more common opinion, namely: granted that she is young but not suspect, and by equal consent with the husband they have taken a vow of perpetual chastity in the hands of the diocesan, it is lawful for the husband to be promoted to sacred orders if nothing else stands in the way.

The ninth case is of the impediment of bond (*ligamen*). Concerning it three things principally are to be asked: namely, the first is when someone is said to be bound by matrimony; the second is what if one contracting errs, [thinking] himself free; the third is what if someone contracts under condition. 154. To the first it is answered that the bond can be considered in four ways: first through betrothal *de futuro*; second through betrothal *de praesenti*; third through matrimony *de futuro*; fourth through matrimony *de praesenti*. 155. Concerning the first it is asked in how many ways betrothals *de futuro* are contracted. Answer: in four ways. First, through words *de futuro* apt for this, as if someone has given a woman faith of a pact, as when he promised her faith that he would marry her, if he promised to have her as his wife, as in c. 1, above, *De sponsa duorum*. And then, if nothing else followed, he is bound to keep faith and not marry another; if, however, he has married another, he must do penance for the faith broken and remain with her whom he married, as in the said c. 1, and above, *De sponsalibus*, c. *Si inter virum*, at the end; and C. 27 q. 2, throughout, and most especially the last c.; and better by the gloss in the *Summa* of the same question, where it says that betrothals are the mention and promise of future nuptials (Dig., *De sponsalibus*, l. 1). 156. Second, betrothals *de futuro* are contracted through words *de praesenti* with persons unfit by age, as in last c., above, *De sponsalibus*, where Lord Antonius infers 157 that a second betrothal *de praesenti* prevails over a betrothal *de futuro* previously contracted, even with an effort at intercourse, by that text, which proves this well expressly. And the gloss there,

on the word *conatus*, says that an attempt without effect does no harm, as in the said last c.; and *De poenitentia*, dist. 1, [c.] *Haec autem verba*, and c. *Cogitatio*; and Dig., *Quibus modis pignus vel hypotheca solvitur*, l. *Sicut*, § *Si voluntate*; and the gloss argues pro and contra. 158. The conclusion, however, is that although in more atrocious crimes sometimes the affection suffices though the effect does not follow (Cod., *De episcopis et clericis*, l. *Si quis non dicam rapere, sed attentare*; and *De poenitentia*, dist. 1, [c.] *Si quis non dicam*; and dist. 50, [c.] *Si quis post acceptum*; and Cod., *Ad legem Corneliam de sicariis*, l. *Si quis cum telo*; *De poenitentia*, dist. 1, [c.] *Si quis cum telo*, and the fourth following §; and above, *De eo qui mittitur in possessionem causa rei servandae*, c. 1), yet in contracts it is otherwise, because in them the affection does not suffice without the effect, as in the said last c., above, *De sponsalibus*, and in other laws alleged above for this side. 159. It is to be noted, however, that although the said betrothals *de futuro*, even with an effort at intercourse, are overcome by a betrothal *de praesenti* ended within its limit, so that there was no proceeding further, yet such betrothals *de futuro* with the said effort do well induce public honesty, as in c. *Iuvenis*, above, *De sponsalibus*; and I said enough above on the justice of public honesty, in the second question. The like is true of bigamy, as in c. *Nuper* and in last c., above, *De consanguinitate*. 160. For although someone in fact contracts with two different women with whom by law he cannot be joined matrimonially, yet he is to be deemed a bigamist, as in the said c. *Nuper*. 161. Just as, if someone contracts nuptials with one with whom by law he cannot contract, he is infamous although the nuptials have no effect (Dig., *De his qui notantur infamia*, l. *Quid ergo*, § 2). 162. And likewise, although a subdeacon who in fact contracts with a widow is not properly a bigamist, yet it is not lawful to dispense with him, as with the husband of a widow — not on account of a defect of the sacrament, but on account of the effect of the intention with the deed following, as in the said last c., above, *De bigamis*.

Third, betrothals *de futuro* are contracted through the giving of earnest-money (*arrhae*) (Cod., *De sponsalibus*, l. *Arrhis*). Concerning which it is asked whether the penalty of earnest-money attached in matrimonies or betrothals may lawfully be exacted or retained. Answer: the last gloss on c. *Gemma*, above, *De sponsalibus*, says yes, according to the laws (Cod., *De sponsalibus*, last l.; Dig., *De verborum obligationibus*, l. *Titia*). Yet it argues the contrary by likeness to a penalty, which, attached in matrimonies or betrothals, cannot be exacted, because matrimonies ought to be free, as in the said c. *Gemma*. Therefore the gloss says: because the reason is the same in a penalty as in earnest-money, it is fitting that the law be the same (*De translatione*, [c.] *Inter corporalia*; and above, *De confirmatione utili vel inutili*, c. *Cum dilecta*, with other concordant places set there). And Lord Antonius on the said c. *Gemma* says that since the canons do not dispose the contrary, one must stand by the laws. The penalty of such earnest-money is that either it is the giver of the earnest-money through whom it stands that the matrimony is not contracted, and he loses the earnest-money; or [it stands] through the receiver, and he must return it doubled, unless it was expressly said that he return it tripled or quadrupled (Cod., *De sponsalibus*, last l.). 164. These are true unless a lawful cause stood through the other of them; for then the earnest-money is not lost. And it is a lawful cause if the other would not carry out the betrothal within two years (Cod., *De sponsalibus*, l. 2); or if the death of the other has intervened (Cod., *De sponsalibus*, l. *Arrhis*); or on account of the person of the betrothed with whom matrimony is forbidden (Cod., *De sponsalibus*, l. *Mulier*, § *Quem vero*, and § *His quoque*); or on account of minority of age. Hence it is safe and well done to give [earnest-money] to the parents, according to Innocent on the said c. *Gemma*; to which Cod., *De sponsalibus*, last l. I think the same in the cases of which above, *De iureiurando*, [c.] *Quemadmodum*, namely when he was not well certified of the

impediment at the time of the contract, by the last l., Cod., *De sponsalibus*, and by the said c. *Quemadmodum*, above, *De iureiurando*; and Hostiensis holds this in the *Summa*, *De sponsalibus*, § 1.

But what is the reason for the difference between a promised penalty and earnest-money? The Doctors answer on the said c. *Gemma*: because earnest-money begins from giving, but a penalty from promising; and one is readier for words than for deeds; therefore he will easily promise a greater penalty than he gives a lesser earnest-money. By which it is concluded that by earnest-money matrimony will less probably be intimidated than by the promise of a penalty; therefore, etc. Hostiensis assigns the reason: because earnest-money is given, and in the handing over of his own thing one can attach whatever condition he wishes (Dig., *De pactis*, l. *In traditionibus*); but in the stipulation of a penalty nothing is given; therefore it is no wonder if it cannot be attached in betrothals or matrimonies. Likewise because the earnest-money is retained and kept: if matrimony follows, he who received gains the earnest-money, if it was so agreed between the parties. The gain, then, is not so joined with fear as a penalty is; therefore, for the favour of earnest-money, earnest-money is permitted, but not a penalty, in which there is fear alone; and in doubt it is presumed that one is drawn to matrimony more by the favour of gain than by fear of a penalty. This reason presses little according to Johannes Andreae, because both the fear of losing the earnest-money and the fear of returning it doubled take away liberty. Likewise no gain is hoped from earnest-money, because, once fulfilment is given, the earnest-money must be restored to him who gave it, and by this he gains nothing. Hostiensis assigns another reason, namely that a penalty is a sign of drawing away from matrimony and of punishing the drawing away, which is done by negative words, namely "if you do not contract, you will pay the penalty"; but earnest-money is a sign of matrimony to be contracted and of rewarding the one consenting, and is done by affirmative words, namely "I give you earnest-money that you may contract with my daughter," which the one contracting gains by special pact (Dig., *De actionibus empti et venditi*, l. *Ex empto*, § *Si is qui vina*). But this too does not press enough; on account of which Johannes Andreae on the said c. *Gemma*, and Cynus on the last l., Cod., *De sponsalibus*, hold the first reason set above, besides

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[besides] which he says that there is no difference between earnest-money and a penalty, but only the quantity of the earnest-money and the quality of the persons is to be distinguished. For if a poor man gives or receives a large earnest-money, the earnest-money will so intimidate him and take away the liberty of matrimony, just as a light penalty [would]; and if a rich man promises a light penalty, it is not probable that by this the liberty of contracting is taken away in him; therefore then the penalty would not be annulled. And if it is said that the last l., Cod., *De sponsalibus*, speaks only of earnest-money, which it grants, and other laws simply annul the penalty: it is answered that the laws did this having regard to frequency, because it commonly happens that smaller earnest-moneys are given and greater penalties attached; for laws are directed to those things which commonly happen, as in l. *Nam ad ea*, Dig., *De legibus*; and therefore the laws prohibit a penalty and do not prohibit earnest-money (Dig., *De verborum obligationibus*, l. *Si servum*, elsewhere beginning *Si stichum*, penultimate [§], and what is noted there). And Cynus and Oldradus hold this on the said last l., Cod., *De sponsalibus*. Bartolus on l. *Titia*, Dig., *De verborum obligationibus*, says that there is a difference between a penalty and earnest-money according as the laws speak, and that a penalty however small is not valid, and

the attaching of earnest-money however large is valid; and this by the laws which speak without distinction; likewise by l. *Neque*, Cod., *De nuptiis*, with the gloss, which says that even if ten are promised the promise is not valid; and by l. *Ea quae*, Cod., *De donationibus inter virum et uxorem*, where the text speaks of twenty, which is a small quantity. Hence he makes a difference whether the penalty is legal, that is, permitted by law — and such an attachment is valid — or conventional, and it is not valid; he alleges a law saying this, because in matrimonies we ought to be content with legal penalties (Dig., *De verborum obligationibus*, l. *Stipulatio ista*). Hostiensis thinks this reason in the *Summa*, *De sponsalibus*, § 1, when he says a penalty cannot be sought unless established by laws. Hence he concludes afterwards that every legal penalty is permitted; and legal penalties are — when the matrimony is perfected — loss of the dowry and of the gifts on account of nuptials in dissolving the contract, as in l. *Consensu*, Cod., *De repudiis*; when no dowry was given, he says the penalty is the loss of a third part of the goods, as in l. *Iubemus*, Cod., *De divortiis*. But perhaps those penalties have no place today, according to Lord Antonius, because divorce, he says, according to the canons cannot be made. But surely, with reverence: although divorce cannot be made today in the way it was made in the Old Testament by a bill of repudiation, of which Deuteronomy 24, yet it can be made for the cause of fornication by the sentence of the Lord, Matthew 19, when he says: "Whoever puts away his wife, except for fornication, and marries another, commits adultery; and he who marries her that is put away commits adultery." For when he says "except for fornication," it appears that for fornication divorce can be made, although they must observe perpetual continence during their common life; or he who had the sentence for himself can, if he wishes, enter religion (C. 27 q. 2, c. *Agathosa*); but he who committed the adultery cannot enter without the licence of the offended spouse, because [the spouse] can be reconciled to him if he wishes, as the Apostle says, 1 Corinthians 7, when he says: "But to those who are joined in matrimony I command — not I, but the Lord — that the wife depart not from her husband; and if she departs, let her remain unmarried or be reconciled to her husband." To which C. 32 q. 1, [c.] *Si quis uxorem*; C. 32 q. 5, [c.] *Praecepit Dominus*, and c. *Christiana*; and C. 32 q. 7, [c.] *Omnes accusantes*. Since, then, divorce can be made in some case, it can therefore be said that the said laws have place, as when a woman has committed adultery she loses the dowry and dower, as in c. *Plerumque* and in c. *Nuper*, above, *De donationibus inter virum et uxorem*, and *De dote post divortium restituenda*.

Sometimes only betrothals have been contracted, and Hostiensis says there is no legal penalty, nor does it have place. Sometimes betrothals have been contracted and it has come to the handing over of earnest-money, and then the legal penalty has place according to the form of the last l., Cod., *De sponsalibus*. Nor does it stand in the way that the penalty there sometimes begins from contravention; because although they agreed on the double, since there it permits [it] by contravention, and so the promise and penalty seem legal (Dig., *De verborum obligationibus*, l. *In conventionalibus*). Hostiensis says, however, that since it is not probable that the law wished to impose a greater penalty on one dissolving a betrothal than a matrimony, the penalty of earnest-money cannot exceed the dowry; and if no dowry was promised, it cannot exceed a third part of the goods, by that law *Consensu* and by [l.] *Iubemus*, alleged above; and most especially he says this is to be held by l. *Stipulatio ista*, Dig., *De verborum obligationibus*, by which he says the said last l., Cod., *De sponsalibus*, is so limited. Second, he says that every penalty outside the disposition of that last l. is not valid in betrothals, because it is not legal; and the text there at the end intends this also, which rejects every other penalty. From this Hostiensis infers several things. First, that if the earnest-money begins from a confession — as when

someone confesses that he received earnest-money which, however, he did not receive — that law does not have place, nor the penalty, if it is established that no handing over of earnest-money was made; otherwise one would stand by the confession against the one confessing himself, which would prove the handing over (Dig., *Depositi*, l. *Publia*). Second, on account of this he says that [Titius] cannot [demand] earnest-money from Caia because Caia confessed she had [received it], that law would not have place, which requires a giving; and this Federicus says in *Consilium* 164, because such a confession is made in fraud of the penalty; and if such penalties were admitted and sought in the secular court, recourse would be had to the Church, that it might prohibit; and the same [in] *Consilium* 189. Third, on account of this he says that if one party gave earnest-money to his co-party, and the other party [did not give] earnest-money of the same quantity to the other, that law does not have place [text unclear], which speaks when earnest-money is given by one party. [Fourth,] he says that if a farm is given in the name of earnest-money [text unclear] in the name of him to whom it is given, to possess, that law does not have place, which speaks of the handing over of a quantity, and which speaks of that which can be doubled; but a farm cannot be doubled (l. *Lucius*, § *Impuberum*, and l. *Plane*, § 1, Dig., *De legatis* 2).

But [concerning] a penal stipulation added in the contract, it is doubtful whether [it is valid as to] what is of interest. The glosses are contrary: one says it is valid [as to the interest], as [in l.] *Titia*, Dig., *De verborum obligationibus*; the gloss on l. *Si stipulatio*, same title, holds the contrary. Dinus says that the stipulation is valid as to the interest of the loss arising, as because he incurred expenses, but not [as to] the profit ceasing, because the interest is not a penalty (Dig., *De damno infecto*, [l.] *Proculus*; and Dig., *De furtis*, l. *Si is cui*). [Lord Antonius] on the said c. *Gemma*, above, *De sponsalibus*, says that it is commonly held that [it is not valid even] to the extent of the interest, because it is to be imputed to the stipulator, since he knows that the penal stipulation does not hold; otherwise it would follow that he would act for the interest, which is not to be said, and it is against the aforesaid laws (Dig., *De servis exportandis*, l. *Titius*). Bartolus also holds this, saying that the penal stipulation is against good morals; therefore it is worth nothing (dist. 8, c. *Quae contra*). He admits, however, that if the opposing party did something deceitfully [text unclear] by expenses, he can act for deceit to such interest.

What [if] pledges [are given] in security of a betrothal or of matrimony to be contracted? The gloss on l. *Titia* says it is valid, because pledges are called earnest-money (Cod., *De remissione pignoris*, l. 1; and [above, *De donationibus inter virum et uxorem*], c. *Et si necesse*; and above, *De arbitris*, c. *Exposita*). Hostiensis [and the] *Speculum* [say that] the pledges cannot be retained, because he who hands over pledges [does not] oblige himself [text unclear]; but by retention [text unclear] it is provided for someone through retention to whom [an action] is not given [text unclear]; alleging for this Dig., *De ritu nuptiarum*, l. *Si quis officium*. The same Innocent and Hostiensis in the *Summa* under the same title, alleging above, *De donationibus inter virum et uxorem*, c. *Et si necesse*; and [Federicus] in his *Consilium* 189, where he says that if it is [agreed] that, the matrimony not following, he gains the pledge and the fruits [text unclear], he will be held to the fruits; if the pledge is given for [text unclear], he will reckon the fruits in the principal. Accursius on l. *Titia* holds: if it is given for earnest-money it holds; if it is given for a penalty it does not hold. Others say that [what is given by] agreement does not hold, just as neither does the promise, [but what is given by way of] donation holds, because it is the same as earnest-money. Johannes Andreae distinguishes the quantity of the pledge. Bartolus seems to hold the first distinction, but it may be said that it proceeds when a pledge is given in a quantity, by

the last l., Cod., *De sponsalibus*; it seems otherwise in a specific thing. Lord Antonius de Butrio on the said c. *Gemma* says at the end: "I think it must be noted how the pledge is given. If it is given for security of the contract and of the interest where it is not contracted, the giving of the pledge is valid, as is the promise of interest; but it is not valid if under the name of a penalty; and the interest having been paid, the pledge is restored, the fruits being reckoned in the interest. But if it were given for security of a penalty added in the contract, it would not be valid, just as neither the principal obligation. And if it were given for security of earnest-money promised, it still would not be valid, because neither is a contract of earnest-money valid where it does not begin from giving, as I said above, whatever Federicus thought. If a pledge is given simply and in a specific thing, with this agreed, that it be lost if the contract does not follow, it is not valid, as Bartolus says. If a quantity is given in place of a pledge for security of the contract, with this agreed, that it be lost if the contract does not follow, Bartolus holds that it is valid." Lord Antonius says: "This does not please me, because here in the giving of a pledge there is another contract than the contract of earnest-money, and so we are not within the terms of the last l., Cod., *De sponsalibus*. Likewise in this there would not have place the doubling of the penalty, or the doubling of the pledge from the other party, and so there would not be equality on either side, since this nature is not in such a contract; and so we are outside the terms of the last l., in whose case the doubling has place." This opinion of Lord Antonius will appear truer to one looking subtly. Sureties, however, can be given for security of the contract (above, *De eo qui cognovit consanguineam uxoris suae*, c. *Veniens*), but they will be bound only to the interest; for which reason I believe the promise of interest is valid under the name of interest, not under the name of penalty. Thus Lord Antonius on the said c. *Gemma*.

Fourth, betrothals *de futuro* are contracted through the giving of a ring (*subarrhatio*) (C. 27 q. 1, [c.] *Si quis*), [and] if an oath has intervened (above, *De sponsalibus*, [text unclear]). [For according to] Innocent and Hostiensis, a ring [given] to a woman [is] a sign of

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matrimony (above, *De praesumptionibus*, c. *Illud*, and there by the gloss, by the Archdeacon, by Johannes Andreae and by the modern Doctors; and by the Archdeacon also on C. 30 q. 5, [c.] *Nostrates*, and c. *Feminae*). 169. For the ring is given to the woman because it signifies mutual love and that conjugal faith is to be kept, says the second gloss on the said c. *Nostrates*. And the text in the said c. *Feminae*, § *Item*, says that in first nuptials a ring is given by the bridegroom to the bride, "doubtless either for a sign of mutual love, or rather so that by this pledge their hearts may be joined. 170. Hence also the ring is put on the fourth finger, because in it a certain vein, it is said, of blood reaches as far as the heart." Where the gloss of Huguccio says that by the handing over and gift of a ring there is a presumption for matrimony (arg. above, *De praesumptionibus*, [c.] *Illud*); and this seems so also by the prayers of Gregory which are said in the blessings, where it says, "Bless, O Lord, this earnest-money" (arg. C. 27 q. 2, [c.] *Si quis uxorem*). Others say that only betrothals are presumed, unless it is given by a priest (arg. the said c. *Nostrates*), or unless by custom of the place the ring is given in matrimony; and it is like what the law says of earnest-money, that it does not make a purchase but is its sign (*Institutes*, *De emptione et venditione*, at the beginning). 171. Some, however, say, as Archdeacon Parmensis [text unclear] reports on the said c. *Nostrates*, that betrothals *de futuro* are contracted in five ways: first by simple promise, as appears in *De sponsalibus*, c. *Si inter virum*; second by giving of faith,

as appears in the same title, c. 2 and c. *Si quis*; third by interposition of an oath, as appears in the same title, c. *De illis*; fourth by giving betrothal earnest-money, namely money or other things (Cod., *De sponsalibus*, l. *Arrhas*); fifth by the giving of a ring (above, *De desponsatione impuberum*, c. *Tuae*).

Concerning the third, it is to be said that a bond results through betrothal *de praesenti* when through words of the present time consent to betrothal is expressed, as in the said c. *Si inter*, and above, *De sponsa duorum*, c. 1, and c. *Licet* — although the said c. *Licet* speaks more of matrimony than simply of betrothal, and likewise the said c. *Si inter*; for betrothals are properly a promise of future nuptials (Dig., *De sponsalibus*, l. 1; and C. 30 q. 5, [c.] *Nostrates*). 172. And betrothals (*sponsalia*) are so called from *spondere*, that is, promising. Hence the bridegroom or bride (*sponsus*, *sponsa*) are so called from *spondeo*, because by the use of notaries they used to send each other matrimonial instruments, in which they promised that they consented mutually to the rights of matrimony, and they gave sureties, as Papias says. The *Speculum* treats of this in the title *De sponsalibus*, at the beginning; and Lord Antonius on the rubric, above, *De sponsalibus*, where as to betrothals he asks three things: first the definition; second the contracting; third the dissolution. To the first he says that betrothals are a promise of future nuptials, as above. 173. For properly under the name of *sponsi* the man and woman are comprehended before the matrimony is perfected; but after the matrimony is perfected, because the promise has been fulfilled or perfected, they are no longer called *sponsi*, but husband and wife (Dig., *De his qui notantur infamia*, l. 1, at the end, and l. *Solet*, at the end; Dig., *De ritu nuptiarum*, l. *Si quis officium*, second response; Dig., *Ad legem Iuliam de adulteriis*, l. *Uxor*, § *Divus*; and Dig., *De iniuriis*, l. *Apud Labeonem*, § *Sponsam*). By this it appears that a statute speaking of a wife is not extended to a betrothed woman; which note well. Of the second, namely of the contracting, enough has been said above in the preceding, namely in what ways betrothals are contracted. Johannes Andreae in the *Summa De sponsalibus et matrimoniis*, and Tancred in his *Summula*, think that the giving of a ring does not induce matrimony but only betrothal. Lord Antonius on the said rubric refers himself to what he noted on c. *Illud*, above, *De praesumptionibus*, and on c. *In litteris*, *De restitutione spoliatorum*; and the gloss on c. *Lator*, *De re iudicata*; and Hostiensis in the treatise in the *Summa De sponsalibus*, § *Quot sunt species*; and the Archdeacon on c. 1, *De sponsalibus*, in the Sext. And there is also the gloss on last c., above, *De desponsatione impuberum*, which says that by the giving of a ring presumed matrimony is concluded unless the contrary is proved, by the said c. *Nostrates* and by c. *Feminae*, C. 30 q. 5, and dist. 27, [c.] *Quod interrogasti*, and above, *De sponsalibus*, c. *His qui*; because it makes no difference whether someone declares his will by word or by deed (dist. 44, c. 1; Dig., *De legibus*, l. *De quibus*). 174. And the said gloss concludes that if the giving of the ring is done by the father, betrothal is presumed; if it is done by the betrothed, matrimony is presumed — unless there were a custom to the contrary, as because the ring could signify something else, as is noted in that c. *Illud*, above, *De praesumptionibus*, and there most fully by Lord Antonius.

One must distinguish, then, conclusively. For sometimes the giving of the ring is done with express consent to matrimony intervening, and the case is plain. Sometimes with a betrothal *de futuro* intervening, and still it is plain that it passes into matrimony, as the gloss says on c. *Tuae* and on c. *Si inter*, above, *De sponsalibus*. Sometimes the giving of the ring intervenes and he utters nothing; and if the mind is established, keep that; if not, and if we are in a place where the putting on of a ring signifies something else, it does not induce matrimony, as in the said c. *Illud*, above, *De praesumptionibus*. But if we are in a place where the bearing of a ring signifies nothing else, then either custom in the place disposes something of the sign of the ring — as that it is a sign of betrothal, or

that it is a sign of matrimony — and keep that; or if it disposes nothing, either it is done in the preparation for matrimony and with a priest present, or at the doors of the church, and matrimony is presumed, as the Doctors say on the said last c., above, *De desponsatione impuberum*; or it is done not in the preparation for matrimony, and then, if it is given by the father, rather a certain gift is presumed; but if it is given by the bridegroom and put on the finger, then matrimony is presumed, according to what is noted on C. 30 q. 5, [c.] *Feminae*, and above, *De sponsa duorum*, c. 1. But if the ring is given by the bridegroom and he does not put it on the finger, then matrimony is not presumed, but betrothal; for such little gifts are wont to pass rather often between the betrothed (above, *De matrimonio contracto contra interdictum ecclesiae*, c. 1). So too the giving of earnest-money is a sign of a future contract (*Institutes*, *De emptione et venditione*, at the beginning); for earnest-money is a contract by itself (Dig., *De actionibus empti et venditi*, l. *Is qui bona*, § 1). By this it is inferred that if a ring is given in play, as happens in some festivities, if it is certain that it was play, because the contrary intention is certain, there will not be matrimony (Dig., *De obligationibus et actionibus*, l. *Obligationum fere*, near the end; C. 22 q. 2, [c.] *Quod ait*; above, *De praesumptionibus*, [c.] *Quia verisimile*, with similar places). But in doubt one will have to judge for matrimony (above, *De re iudicata*, last c.), or the prince is to be consulted (above, *De translatione praelatorum*, c. 1), as in a similar case Augustine says, *De consecratione*, dist. 3, [c.] *Solet quaeri*. Sometimes it is doubtful whether the giving of a ring confirms a matrimony contracted at a minor age; and then either the giving of the ring supervenes by sending a ring, and without doubt it ratifies; or the giving is other gifts and little presents, and then Hostiensis says on the said last c., above, *De desponsatione impuberum*, that it neither ratifies nor confirms. But this could be true when the betrothal had been contracted *de futuro*; otherwise, if he frequents the bride's house after reaching the greater age, the matrimony having been contracted at the minor age, and gives little gifts to the bride, the matrimony is ratified, according to what is noted on c. 1, *De desponsatione impuberum*, in the Sext. Lapus de Castiglionchio treats this matter enough in his *Allegationes*, allegation 57; and Thomas Aquinas touches it on [book] 4 of the Sentences, dist. 27, q. 2, art. 1; and Lord Antonius on the said c. *Illud*, above, *De praesumptionibus*, abundantly.

The effect of betrothal is principally twofold. For one is an effect arising from the betrothal and following the end of the betrothal, namely that matrimony follow; this is the end to which betrothals are ordered. And then, if it is asked whether matrimony arises precisely from betrothal, it is to be said that it does not precisely necessitate matrimony, where both parties consent to dissolving the betrothal (above, *De sponsalibus*, c. *Praeterea*). But whether, one willing, the end necessitates the other to matrimony: say that if the matter is intact — as because neither has contracted with another — then it necessitates, especially if the betrothal is sworn; unless there were a probable presumption that worse would happen from it, as in c. *Requisisti*, above, *De sponsalibus*; which Johannes Andreae and Tancred also hold, above, *De sponsalibus*. But if the matter is not intact, because one has contracted matrimony with another woman, or conversely, then, because the subsequent bond, as greater, removes the preceding lesser one, he can no longer be compelled to contract with the first. The second effect of betrothal is indirect, and rather removing what obstructs the end than inducing the end: as because from it arises a certain impediment to contracting matrimony with the blood relatives of the spouses; and this is the impediment of public honesty, of which we spoke enough above; which impediment also had its origin from civil law, as in the last l., Dig., *De ritu nuptiarum*.

Of the third, the same Lord Antonius speaks on the rubric, above, *De sponsalibus*; and Johannes Andreae in the *Summa*, and Tancred also in his *Summa*, sets out some cases. 176. But Johannes

Andreae [sets out] more, and Lord Antonius reports that betrothals can be dissolved in fifteen ways. Namely: first, by entry into religion, the other spouse unwilling; which holds also in betrothal or matrimony *de praesenti* without intercourse (above, *De conversione coniugatorum*, c. *Verum*, and c. *Ex publico*, with its gloss; and in c. *Commissum*, above, *De sponsalibus*). Yet it is not dissolved by the reception of order, as the gloss says on c. 1, *De voto*, in the Sext, which holds that even if he becomes a bishop or Pope, a betrothal *de praesenti* is not dissolved, as Johannes Andreae says there; nor is matrimony *de praesenti* dissolved by a vow of chastity (above, *De conversione coniugatorum*, c. *Ex parte*, first). Second, betrothals are dissolved by reception of sacred order (C. 27 q. 2, c. *Desponsatam*). Third, they are dissolved when the betrothed mutually release each other (above, *De sponsalibus*, c. 2). Fourth, when one withdraws, going to a far region, before carnal intercourse (above, *De sponsalibus*, c. *De illis*). Fifth, when one incurs leprosy or another great infirmity of the body (above, *De coniugio leprosorum*, last c.; and above, *De iureiurando*, [c.] *Quemadmodum*); yet deformity or leprosy does not dissolve a matrimony *de praesenti*; indeed, the healthy one is bound to render the debt to the infected (above, *De coniugio leprosorum*, c. 1 [and] 2). Sixth, if affinity supervenes (above, *De eo qui cognovit consanguineam uxoris suae*, [c.] *Veniens*, and c. *Ex litteris*). Seventh, if report holds an impediment, for example that affinity has supervened, as in c. 1, *De sponsalibus et matrimoniis*, in the Sext; which understand when the betrothal was contracted under condition

and before the event of the condition he contracted by words *de praesenti* with another woman, a blood relative of the former, as the text says there at the end. Eighth, when one fornicates carnally (above, *De iureiurando*, [c.] *Quemadmodum*). Ninth, when one fornicates spiritually (C. 28 q. 1, [c.] *Non solum*, and c. *Iam nunc*). Tenth, when they contract a second betrothal *de praesenti* (above, *De sponsalibus*, [c.] *Si inter virum*; and in c. [1], above, *De sponsa duorum*); but by a second betrothal *de futuro* a first *de futuro* is not broken (above, *De sponsalibus*, [c.] *Sicut ex litteris*) — which understand if he has not known the second, because then it would be matrimony (above, *De sponsalibus*, [c.] *Is qui fidem*), and so he would have to return to the one known, as is proved here. Eleventh, when a minor reaches adult age and will not keep what was done (above, *De sponsalibus*, c. *De illis*). Twelfth, when someone promised to contract within a certain time and it did not stand through him, as in the said c. *Sicut ex litteris*. Thirteenth, when spiritual or legal kinship supervenes, for example adoption, according to Hostiensis (above, *De cognatione spirituali*, c. *Veniens*; and above, *De eo qui cognovit consanguineam uxoris suae*, c. *Veniens*; and in c. *Ex litteris*, above, *De sponsalibus*). And Johannes Andreae understands all these of betrothals which hold by law. 177. There are, however, many cases in which betrothals do not hold by law itself, which are contained in the aforesaid verses, namely "Error, condition, vow," etc., according to the declarations which we have set above and will follow below. Betrothals, then — whether between children of seven, as in c. *Litteras*, above, *De desponsatione impuberum*, and in c. *Si infantes*, same title, in the Sext; or contracted at the said age by parents with the children consenting, or present and not contradicting, or afterwards ratifying — one must labour in good faith that they come to the end of the betrothal, namely to matrimony, according to what is noted in c. *Ad audientiam*, above, *De sponsalibus*, and in c. *Ex litteris*, above, *De desponsatione impuberum*, and in c. *Ex parte*, above, *De restitutione spoliatorum*. For if the betrothal held, as because it was contracted at the due age, they are bound to contract matrimony together, nor can one of them contract with another person; if, however, he has contracted, the second matrimony holds, as in the said c. *Sicut ex litteris*.

Concerning the third, it must be said that the bond of matrimony through words *de futuro* results from this, that the justice of public honesty arises, of which enough was said above; likewise because, as to conscience, he is bound to keep what he promised if no other lawful impediment stands in the way, and most of all if an oath intervened, according to what is noted in c. *Ex litteris*, second, above, *De sponsalibus*. And understand: if they are fit in age and quality, so that they consented from the promise made by them, or by others in their name, according to what is noted in c. *Ex litteris*, first, and in c. *Non est nobis*, above, *De sponsalibus*, and in c. *Ad audientiam*, same title. Hence if the betrothal held, those contracting the betrothal are bound to contract matrimony together; otherwise they sin mortally, as Blessed Thomas says on [book] 4, dist. 27, unless a lawful impediment appeared. If, however, either of them contracted matrimony with another person by words *de praesenti*, the second matrimony would hold and not the first (above, *De sponsalibus*, [c.] *Sicut ex litteris*); yet he must do penance for the faith broken, and much more if an oath intervened in the promise, as in the said c. *Sicut* and in c. *Si inter virum* and in c. *Ex litteris*, above, *De sponsalibus*.

But that we may have the matter more clearly, let us pass to the fourth; 179. concerning which it is to be said that the bond properly and strictly is said to result from a matrimony contracted by words *de praesenti* between lawful persons, every impediment whatsoever ceasing. Hence one so bound, while the first spouse lives, can never contract with another, as in c. *Licet*, above, *De sponsa duorum*; nor was it ever lawful, unless it was done by divine revelation, as is read of the patriarchs; on which passage it is noted enough 180 on c. *Gaudemus*, § 1, above, *De divortiis*. Although one bound by matrimony through words *de praesenti*, before carnal intercourse, can pass over to religion, as in c. *Verum* and in c. *Ex publico*, above, *De conversione coniugatorum*, and in c. *Commissum*, above, *De sponsalibus*, even with the spouse unwilling and remaining in the world; who, however, after the profession, tacit or express, made by the one entering, remains free and can contract with another man, by a certain fiction of law which feigns the first husband dead to the world, as in the laws alleged. Hence, as the Apostle says, 1 Corinthians 7: "A woman is bound by the law as long as her husband lives; but if her husband sleeps, she is freed; let her marry whom she will, only in the Lord. But she will be more blessed if she so remains, according to my counsel."

But I ask: someone contracted betrothal or matrimony by words *de futuro*; carnal intercourse followed between him and the betrothed; afterwards he contracted with another by words *de praesenti*, and likewise carnal intercourse followed. Which of these will be judged matrimony, the first or the second? Answer: the first, according to what is noted on c. *Is qui fidem*, above, *De sponsalibus*, where there is a case to the letter. Similar in c. *Veniens*, second, same title, and in c. *De illis* and in c. *Per tuas*, above, *De conditionibus appositis*. For the intercourse that followed induces so vehement a presumption that against a presumption of this kind no proof is to be admitted, as the text says in the said c. *Is qui fidem*. There the gloss solemnly treats the matter of presumption, and Lord Antonius 182 follows it, saying that presumption is a certain degree of certitude about something. For while there is doubt about something, sometimes the mind wavers, and yet inclines more to one side than to the other, namely the opposite, and this is a certain suspension if the mind is not made firm. Sometimes it applies the mind to one side and firmly fixes it, and this is presumption; for by this he is not certain, but so from accidents he presumes. And although it is called presumption and denominated by law, yet the origin of presumption is to be weighed from law as it is applied to the mind of man. Hence every presumption of law could be called a presumption of man; but because the law approves some, and some are not found approved, in species certain presumptions can be called presumptions of man

which are not specifically approved by law, but are approved in genus, because degrees of proof are given by law, concerning which how much and what faith and proof there is the law leaves to the breast of the one judging (Dig., *De testibus*, l. 3). And such a species can be called a presumption of man, the species considered; and, considering that it is approved by law with a general approbation, it can also be called a presumption of law (Dig., *De verborum obligationibus*, [l.] *Obvenire*). And it is to be noted that the genus of presumption can be divided into species, taking the division from the quality of the end and effect; and then I say that one is a presumption of law only; another is a presumption of law and by law (*iuris et de iure*); another is a fiction. A presumption of law is taken here when the law presumes something about a doubtful matter and approves the presumption in species or in genus, according as and just as, extrinsic signs of the matter being given, it is presumed by man; yet it does not wholly fix its feet, [so] that what it presumes it would wish in every case to be preferred to the truth. Such a presumption, then, admits proof to the contrary; and so presumption is regularly understood in the title *De praesumptionibus*. Of this the gloss on the said c. *Is qui fidem* speaks, toward the end of the gloss, when it says: "Another is a presumption of law only, as if a husband has long cohabited with his wife, she is presumed known by him (C. 32 q. 1, [c.] *Dixit Dominus*; and C. 27 q. 1, [c.] *Nec aliqua*); and against this proof is admitted, as above, *De probationibus*, [c.] *Proposuisti*, and Dig., *De probationibus*, l. *Si chirographum*." A presumption of law and by law is when the law, concerning some doubtful matter, applies the mind of the one judging to one of the extremes, and from the circumstances so far renders itself certain that it does not admit other proof to the contrary. Therefore it is masterfully called a presumption of law and by law: because first the law operates principally on the mind of the one judging by applying it more to one side than to the other — and in this it is called "of law," as though it denotes the inducing and efficient cause; and the mind of the one judging being applied, it so far confirms it that it wills the judge to close his ears to the hearing of another, opposite proof. And this is called a presumption of law and by law, that is, "of law" as caused by law, and "by law" as confirmed by law, so far that one saying the opposite is in no way to be heard, as in the said c. *Is qui fidem*; and similar in c. *Filii*, *De haereticis*, in the Sext. Hence such a presumption regularly does not admit proof to the contrary. The legists say, however, that it admits proof by confession of both parties (in the Authentic *Et si necesse*, Cod., *De donationibus ante nuptias*), where Cynus holds this, and the gloss holds it in the body from which that Authentic is taken. Lord Antonius says on the said c. *Is qui fidem* that when it is a question of proof against the cause of an instrument, or of another proof extrinsic to the contracting parties, this, as a direct proof, is not admitted if it directly conflicts with a presumption of law and by law, as in the said c. *Is qui fidem* and c. *Quod ait*, same title; but an indirect proof, by which the presumption is not wholly argued false, would well be admitted, as the gloss notably says on Clementine 1, *De probationibus*, and the Doctors on the said c. *Is qui fidem*. It is to be noted, however, that although they do not admit proof, yet if the parties in fact admit it and it is done, that proof derogates, as Innocent notes on c. *Fraternitatis*, above, *De frigidis et maleficiatis*, and above, *De re iudicata*, c. *Cum Bertholdus*, and above, *De rescriptis*, c. *Cum dilecta*. 183. A certain proof is that which arises from the power of the parties; and this can be twofold. One by way of confession, because the parties confess that it is otherwise than the presumption of law and by law holds; and then it is to be noted that if we are in a matter in which confession can effect something — so that we are in an act whose being depends on the power of the parties — confession also removes the presumption of law and by law, as in the said Authentic *Et si necesse*. And there is a singular saying of Innocent on c. *Quia plerique*, above, *De immunitate*

ecclesiarum, where he notably says that although the law feigns or presumes a sentence just because it has passed into a judged matter, yet if the party confessed the sentence unjust, one would stand by the confession

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and the presumption of law and by law would be removed, because in such matters the parties can prejudice themselves. But if we are in a matter in which the parties cannot prejudice themselves, because it is a matrimonial cause, as in c. *Super eo*, above, *De eo qui cognovit consanguineam uxoris suae*, then the confession does not take away the force of the presumption, because the matter stands in the way. And therefore, if after intercourse the woman confessed that they did not have intercourse after the betrothal with the intention of joining themselves to each other, one would not stand by the confession; indeed, matrimony would be judged, as the Doctors say on the said c. *Is qui fidem*; at which Lord Petrus de Perusio wondered. 184. Second, a proof opposed to the presumption can arise from the protestation of the parties: as when, from a deed, the law presumes something of the mind by a presumption of law and by law, and the one doing the deed protests the opposite. And in this case too it must be said that either this protestation is clothed with a just cause, and such proof is admitted (above, *De his quae vi*, c. 1); and this is true whether the protestation preceded the deed and the deed followed the protestation, or the deed and protestation were simultaneous, as there and in c. *Vidua*, in the last gloss, which is quite notable for this, above, *De regularibus*. Sometimes, however, a protestation precedes the uttered words of matrimony, in which someone protests that whatever words he utters with such a person he does not intend to contract with her — this protestation being made without the other party consenting — and afterwards he publicly contracts, uttering words wholly certain for contracting matrimony. And then say that either some lawful cause of protestation preceded, and matrimony will not be judged, as because perhaps he feared a fear such as afterwards intervened in the contract itself (above, *De his quae vi*, c. 1; C. 31 q. 2, [c.] *Lotharius*); hence then he does not seem to have withdrawn from the protestation through a contrary deed conflicting with the protestation. Sometimes no cause of protesting exists, as when he first protested that whatever words he utters with such a woman, and in whatever way, he does not intend to contract matrimony with her; and then the gloss on c. *Tua nos*, above, *De sponsalibus*, says that if afterwards he contracts publicly and by certain words, it will be matrimony, as if he seems to have withdrawn from the protestation, and the interpretation must be made against him who employs deceit (above, *De sponsalibus*, c. *Ex litteris*). It must be noted, however, that this is true in the contentious forum; but in the penitential forum it would not judge matrimony if in truth he had not consented to her, as in the said c. *Tua nos*, at the end, above, *De sponsalibus*; and so that text is soundly understood. And for this determination there is a case in l. *Cum plures*, § *Locator horrei*, Dig., *Locati*, which Lord Antonius de Butrio makes much of on the said c. *Tua nos*, above, *De sponsalibus*, when he says "although the Doctors do not allege it"; and he adds: because here it is an act depending on the will of two, a protestation to which the other party does not consent is removed by a contrary deed following, in acts regulated by the will of two. These are true unless voluntary intercourse has followed, by which he seems to have withdrawn from the words of protestation, because such intercourse purges all and removes the protestation.

For voluntary carnal intercourse principally works four effects. The first is that it turns words of future time to the present, as in the said c. *Is qui fidem*, above, *De sponsalibus*. The second is that out of an express preceding dissent it makes consent, as in c. *Veniens*, same title. The third is that it renders a conditional promise pure, as in c. *De illis*, above, *De conditionibus appositis*. The fourth is that it draws words of the third person to the first, as in the said c. *Tua nos*, according to Hostiensis, Johannes Andreae and Johannes de Lignano. It is of no force, then, whether the instrument speaks in the first or in the third person (above, *De iure patronatus*, § *Qui autem*; and it is noted below, *De verborum significatione*, c. *Abbate*, and in c. *Dudum*, above, *De statu monachorum*). Sometimes he protested from the beginning that if he uttered any words he did not intend to contract, and from the beginning both parties consented to that protestation; if nothing else followed but words, then the protestation would vitiate the act, since the party who is prejudiced consents, as in l. 1, § *Item si praedixerit*, Dig., *De Publiciana*; and Bartolus sets it on l. *Non solum*, § *Ex morte*, Dig., *De novi operis nuntiatione*, where he treats of the matter of protestation; Lord Antonius reports it on c. *Cum M.*, above, *De constitutionibus*. And note the words "if nothing else followed but words": because if words had followed and intercourse, the protestation, as base, ordered to inducing fornicating intercourse, would not have been valid, according to what is noted on the said c. *Cum M.* and on c. *Veniens*, second, above, *De sponsalibus*. For such a protestation is not only base but also contrary to the deed, and tends to remove the legal consequence; therefore it does not help, as in the said c. *Cum M.* 186. The decretal *Tua nos*, above, *De sponsalibus*, does not stand in the way, because there there was neither the substance nor the form of conjugal matrimony. Moreover, against such a presumption proof is not admitted even by confession, because the act is of such a nature that the confession of the parties does not stand against it. This is true unless the betrothed had first released each other from the betrothal and afterwards carnal intercourse followed; because then, since no betrothal existed, there would be nothing to be confirmed by intercourse, and then the betrothal would not pass into matrimony. Otherwise the Doctors say that the protestation is removed even if it were clothed with some cause, if intercourse has followed, provided there is no fear in the intercourse; because then the intercourse would not purge a fear which would fall on a constant man, as in c. *Veniens*, second, above, *De sponsalibus*.

Sometimes a protestation preceded and afterwards doubtful words followed for contracting matrimony, as in the said c. *Tua nos*, when he says "John betroths you"; and then say that matrimony is not induced, because what is said, that a protestation made in the absence of the party is removed by a contrary deed, has place when the deed is determinate and certain; but a doubtful deed is not so powerful for removing a preceding protestation. And Johannes, the ancient glossator, holds this, and after him Johannes Andreae on the said c. *Tua nos*, above, *De sponsalibus*; to which bears what is noted by Innocent on c. 1, above, *De his quae vi*. Sometimes the protestation is not clothed with a just cause, as when, a betrothal preceding, I protest that I do not wish to know the betrothed with the intention of contracting matrimony, and no cause exists for protesting this; and then Vincentius said on the said c. *Is qui fidem* that the protestation helps and that there will not be matrimony. Which saying, however, is commonly rejected by c. *Veniens* and by c. *Cum in tua*, above, *De sponsalibus*, unless they first dissolved the betrothal, as I said above. The reason is that although that protestation is not bare, yet it is clothed with a base cause, because it induces to fornicating intercourse. Hence, granted that both consent to the protestation, the protestation would not help; to this c. *Gratiae*, at the word *renuntiare*, *De rescriptis*, in the Clementines, satisfies enough. Sometimes no protestation preceded, and

only words intervened without intercourse, namely "John betroths you," as in the said c. *Tua nos*; and then Hostiensis and other Doctors seem to agree that matrimony is not induced, weighing intercourse itself as the final cause inducing matrimony. Lord Antonius on the said c. *Tua nos* says that either it is established in the penitential and in the contentious forum that he willed to contract by those words, and the case is clear that it is matrimony; or it is established in both forums that he did not will to contract, and likewise it is clear that it is not matrimony; or it is doubtful, and in the penitential forum one stands by what the party confesses. But in the contentious [forum], say: either it is established that the woman consented to the person, although she erred in the name, and it will be matrimony; or it is doubtful what she thought, and then either she knew this man, and she is presumed to have consented; or she did not know this man but John, and it will not be matrimony, because she is presumed to have erred in the body or person; or she knew neither, namely neither this man nor John, and then it will be matrimony, because she is deemed to have consented to the substance and to this person who uttered the words expressing consent *de praesenti*. Sometimes these words are present with intercourse, and the Doctors say on the said c. *Tua nos* that in the contentious forum matrimony will be judged, but in the penitential forum one will stand by the truth and intention of the contracting parties. And this is the mind of the said decretal *Tua nos*, which, so understood, does not contradict itself, since in the first case it speaks of what [holds] in the contentious forum, in the second of what in the penitential. Or: in the first, when there is doubt of consent or dissent; in the second, when dissent is set down as established — which can be established in the contentious forum, at least by a preceding protestation clothed with a just cause, or by a simple one only, since the words are doubtful. And this is the truer understanding of the said decretal *Tua nos*, according to Lord Antonius; and so, according to him, in both cases the aforesaid decretal *Tua nos* speaks of the contentious forum, since by that text it can by no means appear that it speaks of the penitential forum, unless one wishes to divine. The judge of the penitential forum, then, to whom these things are disclosed, has [the task] of inducing him who says he dissented to contract matrimony, and of counselling him to cleave to her as to a wife: because, granted that the penitential and contentious forums disagree, the penitential judge ought not to counsel that he not obey the contentious forum, since he can obey without sin. Which is to be well noted, according to Goffredus and Raymond in the *Summa* on matrimony, § *Pono quod aliquis*; and Lord Antonius follows this opinion on the said c. *Tua nos*, and says that he so counselled, in a like case, a certain monk who as to the penitential forum was not professed, although as to the contentious forum he was professed. Lord Antonius said that since the Church held him as excommunicated, he ought to obey the contentious forum; which is well to be noted.

There is a certain proof having its origin partly from the party, partly from another proof: as when the law presumes against me from another presumption of law and by law, [and] I wish to prove the contrary by oath and by one witness: will I be admitted to prove? The gloss on the said c. *Is qui*

fidem seems notably to say that it is so, with a distinction: either a just cause exists on account of which the proof should be admitted, and then it ought to be admitted; or no just cause exists, and it ought not to be admitted. And the text and gloss on the said c. *Vidua*, above, *De regularibus*, mean this. But Lord Antonius on the said c. *Is qui fidem* says he does not believe that gloss in monastic and matrimonial matters, in which proof by oath is not admitted, as is noted on the last chapter, above, *De iureiurando*. In other matters, then, the saying of the gloss is to be held.

There is a certain species of proof which is called fiction, where the law, certain about one thing, specially feigns the opposite. For if someone is captured and returns from the enemy, the law feigns him never captured, by the right of *postliminium*; and if he dies [there], the law feigns him dead at the first hour of captivity, as in l. *Lex Cornelia*, Dig., *De testamentis*; and Dig., *De captivis et postliminio reversis*, throughout; and Dig., *De vulgari et pupillari substitutione*, l. *Lex Cornelia*. And so in a like case: supposing that the woman stipulated nothing, the law feigns that she stipulated the dowry, as in l. 1, Cod., *De rei uxoriae actione*. For this is a fiction, although the gloss on the said c. *Is qui fidem* gave this example for a presumption of law and by law — and wrongly, as Lord Antonius says. And in this two differences appear between a presumption of law and by law and a fiction. [First,] a presumption of law and by law admits proof to the contrary by confession or by a preceding protestation; but a fiction holds wholly the opposite, because it admits no proof at all, since it feigns against the truth, of which truth, however, it is certain. Likewise in effect: because in a fiction the law never admits proof to the contrary, since the law, certain of the fact, wills it so to be and so disposes; proof and certification of the contrary of the fiction would therefore be superfluous. But a presumption of law and by law, as falling upon a doubt, sometimes admits certification of the opposite, as appears from what has been said. Set also the example of one adrogated, as the gloss sets it on the said c. *Is qui fidem*, by l. *Si arrogator*, Dig., *De adoptionibus*; and it alleges other laws concerning other examples, both of presumption of law and by law and of fiction.

Second, presumption of law only is distinguished on the side of the matter from which the presumption is drawn; and so we say that one is a presumption of nature, as when nature, in the matter, inclines the deed to be more in one sense than in another; therefore the law presumes that if I disinherit my son, I disinherit unjustly, as in the Authentic *Non licet*, Cod., *De liberis praeteritis*. Another is a presumption from another accident or from custom; and the gloss on the said c. *Is qui fidem* improperly calls this a presumption of man, for it is presumed from the custom of man (Dig., *De pignoraticia actione*, l. *Vel universorum*); so too it is presumed from the custom of beasts (Inst., *De rerum divisione*, § *Pavonum*); and this too is to this extent a presumption of law. Another is a presumption of fact, that is, arising from some deed; and then the effect of things having their matter from some accident is distinguished, because some of them extend the effect of the presumption from past to future, and so one is presumed to make false accusation because he once made false accusation (Dig., *De accusationibus*, [l.] *Si cui*, § *Idem*; and in c. *Semel malus*, *De regulis iuris*, in the Sext, and there the concordances in the gloss of Johannes Andreae). 190. Sometimes from a deed the law draws the effect of the presumption into the past: for example, some are accused of adultery; they repel this on the pretext of consanguinity; afterwards they contract matrimony; from this it is presumed for the past that they committed adultery (Cod., *De adulteriis*, l. *Si quis adulterii*; to which [bear] Dig., *Quod metus causa*, l. *Non est verisimile*; Cod., *De praescriptione*, [l.] *Scribam*; D. 44, [c.] *Multis*, where the gloss says it is an argument that one is sometimes presumed against on account of a past crime; D. 18, [c.] *Pervenit*; C. 34 q. 1, [c.] *Cum per bellicam*). Sometimes from the present about the present, as in the said c. *Multis*; sometimes from the present about the future (D. [5]0, [c.] *Si quis diaconus*); sometimes from the past about the past (C. 22 q. 1, [c.] *Non est*); sometimes from the past about the future (C. 23 q. [5], [c.] *Si apud*; and D. 82, [c.] *Plurimos*); and so one deed proves another (C. 1 q. 1, [c.] *Constat*). Guilelmus also treats of this in the *Speculum*, *De praesumptionibus*.

But you will say: is not that constitution of the Church, namely the decretal *Is qui fidem*, above, *De sponsalibus*, dangerous? For if matrimony will be judged in the contentious forum between those who

contracted a betrothal or matrimony *de futuro*, it is possible that, although carnal intercourse intervenes, yet those joined do not consent to matrimony; and so the Church will judge matrimony against the truth. For although, as to the bounds of the contentious forum, the Church can feign that consent intervened, yet it cannot make it truly so that consent intervened if it did not intervene, and that a man is truly and naturally bound against conscience. Hence on this account Hostiensis wished to argue against the Pope, that he would better have decreed that one so knowing could not contract with any other woman, nor she with any other man, and that if they contracted it would not be matrimony, and not have decreed that there is at once matrimony between them. And he says that this cause seems more reasonable than legal kinship or public honesty, through which even children who do not have full consent are rendered incapable (above, *De delictis puerorum*, c. ...).

But will one then have to obey the judge of the forum of penance or the judge of the contentious forum? Vincentius says that, since in the forum of penance matrimony is not judged by reason of defect of consent, he ought not to remain with her, but rather endure the sentence of excommunication; he alleges c. *Inquisitioni*, below, *De sententia excommunicationis*. He says, however, that the Church will stand for the presumed matrimony and the children will be deemed legitimate; and if he contracts with another, he will be deemed a bigamist, although in truth he would not be, nor will proof against bigamy be heard, just as not against the presumed matrimony. Which note well: because just as proof is not admitted against the principal, so neither against what follows from it, according to what is noted on c. *Accessorium*, *De regulis iuris*, in the Sext. 193. Hostiensis says that in both forums the Pope must be obeyed, because concerning matrimony not consummated he can dispose as he pleases without offence to God (above, *De conversione coniugatorum*, [c.] *Ex publico*). By which I believe that if after the betrothal he knew the first with fornicating intent and contracted with the second with true intent, the second will not be matrimony: because, since the Church judges this first [to be] matrimony, it necessarily sets an impediment to the second; therefore it annuls the second, which it can, since it is in the making and it is doubtful whether it is made. Lord Antonius says: I believe it safer to say that the second is valid as to God, the first as to the Church; and then what Vincentius said would proceed, that he ought rather to cleave to the first.

You see, then, how great a conflict has arisen in the preceding question. And certainly, since one cannot easily judge of intention — "for who among men knows the things of a man, except the spirit of the man which is in him," as the Apostle says, 1 Corinthians 2 — and if one ought simply to stand by the word of one saying he did not consent nor intend to contract and consummate matrimony, then anyone could say so in order to separate a matrimony; thus we would be in greater confusion than the Jews giving a bill of divorce (Deuteronomy 24), whom nevertheless the Lord rebukes, Matthew 19, saying: "Because Moses, by reason of the hardness of your heart, permitted you to put away your wives; but from the beginning it was not so." 194. Thus, then, since we believe the canons of the Church to have been issued and dictated by the Holy Spirit and by His prompting, as in c. *Violatores canonum*, C. 25 q. 1, it seems safer to stand by the judgment of the Church according to the contentious forum than by the judgment of anyone's own head. And it is just that the interpretation be made against him who employed deceit in extorting intercourse without marital affection, 195. since fraud and deceit ought not to protect anyone, nor ought anyone to carry off advantage from his own deceit (Dig., *De dolo*, l. *Ne dolo*; C. 15 q. 6, c. 1; C. 20 q. 3, [c.] *Constituit*; C. 30 q. [5], *dictum*; and above, *De rescriptis*, c. *Ex tenore*, and c. *Sedes apostolica*, at the end); and the misdeeds of men are not to be indulged, as in c. *Plerumque*, above, *De rescriptis*, and in c. *Significante*, above, *Qui matrimonium*

accusare possunt, as Dig., *De rei vindicatione*, l. *In fundo*. 196. So too we say that if a man contracted with some woman under the condition "if he found her a virgin," granted that he does not find her a virgin, it is presumed for matrimony (C. 29 q. 1, [c.] *Consensus*). Hostiensis, however, says that in the judgment of the soul it is not matrimony (above, *De conditionibus appositis*, c. *De illis*, and c. *Super eo*, and c. *Per tuas*). For it is also well that the woman who in fraud lied, saying she was a virgin when she was not, should remain deceived, who sought to deceive; and that the man be assisted, who perhaps intends to avoid bigamy. So, then, let them assist the deceived woman against the deceiver, that "he may learn that his penalty returns upon its author"; for without fault, unless a cause exists, no one is to be punished, as in c. *Sine culpa*, *De regulis iuris*, in the Sext; therefore a deceived woman ought not to bear the penalty without her own fault. 197. And since no penalty is said to be more fitting than that one be punished in that in which he offended, as in c. *Litteras*, above, *De temporibus ordinationum*, and in c. *Quanto*, above, *De translatione*, and C. 1 q. 1, [c.] *Si qui episcopi*, with similar places — therefore, when such a one after intercourse alleges dissent, it is fitting that it be presumed against his consent, as in the said c. *Is qui fidem*. It cannot be denied, however, that if in truth dissent is established before God, it will not be matrimony; and therefore, if he contracted with a second, the second will be matrimony and not the first, although the fraudulent deceiver sinned mortally, since on the other side, namely of this fraudulent man, deceit was present and consent was wholly lacking, without which the other things cannot effect the conjugal bond, as in the said c. *Tua nos*, above, *De sponsalibus*. And the theologians commonly hold this side on [book] 4 of the *Sentences*, dist. 28, where Richard, art. 1, q. 4, determines the same, saying in reply to the first argument, [drawn] from the said c. *Is qui fidem*, that what is contained in the said chapter is to be understood according to the judgment of the Church, which judges of interior things through exterior presumptions

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And he adds, in replying to the second, that the Church sometimes forbids something to be done, decreeing implicitly or explicitly that a deed done against this prohibition is void and empty; and in this way it forbids the contracting of a presumed matrimony which according to the truth of the matter is none. Sometimes in another way it forbids something to be done, not decreeing, explicitly or implicitly, [that it is] void or empty if the contrary is done; and although one acting against such a prohibition sins, yet the deed holds, unless there is something else that stands in the way. And in this way the Church forbids the contracting of matrimony while another presumed matrimony lasts, which according to the truth of the matter is none. Or it can be said, says Richard, that the Church does not forbid the contracting of a second matrimony except by supposing, from presumption, that the first is true; and therefore the second matrimony, although really it is true matrimony according to the judgment of God, yet according to the judge of the Church is none, and so it is none in the way in which it was forbidden by the Church. Thomas, however, says that if the deceiver wishes to do true penance, he must marry her without pretence, as far as lies in him, or give her a husband suited to her, or otherwise make satisfaction. He adds, however, that the condition of such persons joined is to be considered: as, if the man is of equal condition with the woman; but if the man is of much better condition, or another evident sign of fraud appears, it can probably be presumed that the betrothed was not deceived but feigned herself deceived; for she could well have thought that, in unequal condition, such a man would not have wished to take her as wife; and therefore then the man, as some say, would not be bound to the aforesaid. 199. On which bears what is noted on c. 1,

above, *De adulteriis*, where one seducing an unmarried virgin and deflowering her must either take her as wife or dower her according to his means and the condition of the girl; for which the gloss there alleges Cod., *De episcopis et clericis*, l. penult., and Cod., *De rei uxoriae actione*, l. *unica*, § *Sed quamvis*. But this penalty was imposed formerly according to the law of the Old Testament, Exodus 22; today, however, such a penalty is that he either have as wife her whom he violated, or be excommunicated and chastised and thrust into a monastery to do perpetual penance, as in c. 2, above, *De adulteriis et stupro*. 200. But in the penitential forum, according to William, if he deflowers her willing, without any negotiation about contracting matrimony, he is not bound to the aforesaid penalty; but if he violated her unwilling, or seduced, a promise of contracting with her preceding, then the aforesaid penalty has place. Hence it is to be enjoined on him in penance that he make satisfaction to the girl, at least by agreeing with her on the amount of a dowry; to which bears the reason of l. 1, at the beginning, [and] § *Publico*, Dig., *De fluminibus*, where the special custom of the region is attended to; to the same, above, *De sepulturis*, c. *Certificari*.

Concerning the second principal question, of the impediment of bond: 201. namely, what if the one contracting errs because he thinks himself free — as because she thinks herself to be [a widow], or conversely, on account of long absence, or because perhaps the husband was captured by the Saracens, and so the wife thought him dead, and so contracted a second matrimony with another — does such a second matrimony hold, and is the woman excused from adultery? It is answered briefly that if she was not first made certain of the death of her husband, she could not and ought not contract, although it is unknown what has become of the husband on account of long absence or a distant region, as in c. *In praesentia*, above, *De sponsalibus*. Which understand of matrimony contracted by words *de praesenti*, even if it had not been consummated by carnal intercourse — unless the person who remained wished to pass over to religion, which can lawfully be done before matrimony consummated by intercourse, as we have often said, by c. *Verum* and by c. *Ex publico*, above, *De conversione coniugatorum*, and by c. *Commissum*, above, *De sponsalibus*. Understand this also as soundly true by canon law, which in this corrects the civil law, which dictated that through a five-year absence divorce took place, and so after five years permitted passing to second vows (Dig., *De divortiis et repudiis*, last law). It is otherwise, however, in mere betrothals *de futuro*: for then, on account of the long absence of the betrothed, the betrothal is dissolved, as in c. *De illis*, above, *De sponsalibus*. But if after such a betrothal, even *de futuro*, carnal intercourse had followed, then by reason of absence for a long time the preceding betrothal would by no means be dissolved, since on account of the intercourse that followed a presumed matrimony is judged, as in c. *Is qui fidem*, above, *De sponsalibus*, and in the said c. *De illis*, same title; to which [bear] above, *De secundis nuptiis*, c. *Dominus noster*; and above, *Qui matrimonium accusare possunt*; C. 31 q. 1, [c.] *Sed ut dicitur*, and the following chapter, and c. *Quando virginibus*, and there the Archdeacon; and the Doctors treat it at some length on c. *Quoniam*, § *Si autem*, above, *Ut lite non contestata*; and Lord Baldus de Perusio on l. 2, Cod., *De repudiis*. Hence, unless she was first made certain of the death of her husband, if she contracts she sins mortally, and the second matrimony will never be lawful while the first stands; she is always judged an adulteress, according to what is noted on the said c. *Dominus noster*; and C. 34 q. 2, [c.] *Cum per bellicam*; and in c. *Cum in captivitate*, and [c.] *Si virgo*; and on the said c. *Quoniam frequenter*.

But I ask when she is said to be made certain, so that she can lawfully contract. I answer: the text in the said c. *Quoniam frequenter*, § *Si autem*, above, *Ut lite non contestata*, says that the absent one is to be awaited until something likely is presumed of his death; and it understands it of one absent without

his fault, as if he is perhaps held by captivity, sickness or other just impediment. But as to the aforesaid case, it would be the same even if he were absent by his own and even malicious will, provided that matrimony had been contracted by words *de praesenti*; which appears also from the definition of matrimony, because it is "the joining of man and woman, retaining an undivided manner of life," as we said above in the matrimonial definition, by the laws alleged there. Hence the gloss says on the said § *Si autem*, on the word *praesumatur*: namely by report; or because he was old and was in battle and did not return — it is presumed in these cases that he is dead; and if she contracts, believing so, she is excused from adultery, even if he lives, on account of ignorance (C. 34 q. 2, [c.] *Cum per bellicam*), because adultery is not committed without guilty intent (Dig., *Ad legem Iuliam de adulteriis*, last law); or if she received letters from those with whom he served in war (Cod., *De repudiis*, Authentic *Hodie*). Say, however, that she ought not to contract unless she is first certain of his death, as in the said c. *Dominus noster*, *De secundis nuptiis*, and the said c. *In praesentia*, above, *De sponsalibus*. But it is certain enough for them through presumptions of this kind, violent ones, after she has thought it necessary to wait for some time, namely for a year, as in the before-alleged Authentic *Hodie*, Cod., *De repudiis*. Of this, namely how death is proved, Bartolus treats enough on l. 2, Dig., *Quemadmodum testamenta aperiantur*. Lord Antonius, on the said c. *In praesentia*, above, *De sponsalibus*, says that either we treat of the possibility of contracting as to effect, that the one contracting may be free of sin — and then any likely presumption of the death of the spouse suffices, nor is she punished for this, provided that afterwards, the husband returning, she return to him; or conversely, the wife returning, or the wife otherwise made certain of the husband's life (C. 34 q. 2, [c.] *Cum per bellicam*). In which case, then, either she is made certain of his life, and she must at once depart if she contracted; or she is not fully made certain, but so that she doubts of his life, and then she ought not to withdraw, but ought not to demand the debt, yet ought to render it when demanded, as in the said c. *Dominus noster*. Or it is treated of the power of giving licence on the part of the Church, that she may contract; and the aforesaid decretal *In praesentia* 203. says that if the Church can be made certain by a messenger, licence is to be given; and so from that text we have one mode of proving. Lord Antonius says: I believe this is possible enough on account of uncertainty, because otherwise this is not easily possible [to prove]. Yet I think that here the judge must attend much to the quality of the messenger — what kind he is, and so how much faith is to be given him — and to the circumstances which he alleges of the likelihood of death; these and other things considered, it is left to the discretion of the one judging whether licence should be given. Second, I believe that it will so avail if death is proved as law 2 and the Authentic *Hodie*, Cod., *De repudiis*, require — which Authentic corrects l. *Uxores*, Dig., *De divortiis et repudiis* — as, if the husband is dead, or is said to have died in war, she should go to the commander of the war, by herself or through another, and some fellow soldiers who were in the war and knew him should swear to the death of the husband in the hands of the judge or of a commissary sent by the judge; and the said law and Authentic mean this — although the canonist Doctors say, and well, that this solemnity is not necessary by canon law, since it can be proved otherwise, as appears from what precedes and follows. A third mode of proving will be if it is proved that the ship in which the husband was suffered shipwreck; then she will be able to contract, and licence should also be given her by the Church. And Lord Antonius says on the said c. *In praesentia* that as to what the gloss says on the said c. *Quoniam frequenter* — namely that if death is established by report she is said to be made certain — he does not believe this suffices for licence to be given by the Church, unless the woman had at least one witness proving the death, as in the said

c. *In praesentia*; but such report would excuse the soldier['s wife] from sin if she contracted. So too it would excuse when proof would otherwise be difficult, and then she could also be licensed by the Church; or when he was absent for a very long time, for in such matters report avails well, as is noted on c. *Veniens*, below, *De verborum significatione*; or because he was old and has long been awaited. And then Lord Antonius says: I believe that for death to be concluded in this, at least the age of 100 years ought to be awaited; nor even then is death fully proved, because although someone is presumed to live for 100 years, yet it is not excluded that he be presumed to exceed the age of 100 years; but I believe well enough that it is proved presumptively. And Cynus holds this on l. *Si quidem*, Cod., *Soluto matrimonio*, and Butrio on l. 2, [§] *Si dubitetur*, Dig., *Quemadmodum testamenta aperiantur*. You say that such an age does not precisely conclude death, since the time of the present life is uncertain with us. Hence Solomon says, Ecclesiastes [9]: "I turned to another thing, and saw under the sun that the race is not to the swift,

nor the battle to the strong, nor bread to the wise, nor riches to the learned, nor favour to the skilful, but time and chance in all. Man knows not his own end; but as fishes are taken with the hook, and as birds are caught with the snare, so men are taken in an evil time, when it shall suddenly come upon them." And Psalm 89, which begins *Domine refugium*, and is called "the prayer of Moses, the man of God": "Our years shall be considered as a spider; the days of our years in them are seventy years; but if in the strong they be eighty years, what is more of them is labour and sorrow." Also of Noah, when he was five hundred years old, God said: "My spirit shall not remain in man for ever, because he is flesh, and his days shall be a hundred and twenty years" (Genesis 6), since for so long a time beforehand the flooding of the deluge was revealed to him. Yet it is added that Noah was six hundred years old when the waters of the flood overflowed the earth; and so it appears that twenty years were cut off from the time announced. Some say that such a diminution or anticipation was made on account of the sin of sodomy, of which Genesis 6. And nevertheless Noah lived after the flood three hundred and fifty years, and all his days were nine hundred and fifty years, and he died (Genesis 9, at the end). Therefore it appears that the age of 100 years does not conclude death. Another proof, then, is necessary for the Church to license justly.

A fourth mode of proving death is that the husband was in battle and is said to have died there; where the gloss concludes that through these violent presumptions it is certain enough of the death of the husband. These modes, namely by report and common opinion, Cynus admits when it cannot otherwise be proved, as because he died among thousands of men; then it is proved by conjectures (Dig., *De re militari*, l. *Non omnes*, § *A barbaris*); and in the first he says it suffices that fellow soldiers report that he was in a dangerous battle in which many died, because such things must be proved by conjectures. And so Cynus says on the Authentic *Hodie*, Cod., *De repudiis*, and on l. 2, § *Si dubitetur*, Dig., *Quemadmodum testamenta aperiantur*. But because this matter of the proof of death is difficult, and the proof of death is handled in many ways in judgments, following Lord Bartolus on the said § *Si dubitetur*, it must be noted that the proof of death is something privative or negative, whose proof is difficult, as in c. *Bona*, above, *De electione*. And therefore in such matter the quantity of the prejudice is to be attended to, and according to it a variation of proof is required, and a greater or lesser certitude of death. For sometimes it is a question of things of the greatest prejudice, as when someone is accused of homicide; and death must be truly proved (Dig., *Ad legem Aquiliam*, l. *Videndum*, toward the end); which will be proved if the witnesses say they saw him dead, or that they touched him cold, or [found] him to have no pulse; or if they say they saw him have the signs of death, or in the throes of

death, since there are no words more express for concluding death. The same if they say, "We saw him buried in such a place" (Dig., *De religiosis et sumptibus funerum*, l. 2); or if they say, "We saw him expire," that is, emitting his last breath, as in l. *Ita vulneratus*, at the beginning, Dig., *Ad legem Aquiliam*; or if someone says, "I saw him beheaded": for such things of necessity conclude death. Sometimes it is a question of things which are not of so great prejudice, though they are great, as of someone's reputation or status; and then a presumptive proof is required, as by report and common opinion, of which it was said above. It must be noted, however, here that sometimes the death bears on the present or a nearby place, within which proof by witnesses can easily be had; and then I believe that proof by report would not suffice, but full proof is required, until the Church is certain, before it gives licence to contract. For, as Bartolus says, in such a case it is a question of prejudice to reputation, whose prejudice is great to the woman marrying, and also to the husband, if his wife marries while he is living. 204. And Lord Antonius says that he saw a man to whom the case in question happened, [who was] as if in a case of despair. And I, with my own eyes, while I was in secular ministries, in the office and government of a certain city, had in fact such a case of one who had been captured by the Saracens and had remained in captivity for 24 years; and his wife, thinking her husband dead, had married a second time and had a daughter by the second husband; but as soon as her husband returned, the woman went back to her own husband, and the daughter remained with her father; and by the grace of God they remained in the best concord, etc. But where proof is sought of a death distant in respect of time, or far off in respect of place, so that clear proofs cannot be had, I believe well enough that proofs by report and the like, of which it was said above, proceed: for report proves in distant matters and where others cannot easily be had, as Innocent notes on c. *Veniens*, below, *De verborum significatione*, and Lord Antonius de Butrio on c. *Veniens*, above, *De testibus*; to which [bear] Dig., *De probationibus*, l. *Arbiter*; and Dig., *De aqua et aquae pluviae arcendae*, l. *In summa*, § *Apud Namusam*; and in the Authentic *Ut liceat matri et aviae*, §...; to which also bears what is noted below, *De verborum significatione*, c. *Quid per novale*. Some things are likewise of great prejudice, but not the greatest, as when it is a question of some pecuniary advantage, about which, whatever is done, it can be restored to the former state; and then too proof by public report suffices, and other similar proofs, as that the kinsmen of such a one made mourning for his death and hold him for dead (Dig., *De heredibus instituendis*, last law; and Dig., *De acquirenda hereditate*, l. *Sed et si de sua*). Bartolus also says on the said § *Si dubitetur* that he thinks well enough that an inquiry can be made to prove death, as is done in other matters where a negative and privative must be proved (Dig., *De rebus creditis*, l. *At magis*, § *Ne passim*; Cod., *De pignoribus*, Authentic *Hoc si debitor*; Dig., *De his quae in fraudem creditorum*, l. 3); and it can be asked of the judge that he send messengers and diligently inquire whether such a one is dead or still lives; to which [bear] Dig., *De verborum obligationibus*, l. *Hoc iure*; and Dig., *De legatis* [2], l. *Cum quidam*, last §, and the following law. And I believe that for the purpose of contracting matrimony it is at least required that this search be made in the places where he is said to have died, or in neighbouring places. And note that it does not suffice that the messenger find nothing; he must inquire what has become of him; and if he finds at least that he is held for dead in those places, it will suffice. Otherwise, if he reports that he heard nothing of him, it does not prove, as the text and the last gloss on the said c. *In praesentia*, above, *De sponsalibus*, mean; and so this decretal can also be understood as speaking of such certification by a messenger sent by the office of the court, or by the woman herself. Some things are of slight prejudice, and proof by one witness, or by another light presumption, suffices, as in the opening of a will, as in the said § *Si dubitetur*.

But where it was said that the woman is excused if, made certain by a light presumption, she contracts, I ask: ought such a matrimony to be published through the churches? Hostiensis says on the said c. *In praesentia* that it should not, because such publication could induce scandal; but publication simply made before the bishop suffices (above, *De clandestina desponsatione*, c. 2), who enjoins penance and suspends carnal commerce for a time, since both are found at fault. 205. But what if the woman who, by the said presumption of the husband's death and alleging it, contracted, afterwards wishes to prove that the first husband is alive — is she to be heard? Hostiensis says not, unless the first appears in person; he alleges C. 34 q. 2, [c.] *Cum per bellicam*. Which saying Johannes Andreae thinks false; which Lord Antonius also holds. For although the said canon *Cum per bellicam* and the following express that the woman must return to the husband who has come back, yet from this it does not follow that, he not having returned, the impediment of matrimony cannot be proved. 206. For what if the husband never wished to return? Would it be lawful on this account for his wife to contract with another? Certainly it would be foolish to say this; for it does not prove that a thing is not, that it happens to be absent from here, as in l. *Neque natales*, Cod., *De probationibus*. To the aforesaid bears what the last gloss says at the end on the said c. *In praesentia*, above, *De sponsalibus*.

Concerning the third principal question, namely what if one contracts under a condition, several things are asked. 207. First I ask: someone contracted a betrothal under the condition "if she permits herself to be known"; does a presumed matrimony result from the intercourse that follows? I answer that it does, according to the gloss on c. 1, on the word *si permiserit*, above, *De sponsa duorum*, which says that if the condition is understood of fornicating intercourse, because it is base, it must be held as not added (in c. [ult.], above, *De conditionibus appositis*); therefore when intercourse follows there is at once matrimony, as in c. *De illis* and in c. *Per tuas*, above, *De conditionibus appositis*. But if the condition is understood of conjugal intercourse, much more strongly the matrimony holds when intercourse follows; for it seems rather a binding than a condition. And the gloss on the said c. 1, above, *De sponsa duorum*, resolves "if" into "because"; similar, Dig., *De tutelis*, l. *Multo*. Hence that "if" is not held conditionally but causally, because in every matrimony this cause, namely carnal intercourse, must intervene, at least as to purpose (C. 27 q. 2, [c.] *Cum ergo*, at the verse *Beata Maria*). Expound "if she permits," that is, "because she permits"; so above, *De electione*, c. *Significasti*, at the words "if you love me." Hence when intercourse follows, at the same moment the betrothal is made pure, and so matrimony is induced (C. 22 q. 5, [c.] *Peierare*; C. 32 q. 5, [c.] *Qui viderit*). 208. Second I ask: Titius betrothed a woman; afterwards I betrothed the same woman; then I betrothed another; the betrothal between Titius and the first is dissolved; with which must I remain? I answer, according to Vincentius on the said c. 1, *De sponsa duorum*: I must remain with the second, since with the first the betrothal did not hold, since she was another's betrothed; hence I sinned in betrothing her. And he says that perhaps it would be otherwise in matrimony. Lord Antonius says there: I believe that in betrothals I must cleave to the first, because that was first; nor does the sin which I committed in contracting wrongly stand in the way, because the obligation is not removed by it. But in matrimony I believe that I must cleave to the second, if I first contracted by words *de praesenti* with the woman betrothed by Titius, [and] afterwards

I contracted with the second, because the first betrothal did not hold. But if a betrothal *de futuro* had been contracted by Titius, and I had contracted *de praesenti* with her with whom Titius had contracted *de futuro*, and secondly I contract *de praesenti* with another, then I must cleave to the first; and this is plain.

But what if someone said thus: "I consent to you, if you kiss me," [and] she kisses him — will it be matrimony? I answer, according to Hostiensis, that it will, because words are not required for the substance, although they are required as the form expressive of consent; of which in c. *Tua nos*, toward the end, above, *De sponsalibus*; and I said above how matrimony ought to be contracted, § *Circa hoc igitur*. For matrimony is substantially perfected by consent alone, as in c. *Tuas dudum*, above, *De sponsa duorum*, and C. 27 q. 2, [c.] *Sufficiat*, and in c. *Cum apud* and in c. *Duae*, above, *De sponsalibus*. 210. Third I ask: what if the condition is not added at the very beginning but after an interval — does that adding of a condition suspend the betrothal? Answer: the gloss on c. *De illis*, above, *De conditionibus appositis*, says not; it alleges Cod., *De donationibus quae sub modo*, l. *Perfecta*. Lord Antonius says there that this is true in betrothals *de praesenti*, because they are already perfected as to every right to be transferred and are irrevocable; otherwise in betrothals *de futuro*, as above, *De sponsalibus*, c. *Praeterea*. Yet that condition would not suspend the betrothal but would dissolve it, where the agreement was clothed by canon law; argument from Dig., *De obligationibus et actionibus*, l. *Obligationum fere*, § *Placet*. But why, when matrimony has been contracted or a betrothal *de praesenti* has followed, is the condition removed? The gloss answers on the said c. *De illis*, above, *De conditionibus appositis*, on the word *consensus*: because then they seem to have withdrawn from the condition added and are understood to consent simply; similar, above, *De desponsatione impuberum*, c. *De illis*, at the end. And much more strongly, if intercourse has followed, one seems to have withdrawn from the condition (and in c. *Per tuas*, above, *De conditionibus appositis*); and so there is presumed matrimony, against which proof to the contrary is not admitted (above, *De sponsalibus*, [c.] *Is qui fidem*). And so one withdraws from a condition in two ways, namely by a subsequent express consent *de praesenti*, or by carnal intercourse had afterwards between them, as in c. *Super eo*, above, *De conditionibus appositis*. Johannes Andreae says on the said c. *De illis*, same title, that if after the betrothal affinity supervened through intercourse had with the betrothed['s kinswoman], it would not pass into matrimony, according to Laurentius; and well, both because affinity does not permit it, and because the intercourse does not find a betrothal, which has already been broken by the affinity that followed, as appears in c. *Veniens*, above, *De eo qui cognovit consanguineam uxoris suae*. Which understand of betrothals *de futuro*; it would be otherwise of betrothals contracted by adults by words *de praesenti*, because there there is matrimony, which is not dissolved by supervening affinity; but he who committed incest is bound to render the debt to the spouse asking, but ought never to demand it, as in c. 1 and in c. *Transmissae* and in c. *Discretionem* and in c. *Tuae* and in c. *Iordane*, and almost throughout, above, *De eo qui cognovit consanguineam uxoris suae*.

Fourth, principally, I ask: someone contracts with a woman by words *de praesenti* under this condition, "if my father consents"; the father will not consent; is it matrimony notwithstanding the father's dissent? I answer that it is not, [where] there has been no proceeding further, namely to intercourse or to an express withdrawal from the condition, as in c. *Super eo*, above, *De conditionibus appositis*. Hence, the ancient opinions rejected, the truth is that whether matrimony is contracted under a

condition placed in the decision of a third party or under another condition, always, as to the one contracting, it regards the substantial thing, namely the consent by which matrimony is given substance; for the substance of matrimony is not regulated by the consent or dissent of a third party. Hence it is of no force whether the condition regards the consent of a third party or not, provided it regards the consent of the contracting party. And for this there is the text in the last chapter, above, *De conditionibus appositis*: for there it appears that a condition added against the substance of what is done vitiates and is not vitiated; and a protestation made against a deed, taking away some substantial part, removes the deed and the protestation is not vitiated; and this because the deed, as struck down in a substantial part, cannot take strength against the protestation itself — of which matter Lord Antonius treats on c. *Cum M. Ferrariensis*, above, *De constitutionibus*. For although a base or impossible condition not taking away from the substance of matrimony is vitiated and does not vitiate matrimony, and in favour of matrimony such conditions are held as not added, as in the said last chapter, above, *De conditionibus appositis*, yet conditions taking away from the substance of matrimony well vitiate but are by no means vitiated.

Hence the gloss there says that four differences of conditions are principally to be investigated. For some conditions are honest and necessary to matrimony; some are honest and accidental to matrimony; some are base and accidental, not touching the substance of matrimony; some are dishonest, conflicting with matrimony or with some part of it. In the first case, when the conditions are honest and necessary to matrimony, then the condition is valid; indeed without it [the matrimony] would not be valid, as if a Christian contracts with a Jewish woman under this condition, "if the Jewish woman becomes a Christian" (C. 28 q. 1, [c.] *Non oportet*). But there is doubt what of a Christian and a heretic. Huguccio, as Johannes says on the said c. *Non oportet*, [says] that the matrimony is not valid; to this, *De haereticis*, c. *Decrevit*, in the Sext, where it says, "unless perhaps the women had contracted matrimony with men whom they then knew to be heretics." William holds the same in the *Speculum*, *De divortiis*, after the beginning; and on c. *Quanto*, above, *De divortiis*, and on c. 3, *De haereticis*, on the first gloss; and I said [it] above, *De disparitate cultus*, q. 2. In the second case, when the conditions are honest and accidental, as for example "I contract with you if you give me 100," or "if my father consents," such conditions are lawfully added, as in the said c. *De illis*, above, *De conditionibus appositis*. But do such conditions suspend matrimony? Say that either they are of the past or of the present, and they do not suspend; rather they either at once infect the matrimony, if they are false, or at once perfect it, if they are true (argument from Dig., *Si certum petetur*, l. *Cum ad praesens*; and Dig., *De iniuriis*, l. *Cum in secundo*); or they are of the future, and then they suspend until the event of the condition, and so on failure of the condition they infect, but on its fulfilment they perfect, as in the said c. *De illis* and in c. *Super eo*. But the suspensive force is removed by intercourse [or consent] *de praesenti*, as in the said c. *De illis* and in c. *Per tuas*, same title. In the third case, when the conditions are dishonest and base and accidental, not touching the substance of matrimony in whole or in part, such conditions are rejected on account of their baseness and the favour of matrimony, as if someone said, "I contract with you if you commit homicide," or the like, as in the said l. *Cum in secundo*. Similar if the condition were impossible, as if it is said, "I contract with you if you give me an empire," or "if you touch heaven with your finger," as in the said l. *Cum in secundo* and in c. 1 and the last, above, *De conditionibus appositis*. In the fourth case, when the conditions are against the substance of matrimony, then it must be said that such conditions vitiate matrimony and are themselves by no means vitiated; and of such the aforesaid last chapter, at the beginning, above, *De conditionibus appositis*, speaks.

For the declaration of which it is fitting to know that there are three goods of matrimony, namely fidelity, offspring and sacrament, of which C. 27 q. 2, [c.] *Omne*, and in [book] 4 of the *Sentences*, dist. 31; the words are originally Augustine's, on Genesis and in the treatise *On the Good of Marriage*. In fidelity it is attended to that after the conjugal bond one not lie with another man or woman; in offspring, that it be lovingly received and religiously brought up; in sacrament, that the marriage be not separated, and that the man or woman put away be not joined to another even for the sake of offspring. 214. A condition against fidelity is as: "I contract with you if I can take another woman." A condition against offspring is as: "I contract with you if you will avoid offspring." A condition against the sacrament is as: "I contract with you if you give yourself up for gain to adultery." Such conditions, because they touch the substantials of matrimony, vitiate matrimony and are not vitiated. It is necessary, however, that the condition be directed against something substantial; otherwise if it were against something that by law is consequent upon the act, not of the substantial part of the contract to which the condition is added — as if I give a thing to a church with the pact that it be lawful for me to alienate that thing apart from the authority and utility of the church, and that it not be at the disposal of the bishop (C. 10 q. 1, c. 2). Otherwise also if it were against something not substantial from the nature of the contract or from its first institution, but from some accidental determination of law or of the Church, so that something is accidentally added to it as to substance, as is the case in the order of the diaconate, that continence be observed: for this is not of the original but of the accidental substance of the order; therefore [such a condition] does not vitiate the character but only the exercise; and such a condition added does not vitiate but is vitiated. Hence the ordination of a deacon under the condition "if it be lawful there to have a wife" is valid, and the condition is rejected (D. 28, [c.] *Diaconi*). Likewise, as to what was said, that a condition added against the substance of matrimony vitiates matrimony, it is true according to the qualification of the Doctors, when both consent; otherwise, if both do not consent, matrimony is not impeded (C. 32 q. 2, [c.] *Aliquando*): as if one says, "I contract with you if you avoid the generation of offspring," and the other contradicts or is silent — when it is presumed that he contradicts, in favour of matrimony, according to Innocent and Hostiensis on the said last chapter, above, *De conditionibus appositis*, and the Archdeacon on the said c. *Aliquando*. And Hostiensis says that women are to be instructed in such practice. By this the Doctors say that if I contract with a woman "if she avoids offspring," and she consents to the condition, and afterwards I know her, here it is not matrimony, because the preceding contract is null on account of the addition of the condition against the substance, and intercourse alone of itself is not sufficient to induce matrimony. A woman knowing the man's deceit ought not to permit herself to be known, unless

the condition is remitted; and if the man remits it to her and afterwards knows her, matrimony will be judged — saving that if he in no way consented, in the penitential forum matrimony would in no way be judged (above, *De sponsalibus*, c. *Tua [nos]*), according to Hostiensis.

I ask: I entered religion under this condition, "if it be lawful for me to use matrimony," or "to have my own goods"; is the entry valid? Some say not, because this is against the substance of the monastic state (above, *De statu monachorum*, c. *Cum ad monasterium*; above, *De conversione coniugatorum*, c. *Dudum*); and it was the opinion of Huguccio. The gloss touches this question on c. *Insinuante*, below, *Qui clerici vel voventes*, on the words *in domo propria*, where the text says that a certain woman made a vow of chastity in the hands of one of the brothers of Saint Augustine, with this tenor added, that she should remain in her own house with all her substance; and it is decided that the aforesaid woman is wholly

bound to religion. The gloss there, however, says that these words, "in her own house with all her substance," are to be expounded, that is, with the usufruct of her substance, formerly hers before becoming a nun: so that from the usufruct of those things she should have food and clothing in her life; for whatever is left over must be and is the monastery's, and if anything is lacking it is supplied by the monastery. A similar exposition is found in C. 27 q. 1, [c.] *Si quis rapuerit*. And so she will be a nun, and can remain in the house that was once hers with the use of her things, which she conferred on the monastery; so C. 27 q. 1, [c.] *De viduis*. The gloss also touches it on c. 2, *De statu monachorum*, and Johannes [Teutonicus] in the gloss on C. 32 q. 2, [c.] *Solet quaeri*. The gloss and Huguccio hold this opinion; Innocent touches it on the last chapter, above, *De conditionibus appositis*; Damasus in the *Summa*, *Qui clerici vel voventes*, last question; Accursius, the glossator of the laws, touches it on the Authentic *Ingressi*, Cod., *De sacrosanctis ecclesiis*, and there Lord Baldus de Perusio. And the same Accursius distinguishes on l. *Per servum*, Dig., *De usu et habitatione*, whether the pact is added at once, and it vitiates; or after an interval, and it is vitiated. William in the *Speculum*, *De statu monachorum*, verse 48, recites the opinions; and various Doctors have spoken variously on this matter, especially the legists, some of whom did not judge well. Johannes Andreae holds that the entry into religion is valid, the condition being rejected, but that the matrimony is not valid; and he assigns a manifold reason for the difference. First, because offspring and fidelity in the matrimonial sacrament are more intrinsic and originating of the substance of matrimony than the renunciation of property is in the monastic state; because from its origin matrimony was induced with these, when Adam said, "They shall be two in one flesh" (Genesis 2), which is expounded, that is, for procreating or begetting one flesh; on account of which it was said to them, "Increase and multiply, and fill the earth" (Genesis [1]). And this was the first original cause of the institution of matrimony before sin, namely for the office of generation; but after sin it was refashioned as a remedy against the concupiscence of the flesh, as the Master says in [book] 4 of the *Sentences*, dist. 26, c. 1 and 2. But that monks should not have property is instituted by the Church (C. 12 q. 1, [c.] *Certe*, and c. *Nolo*). Second, because in carnal matrimony the contract regards the advantage of both parties, because an obligation is contracted on both sides in each; hence the wife is bound to the husband because the husband is bound to the wife. But in the monastic state one is bound principally to God, and is bound to the vow through the abbot or another receiving him, as through a minister. Therefore he says that the consent of the woman in the contract prejudices, because the consent is present of him to whom the promise is made, as to whom one is principally bound; but when he made the vow with this, that it be lawful for him to retain his goods, Johannes says that there only the consent of that minister is present, whose fault ought not to harm God, to whom one is principally bound. Thus Johannes Andreae.

Paulus de Lazariis, on the Clementine *Eos qui*, *De regularibus*, attacks this opinion of Johannes: for he himself says that just as in matrimony, so in the monastic state, each is bound to God, so much so that by common consent, after each has been contracted, just as in the one, so neither in the other can it be dissolved by one's own will. Of matrimony it appears in the said last chapter, *De conditionibus appositis*; of the monastic state it appears in c. *Licet*, above, *De regularibus*, unless he wishes to pass to a stricter rule, as in the said c. *Licet*. Likewise in both the obligation equally regards a man and is made through a man: for just as matrimony requires husband and wife, so too the monastic state in profession requires an abbot receiving and a subject, or another in place of the abbot. Hence, although someone professed the Cistercian order, he would not be a monk there unless he were received to profession; to which bears what is noted above, *De regularibus*, c. *Porrectum*, because the

habit does not make the monk, but profession. No reason, then, can be given, says Paulus, why an abbot receiving one to the monastic state with the condition that the monk have property should not so prejudice [himself] as the woman does by consenting to the aforesaid condition, namely of avoiding offspring. But certainly, as Lord Antonius de Butrio says on the said last chapter, above, *De conditionibus appositis*, Paulus does not rightly grasp the words of Johannes Andreae. For the contract of matrimony is principally entered upon for the benefit of those contracting; hence the Lord said, "It is not good for man to be alone; let us make him a help like unto himself" (Genesis 2); and Ecclesiasticus 26: "A good wife is a good portion; she shall be given in the portion of them that fear God, to a man for his good deeds"; [and] "as the sun when it rises to the world in the high places of God, so is the beauty of a good wife for the ornament of her house"; and Ecclesiasticus 36: "The beauty of a woman cheers the countenance of her husband, and a man desires nothing more"; and below: "He that possesses a good wife begins a possession; she is a help like to himself, and a pillar of rest. Where there is no hedge, the possession shall be spoiled; and where there is no wife, he mourns." But the obligation and benefit of those contracting is not so equal in the monastic state, because the abbot binds himself to nothing toward the monk, or at least not to what the monk binds himself to. Moreover, in each contract two things can be considered concerning the bond of obligation. First, the bond itself of the contract; and this bond in matrimony is principally in the person set before [one] as the end of the binding, but secondarily in God as to the indissolubility of the bond; hence the sacrament holds the last place among the three goods of matrimony. The whole opposite is in the monastic state, in which the principal bond of the vow is directed to God; hence the one professing promises principally to God and lastly to the abbot, as appears in the form of profession; for the one professing or vowing intends principally to please God, of which Lord Antonius speaks on c. *Praeterea*, above, *De sponsalibus*; and so it appears that the obligation is directed secondarily to the prelate. But in the remission of a condition concerning the bond, the person with whom the contract is principally entered must be attended to; which person in matrimony is the man and the woman; therefore the man consenting prejudices himself, or conversely. In the monastic state the principal person with whom one contracts is God himself; therefore, since God does not consent, the consent of the minister does not prejudice Him in the adding of a condition against the substance of the monastic state; and so the monastic state will be valid.

Conclude, then, by distinguishing threefold. For sometimes the entry is made by way of a mode, sometimes by way of a cause, sometimes by way of a condition. If it is made by a mode — e.g., "I enter religion so that it may be lawful for me to retain my own goods" — it is plain that the entry is not vitiated, because the nature of a mode is not to suspend the beginning of the act but to give a quality to the act, as Lord Antonius says on c. *Verum*, above, *De conditionibus appositis*, in the [second] understanding of that decretal; therefore, since the entry is given, it receives being and rejects the mode repugnant to its nature. If by a cause — as "I enter religion because it is lawful for me to retain my goods" — still the entry is not vitiated, because the cause comes to confirm what is, and does not suspend the act; therefore what is done is valid, and the cause is rejected as false. If by a condition, then either the condition is resolutive — as "I enter religion, and unless it be lawful for me to retain my goods, let the entry not be valid" — and still the entry is valid, because this resolution presupposes a valid entry, which receives being with power to repel the resolution from a condition repugnant to it. And Lord Antonius says the same in all these cases in matrimony, by which he limits the said last decretal, above, *De conditionibus appositis*. Or the condition is suspensive; and then either

it is added after an interval, and still both the matrimony and the entry are valid, because once it has received being, the adding of a condition cannot [touch] the being of the matrimony already founded, as in l. *Per servum*, § 1, and what the gloss notes there, Dig., *De usu et habitatione*; and so understand Butrio and Marsilius on the said Authentic *Ingressi*, whose are the preceding words. Or something suspensive is added from the very beginning, as "I enter religion if it be lawful for me to retain my goods"; and then note a certain plausible consideration which Bartolus had on the said Authentic *Ingressi*, where he says that either it is established that he wishes to retain them as to administration, and the entry is valid, because it is not repugnant to the substance of the monastic state that he have goods as to administration, as in c. 2, above, *De statu monachorum*; or it is doubtful, and in doubt it is understood so that the condition is not against the substance, and so the entry is valid, and the condition is understood as to administration only. But certainly this consideration of Bartolus is of the mind of the gloss on the said c. *Insinuante*, above, *Qui clerici vel voventes*; which saying, however, Lord Antonius attacks on the said last chapter, above, *De conditionibus appositis*, following Johannes Andreae; and Lord Antonius says: this saying never pleased me, because in such a case the monk has the administration, namely from a pact, as by right owed to him; which is against the substance of the monastic state, because at least he has that as his own, namely the administration as by his own right, and all appropriation is against the substance of the monastic state. It is, however, well lawful for a monk to have administration, not by right of purpose, but by the motion of the abbot commanding, which is not so in the aforesaid case. And if it is said, "Rather, he can have perpetual administration, as appears in one confirmed by the Pope, as in c. *Porrectum*, above, *De regularibus*," say that he can have it from the Pope alone, not from his own contract; nor even there does he have it perpetually in respect of the Pope, because then the Pope is in place of the abbot, who at his nod can remove him

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from the administration. Lord Antonius therefore says, the aforesaid distinction rejected, that in every aforesaid case the condition is vitiated and the entry is valid, as Johannes Andreae says, because in this adding of a condition — as against the substance of the monastic state, but [directed] toward God — it cannot prejudice God who receives, who does not consent to such a condition. But it is otherwise in matrimony, as Johannes Andreae says. Lord Antonius therefore adds: let the legists, then, decide their laws and leave the canons, because it is not without fault to put one's sickle into another's harvest. It could, however, be saved, he says, in such a way that the one so vowing is bound only by the vow of obedience and chastity, but not of poverty. Nor is it impossible that someone vow one without the others, as appears almost throughout the title above, *Qui clerici vel voventes*. But where he wished to stay in a congregation, this condition would have to be rejected as base, because every part is base which does not agree with its whole (D. 8, [c.] *Quae contra mores*; and in the last chapter, above, *De sponsa duorum*).

But I ask whether an impossible condition vitiates in other acts. The gloss on the said last chapter, above, *De conditionibus appositis*, says that in last wills it is vitiated and does not vitiate (Cod., *De institutionibus et substitutionibus*, l. *Reprehendenda*; and Dig., *De conditionibus institutionum*, l. *Quidam*; and Dig., *De his quae poenae nomine relinquuntur*, l. *unica*, at the end; and Dig., *De legatis* 1, l. *Turpia*, with similar places). Understand, however, that it is vitiated in favour of him in whose odium it is added;

therefore, if an heir is charged to give ten unless he kills a man, then the condition and the disposition are rejected, as in the Institutes, *De legatis*, at the end, and Cod., *De his quae poenae nomine*, l. 1. But if it is added in odium of the legatee, as "I bequeath ten to Titius if he kills a man," then the condition is rejected and the legacy must be paid, which is favourable. But in contracts, the gloss says, a base condition vitiates the contract: as "I promise you 100 if you kill a man" — the promise is not valid (Dig., *De verborum obligationibus*, l. *Generaliter*; and Inst., *De inutilibus stipulationibus*, § *Impossibilis*). Nor does l. *Si militem*, [Dig.,] *De condictione ob causam*, stand in the way, because there the condition was not impossible, namely that a soldier be a proctor: for he can be a proctor if he is not excepted against, as in l. *Ita demum*, Cod., *De procuratoribus*; therefore, unless it is objected to him, what he does as a proctor admitted in judgment is well valid. And let the aforesaid suffice concerning the impediment of bond.

There follows the tenth case, according to the order of the words expressed in the verses, namely the justice of public honesty; but because it was sufficiently treated above concerning carnal kinship, I do not care to enlarge further; but see what was said there, § *Circa tertiam speciem*. There follows the eleventh, namely concerning affinity, of which also, because enough was said above, I do not care to pursue further. 217. But, consulted incidentally, I ask here: may a wife knowing her husband to be an adulterer lawfully ask the conjugal debt, or, when it is demanded, can she lawfully render it without sin? It seems, first, that she can ask and render, because no one is to be punished without fault, as in c. *Sine culpa*, *De regulis iuris*, in the Sext; C. 16 q. 7, [c.] *In veteri*; above, *De homicidio*, c. *Ioannes*, and the last chapter; and above, *De consuetudine*, penultimate chapter; and in l. *Sancimus*, Cod., *De poenis*. For penalty is the measure of fault (above, *De officio delegati*, c. *Sane* 3; and above, *De homicidio*, c. *Sicut dignum*); but where there is no fault, neither ought penalty regularly to be present. But such a woman is not at fault; therefore neither ought she to bear penalty, because, as Moses says, Deuteronomy 25, "According to the measure of the sin shall the measure also of the stripes be." But such a woman would be punished without measure of sin if at least she could not lawfully demand, granted that she were not bound to render; therefore she would suffer against justice. Moreover, the Lord, asked by Peter how often he ought to forgive one sinning, answered, "Not only seven times, but seventy times seven times" (Matthew 18). Since, then, the husband by committing adultery has sinned against the wife, and the wife is bound to spare the husband, it seems therefore that the wife is bound to render the debt even to an adulterer demanding it. Moreover, the stronger the cause, the more efficacious the effect that follows from it. But adultery is stronger when it is in both spouses than when it is in one only; but if it is in both, one cannot on this account put away the other, as Augustine says in book 2 *On the Lord's Sermon on the Mount*, beyond the middle; and the Master of the *Sentences* reports it in [book] 4, dist. 35, c. 3, and Gratian in the *Decretum*, C. 32 q. 6, c. 1. And the reason is, as the text there says, that one stained with the same crime cannot punish, that is, accuse, another of the same. Hence when the adulteress was presented to the Lord as He preached, that He might answer what was to be done with her, the Lord said, "He that is without sin among you, let him first cast a stone at her" (John 8). Therefore much less, it seems, can one spouse put away the other on account of the adultery perpetrated by one only. The contrary seems also from the words of the Lord saying, Matthew 19: "Whosoever shall put away his wife, except it be for fornication, and shall marry another, commits adultery; and he that shall marry her that is put away commits adultery." Moreover, John Chrysostom says on Matthew: "Just as he is cruel and wicked who puts away a chaste wife, so he is foolish and unjust who keeps a harlot; for he is a patron of the shame who conceals the crime of

his wife" (C. 32 q. 1, [c.] *Sicut crudelis*). Moreover, if [something] seems less to be present in that and is present, then much more strongly in that in which it is more. But suspicion of fornication is less than its truth; and yet wherever there is fornication or suspicion of fornication, the wife is freely put away (C. 32 q. 1, [c.] *Dixit Dominus*), because fornication and suspicion of fornication are reputed for the same, as the gloss says there. For what if the belly of one not known by her husband swells — will there not be certain suspicion of fornication? (C. 2 q. 1, [c.] *Si peccaverit*, [in the] reply; to which, in the Authentic *Ut liceat matri et aviae*, penultimate §, collation 8.) Therefore, etc. Moreover, if a woman procures an abortion, the husband is not bound to render her the debt, because she acts against the good of offspring; but one fornicating acts against the good of fidelity; therefore the one not fornicating is not bound to render the debt to the one fornicating, as Bonaventure says on [book] 4 of the *Sentences*, dist. 32, art. 2, q. 3.

Answer: it must be said that the one not fornicating, if through probable signs and open conjectures he can grasp that the spouse commits adultery, is not bound to render the debt to him while he is in the purpose of persevering in adultery; and much less if the adultery is notorious. Nor ought [she] in such a case to ask — not because by her own fault she is deprived of her right, since she did not sin, nor because she is punished without her fault, but because, if she asks the debt, she deprives herself of her liberty, which she has, of not rendering to the adulterer asking; and therefore by asking she binds herself to render to the one asking, because husband and wife, as to the rendering of the debt, are not judged unequally. Hence the Apostle says, 1 Corinthians 7: "Let the husband render the debt to the wife, and likewise also the wife to the husband. The wife has not power of her own body, but the husband; and likewise also the husband has not power of his own body, but the wife." And that they are not judged unequally appears in C. 32 q. 1, [c.] *Si quis uxorem*, and C. 32 q. 5, [c.] *Praecepit Dominus*, and c. *Christiana religio*. Therefore one who ought not to render, in order that prejudice not be done to him, ought not to ask, because by asking he prejudices himself, and so from his own fault prejudice follows to him. For if a husband knowing that his wife has offended, who had not done penance but remains in fornication, lives with her, he will be guilty of the crime and a sharer of her sin; but if the woman put away has done penance and wishes to return to her husband, he ought [to receive her], but not often to receive a sinful woman. So says the text of the Council of Orleans, above, *De adulteriis et stupro*, c. *Si vir*. Hence it must be distinguished: for either the adultery is notorious or hidden. In the first case the one who did not sin ought neither to render nor to demand the debt, lest he become a sharer of [the other's] crime, because he is a patron of shame, etc., as above — unless the [guilty] person wishes to abstain from the sin of adultery and do penance, and so is prepared to change life and correct himself or herself; or unless such a person who sinned in the marriage is already amended and corrected: for then he is to be helped and reconciled, lest he slip into penalties. And therefore the text says in the said c. *Si vir* that if the woman put away has done penance and wishes to return to her husband, he ought [to receive her], but not often to receive a sinful woman. And therefore, if [the guilty] is not corrected, nor is correction hoped for, but is probably presumed incorrigible, then the one who did not sin against the marriage ought to put away the sinful one, lest he seem to consent to her crime, because "he is not free from the suspicion of hidden complicity who ceases to oppose a manifest crime" (D. 86, [c.] *Facientis*, where there are many similar arguments); to which also above, *De homicidio*, c. *Sicut dignum*, verse *Illi etiam qui non ut ferirent*. For since the husband is bound to correct his wife and guard her, or accuse her and so put her away, and conversely the wife the husband (C. 32 q. 1, c. 1, 2, 3 and 4, and the following chapter), if he

does not do so he is at fault, because he seems to consent and to foster the adultery. For, as the Apostle says, Romans 1, at the end, "Worthy of death are not only they that do them," namely the mortal sins which he set before, "but also they that consent to them that do them"; to the same, C. 11 q. 3, [c.] *Qui consentit*. But if the adultery is hidden and cannot be proved, then, since one accusing a spouse of adultery for the legal penalty must inscribe himself to the penalty of retaliation, by failing to prove he would succumb. But if he accuses before an ecclesiastical judge for separation of bed, although he ought not to bind himself to the penalty of retaliation, yet he must inscribe himself and present an accusatory libel; and then he can act and answer through a proctor, as all these are proved above, *De procuratoribus*, c. *Tuae*. Therefore, lest he be reputed a false accuser if the crime is not evident, and lest he place himself in danger to his own reputation and his wife's — because he who neglects his reputation is cruel (C. 12 q. 1, [c.] *Nolo*) — therefore in such a case, while it is hidden, it is not safe to accuse nor to put away; although, according to Blessed Thomas on [book] 4 of the *Sentences*, dist. 35, when the fornication of the wife is established to the husband, the husband can

by his own authority put away the adulteress as to bed, namely by denying her the debt: for if he were to have intercourse with her, he would not only incur irregularity but would also generate prejudice to himself in accusing. Others, however, say that when it is not notorious but hidden, the one asking must render (above, *De divortiis*, [c.] *Significasti*, and in the said c. *Si vir*, above, *De adulteriis*). As to cohabitation, [Hostiensis] says it is not lawful for the husband to put away his wife without the judgment of the Church; and if he has put her away, he must be compelled to receive her, unless the husband can prove the fornication immediately; and Hostiensis understands the word "immediately" as within 8 days, within which, if he has not proved it, restitution is to be made in full; to which C. 33 q. 2, [c.] *Ecclesiastica*. And Hostiensis also says that if the adultery is notorious, so that there is no place for denial, then the husband can put away the adulteress by his own authority, as in c. *Significasti*, above, *De divortiis*. The same Innocent on the said c. *Significasti*, who gives the example of witnesses creeping on the earth (D. 8, c. *Priusquam*), and understands this generally wherever there is a notorious fact of a permanent act; for which he alleges Dig., *De doli exceptione*, l. *Dolo*; and I said it fully on c. *Vestra*, above, *De cohabitatione clericorum et mulierum* — even if it is not notorious to the judge but to others, provided the plaintiff has proofs ready (argument from above, *De restitutione spoliatorum*, c. *Litteras*). And the gloss on the said c. *Si vir*, above, *De adulteriis*, says that if he does not denounce [her], at least for penance, he sins mortally (C. 2 q. 1, [c.] *Si peccaverit*; and above, *De iureiurando*, c. *Quemadmodum*); which Huguccio, on c. 1, C. 33 q. 1, understands even if it is hidden, provided he can prove it. Brother John of the Order of Preachers, in the *Summa confessorum*, book 4, tit. 2, q. 39, takes the words of Huguccio more broadly on c. *Si quis uxorem*, C. 32 q. 1, saying that if one of the spouses demands the debt from the other remaining in adultery, whether hidden or manifest, and knowingly, he sins mortally by demanding, because he acts against the constitution of the Church. He sins also by rendering, if divorce has been celebrated by the judgment of the Church, or if [the other] publicly lingers in adultery; but if neither of these is the case, he does not sin by rendering, because he is not bound to it. But if on account of incontinence and frailty of the flesh he demands the debt, he sins mortally, because he acts against the constitution of the Church; yet he sins less when the adultery is hidden. Others say that the inability to abstain from carnal intercourse excuses the one demanding in this case; whose opinion is more kindly, though perhaps not truer. In the second case, namely when the adultery is not notorious, he must render to her asking, because he ought not to despoil her before sentence (above, *De divortiis*, [c.] *Porro*; and above, *Ut lite pendente*, [c.] *Laudabilem*; and

argument from C. 8 q. 4, [c.] *Nonne*, where it is said that a bishop criminally accused ought not to be abandoned by his subjects or clerics before the definitive sentence). Thus Brother John in the *Summa confessorum*, as above. 218. Who adds there, q. 40: but does one committing adultery, immediately upon committing it, lose by law itself the right of asking the debt? Raymond answers there: it seems so, at least as to the judgment of the soul, because by sinning against the law of matrimony he renders himself unworthy, and therefore he ought not to ask unless the fault is purged by penance; if, however, he asks, the other must render, as has been said. And he adds, q. 41: but how is [the other] bound to render, if he ought not to ask? Answer, according to the gloss there on the word *debet reddere*: each of the spouses, as Huguccio noted on C. 27 q. 2, [c.] *Agathosa*, has in a certain way a right in the other, namely the right of demanding the debt, and the right that it be rendered to him when he demands the debt. The first he loses by fornicating, but not the second. So too a prelate does not have the right of commanding a subject something unlawful, or about which there is doubt whether it is lawful or unlawful; yet the subject must obey him in a doubtful unlawful thing, and the prelate has this right in him, although he does not have the right of commanding, but sins by commanding in this case (C. 35 q. 1, [c.] *Quod culpatur*).

To the arguments for the first, affirmative side, it is answered; and first to the first, when it is argued that no one is to be punished without fault: I say this is true regularly; it fails, however, wherever a cause exists. Hence the rule there says: "Without fault, unless a cause exists, no one is to be punished"; and so a rule and an exception are set down. For if some husband kept a corrupted woman, he is repelled from promotion without his fault, yet not without cause; for there is a cause on account of the defect of the sacrament (D. 34, [c.] *Si cuius*, where there is a case that if the wife of a layman has committed adultery, such a one is afterwards repelled from promotion; which is soundly understood if after the adultery was perpetrated he knowingly knew the adulteress; for if he did not know her he is not repelled, as the gloss says there, alleging the last chapter of the same cause and question). A similar thing also appears in a leprous cleric, who without his fault, yet not without cause, is deprived of his church; for there is a cause on account of the scandal of the people, as in c. *Tua nos*, above, *De clerico aegrotante*; and so in similar cases. In our aforesaid case, then, even if the fault of the one not fornicating is absent, yet cause is not absent. For there is a cause, because "every sin that a man does is without the body; but he that commits fornication sins against his own body," says the Apostle, 1 Corinthians 6; and it is understood "against his own body" not only as to his own person but also as to the person of the spouse; hence a little before he says, "Know you not that he who is joined to a harlot is made one body? For they shall be, he says, two in one flesh"; of which I said enough above, *De cognatione spirituali*, in the question whether co-parenthood passes through fornicating intercourse. Hence Jerome on the aforesaid place to the Corinthians says: "One placed in marriage, whatever sins he commits, does not infect his own spouse; but fornication also contaminates the wife, so that she is no longer lawful to her husband, but an adulteress." Where the gloss says: and so it appears that if one of the spouses commits adultery, the other loses the right of demanding.

To the second it is answered that he must forgive or spare, not only seven times, etc. (*De poenitentia*, dist. 3, [c.] *Adhuc instant*; and above, *De iureiurando*, [c.] *Quemadmodum*, at the end) — namely as to God and conscience, and so in the penitential forum; not, however, as to the judicial forum, so that he be compelled to bear with her as an adulteress. Hence the gloss says on the said c. *Si vir*, above, *De adulteriis*, on the words *sed non saepe*, that if the woman offends more often, the husband can always

spare her if he wishes to receive her after penance, according to the gospel truth; but the Church does not intercede for her, since he has spared her several times; and therefore it says here "not often," lest the Church seem to give her licence to sin; and for terror also it will be said, "not often to receive a sinful woman." Moreover, pardon of sin is not given except to one corrected, as in c. *Peccati venia*, *De regulis iuris*, in the Sext. But in our case, as was said in the answer, it is presupposed that neither is the adulterer corrected nor is there probably a presumption of correction, and consequently he does not merit pardon. For the Lord, about to say "forgive the one sinning," promised it "if he does penance," as appears in Luke 17, where He says: "If your brother sin against you, reprove him; and if he do penance, forgive him. And if he sin against you seven times in a day, and seven times in a day be converted unto you, saying, I repent, forgive him." Thus, then, a separation having been made from bed and dwelling and the rest of conjugal service on account of adultery perpetrated by the other, if afterwards she commits adultery many times, or even if she became a public harlot — although he ought to grieve for the sin of his neighbour, and, as to the injury which he thinks inflicted on himself, ought to forgive her — yet he is not compelled to receive her, nor to take any further trouble about her, because, after denunciation made to the Church, one not obeying the Church is to be held as a heathen and a publican (Matthew 18; and C. 2 q. 1, [c.] *Si peccaverit*). And that he is not compelled to receive her appears in c. *Significasti*, above, *De divortiis*, where [it is said that] he who put away his own wife by his own authority on suspicion of incest with his kinsman — if it is notorious that afterwards she did not remain continent — the aforesaid man ought not to be compelled to receive her.

To the third it is answered that adultery in both spouses is not a stronger cause of making divorce than in one only, although there is more of sin when it is in both than when it is in one only. For the reason of divorce is the breaking of faith by one against the other keeping faith, as appears in C. 32 q. 6, c. 1, where it says, "for it does not seem that one stained with the same crime can punish another for the same": for when both have sinned, neither is then above the other, because neither has anything to object to the other, since he himself committed what he wishes to object against the other. But if only one acts against fidelity or against the good of matrimony, then he who acts deserves to be punished, and the other deserves to have liberty; and therefore, in order to preserve his liberty, just as he is not bound to render, so he ought not to demand, lest he deprive himself of his liberty and do prejudice to himself, as was said above. Lord Bonaventure also holds this on [book] 4 of the *Sentences*, dist. 3[5], art. 2, q. 2, and Richard in the same book, dist. 35, art. 1, q. 1 and 2. And that when both committed adultery, then equal crimes are removed by equal compensation, the text proves in the penultimate and last chapters, above, *De adulteriis*, and enough there also by the gloss. And Augustine says in book 1 *On the Lord's Sermon on the Mount*: "Nothing is more unjust than to put away a wife for the cause of fornication if he himself is convicted of fornicating"; for that of Romans 2 occurs: "Wherein you judge another, you condemn yourself; for you do the same things which you judge"; to the same, C. 32 q. 6, [c.] *Nihil iniquius*. So too in substance the text says, Dig., *Ad legem Iuliam de adulteriis*, l. *Si uxor*, § *Iudex*, where it says, "For it is unjust that a husband should demand from his wife a chastity which he himself does not show"; to the same, D. 95, [c.] *Esto subiectus*. For he asks the debt in vain who does not pay what he owes; for it is just that whatever law one sets for another, he himself should use the same law (Dig., *Quod quisque iuris*, throughout).

But to the arguments for the negative side it is not necessary to answer otherwise than as was answered above in the body of the question; and therefore, when the adulterer or adulteress is

probably presumed incorrigible, then the innocent spouse is not bound

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to render; indeed he is bound to put away the adulteress or adulterer, lest he be mixed up in the crime; and so he ought not to demand, lest prejudice be generated to himself, as was said above.

But I ask: when is one presumed incorrigible? Answer, according to Richard, as above, q. 2: one is presumed incorrigible in two ways. First, when with an obstinate mind he refuses to correct himself. Second, when, promising correction, he falls back into the same thing out of habit. Hence the Master of the *Sentences* says in [book] 4, dist. 35, c. 4, alleging Gregory in the book *Of the Just*, that the husband ought to receive a sinful woman who has done penance, "but not often," that is, not too frequently. Richard says: that is, beyond what a wise man would determine she ought to be received. For a wife committing adultery sins not only against her husband but also against herself and against God; and therefore the husband cannot wholly remit the penalty unless total amendment follows. Which also serves for the answer to the second argument. He says also, as above, that if the husband knowingly tolerates the adulteress, he [seems] to consent: "For if she chooses to persevere in adultery, the husband will be held a patron of shame and guilty of pandering, unless he wishes to make a case of adultery"; and below: "Likewise, if the husband knows that his wife has offended and the woman has not done penance but remains in her fornication, and he lives with her, her husband will be guilty and a sharer of her sin." And in substance he reports what is contained in the said c. *Si vir*, above, *De adulteriis*. Gratian reports the same words in substance, C. 32 q. 1, [c.] *Quod si in adulterio*, where the gloss says: "He bears the penalty of adultery who despises his marriage and suffers his wife to offend and is not indignant at the defilement" (Dig., *De adulteriis*, l. 1, § *Lenocinii*; to which Cod., *De adulteriis*, l. *Castitati*).

But again I ask: in any case is a husband forbidden to put away or accuse an adulterous wife? Answer: there are seven cases in which it is not lawful for the husband to put away his wife on account of adultery, and in accusing he is repelled by exception. The first is if he himself has fornicated (C. 32 q. 6, c. 1). The second is if the wife was overpowered by force (C. 32 q. 5, [c.] *Ita ne*); and the reason is because, as is said in C. 34 q. 1, c. [1], in no way is that to be drawn to the reproach of an evil will which necessity demands. Hence Ambrose also says in the book *On Virgins*: "Truly the flesh cannot be corrupted unless the mind has first been corrupted" (C. 32 q. 5, [c.] *Re vera*), where it says that her corruption, namely of the flesh, ought not to be imputed to guilt or to eternal damnation; to the same bears D. 50, [c.] *Presbyteros*; C. 15 q. 6, c. 1. The third is if she believed her husband dead (C. 34 q. 2, [c.] *Cum per bellicam*): for such a one is excused through probable ignorance, as I said above concerning the impediment of bond, q. 2, § *Sed quaero quando dicatur certificata*, fully there; of which also in c. *Quoniam frequenter*, § *Si autem*, above, *Ut lite non contestata*. The fourth is if another, under the appearance of the husband, knew the wife (C. 34 q. 2, [c.] *In lectum*): for such a woman so deceived is excused on account of ignorance, because adultery is not committed without guilty intent (Dig., *De adulteriis*, l. penult.); and I spoke of it above concerning error. The fifth case is if the husband gave the wife occasion of fornicating, as in c. *Discretioni*, above, *De eo qui cognovit consanguineam uxoris suae*; and especially if he had handed her over unwilling to be prostituted: for in such a preceding case such adultery is imputed more to the husband than to the wife. Therefore the harm which someone feels by his own fault he ought to impute to himself and not to others, as in c. *Damnum*, *De regulis iuris*, in

the Sext; and Dig., *De regulis iuris*, l. *Quod quis ex sua culpa*; to which C. 23 q. 4, [c.] *Displicet*, with similar places; similar in c. *Si clericus*, *De praebendis*, in the Sext, with other similar places. The sixth case is if the husband after the adultery knowingly knew the adulteress and tolerated her (C. 32 q. 1, [c.] *Si quis uxorem*); and the reason is that a crime remitted by reconciliation ought not to be objected further unless a relapse follows; to which Dig., *Soluto matrimonio*, l. *Cum mulier*. The seventh is if, while matrimony stood among unbelievers, the husband gave the wife a bill of divorce and the wife married another: for then, if both are converted to the faith, the husband is bound to receive the wife, as in c. *Gaudemus*, above, *De divortiis*. And the reason is that, since he gave her a bill of divorce, which it was unlawful to do according to the sentence of the Saviour, Matthew 19, when He said, "What God has joined together, let no man put asunder," and below, "Because Moses, by reason of the hardness of your heart, permitted you to put away your wives; but from the beginning it was not so" — thus, then, by giving a bill of divorce, of which Deuteronomy 24, he interpretatively gave her occasion of adultery, since it is not lawful to marry another while the first husband lives, as appears in the definition of matrimony, that it ought to retain an undivided manner of life (C. 27 q. 2, [c.] *Sunt enim nuptiae*; and in c. *Illud*, toward the end, above, *De praesumptionibus*); and I spoke of it above concerning the definition of matrimony. The gloss sets these seven cases briefly on C. 32 q. 6, in the summary, on the words *Sed ponatur quod ipsa sit adultera*, and the gloss begins *Secunda quaestio nihil habet quaestionis*. Richard, however, sets them in [book] 4 of the *Sentences*, dist. 35, art. 1, q. 1, and makes no mention of the said gloss. Some add an eighth, as the same Richard also says, namely if the husband, by abstaining against the will of the wife, gave her occasion of adultery (C. 27 q. 2, [c.] *Si tu abstineas*). Others, however, say that the adulterous woman would not be excused on this account, but that the husband could accuse her of adultery and so put her away; and the gloss holds this there against Johannes Faventinus. Enough serves c. *Significasti*, above, *De divortiis*, where the gloss also holds against the aforesaid Johannes, and well; for this side also bears C. 32 q. 5, [c.] *Ita ne*. Nor is she to be pardoned who, on the pretext of poverty, leads a most shameful life (Dig., *De ritu nuptiarum*, l. *Palam*, § *Non est*, with the gloss). The modern Doctors commonly hold [this] on the said c. *Significasti*, unless he had handed her over to be prostituted, as I said above. The gloss also sets the aforesaid seven cases on c. *Intelleximus*, above, *De adulteriis*, on the word *compensatione*.

Incidentally also I ask: is all honest life of a spouse with an adulterer forbidden, and conversely? Answer, according to Lord Antonius de Butrio on c. *Si vir*, above, *De adulteriis*: carnal intermingling is forbidden, as there and in the other laws alleged above; yet [living together] for the sake of piety, and the administration of necessaries, if he wishes, is not forbidden. To this bears what is noted on c. *Consultationi*, above, *De frigidis et maleficiatis*, where the text says at the end, "that those whom they cannot have as wives they may have as sisters." The text says the same in c. *Laudabilem*, about the middle, same title.

But further I ask: can a wife put away her husband on account of the sodomitic vice, and conversely? Answer: although there are various opinions on this question, yet it is probable that one can be so put away on account of the sodomitic vice, just as on account of adultery; indeed so much the more, as the sin is graver; and that it is graver no one of sound mind is ignorant. For among all sins of lust the gravest is to act against nature, as Augustine says *On Adulterous Marriages*, and it is reported in C. 32 q. 7, [c.] *Adulterii malum*, where he says thus: "The evil of adultery surpasses fornication, but is surpassed by incest; it is worse to lie with one's mother than with another's wife; but the worst of all these is what is done against nature, as if a man should wish to use a member of the woman not

granted for this." And the same Augustine, *Confessions* book 3, reported in the same cause and question, c. *Flagitia*, says: "For that very fellowship which we ought to have with God is violated when the same nature of which He is the author is polluted by the perversity of lust." Hence also the most Christian Emperor says that such a crime brings on pestilences and tempests, and famines and earthquakes, as in the Authentic *Ut non luxurientur contra naturam*, where he also says that from impious acts of this kind cities too perished together with their men, as were Sodom and Gomorrah with three neighbouring cities (Genesis 19); and in c. *Clerici*, above, *De excessibus praelatorum*; and *De poenitentia*, dist. 1, [c.] *Sed et continuo*, in the gloss. But concerning this doubt, the gloss on c. *Omnes causationes*, C. 32 q. 7, on the word *sodomita*, says: "I scarcely believe that the husband could be put away on account of any of these," as in C. 35 q. 3, [c.] *Extraordinaria*. But certainly the said c. *Extraordinaria* well concludes that affinity is not induced by extraordinary pollution; yet it does not conclude the gloss's intent, although the gloss intends to argue from this that, since through the sodomitic vice, and so through extraordinary pollution, there is no union of flesh and blood, so consequently there will not be marital division. But certainly this does not follow: "if there is no union here, therefore there is no division there"; for it does not prove that a thing is, that it happens to be absent from here, as in l. *Neque natales*, Cod., *De probationibus*. For by cleaving to the flesh of another he well separates himself from the flesh of his wife — and not only equally, but more: the fidelity of matrimony is violated, the office of offspring is impeded, and the sacrament is confounded; and so all the goods of matrimony are more shamefully offended. For it is established that he committed an abominable fornication (argument from C. 32 q. 4, [c.] *Meretrices*). Innocent likewise passes over it with the word "believe," on c. 1, above, *De adulteriis*, when he says: "Nor do we believe that on account of the sodomitic vice one can be put away from bed, nor on account of another crime, unless he wished to draw his wife into it (C. 2[8] q. 2, [c.] *Idolatria*); and so it is understood," he himself says, [on] C. 32 q. 7, [c.] *Omnes causationes*, where [he treats] of this. But with reverence, his own words argue against him, when he says, "unless he wished to draw his wife into it": therefore, if the husband wishes to draw his wife into the sodomitic vice, she will lawfully be separated from the husband's bed. But certainly also, if he committed such a vice with another person than his wife, the wife knowing it would be drawn to it by the husband's example; therefore, consequently, she is lawfully separated. And on this account the opinion of Huguccio and Laurentius seems truer, who hold that on account of the sodomitic vice too separation of bed is lawfully made, by the said c. *Adulterii*, and c. *Flagitia*, and c. *Usus*, and c. *Non solum*, verse *Omnis*, and C. 2 q. 4, [c.] *In eo*. The Archdeacon of Bologna also favours this side as truer, and after him the Parmese, on the said c. *Omnes causationes*, in the said gloss, on the word

sodomita. Raymond also holds this in the *Summa*, title *De divortiis propter fornicationem*, § 6, *Sequitur videre*, verse *Item credo*, [saying] that it extends to the sodomitic vice. For it is plain that the name of fornication comprehends every such intercourse (C. 32 q. 7, [c.] *Non solum*, verse *Omnis*); and the gloss pursues this on the said c. *Omnes causationes*. Johannes Andreae on c. *Maritis* recites the opinions and seems to incline to the opinion of the Archdeacon; and Lord Antonius de Butrio does likewise on the said c. *Maritis*, above, *De adulteriis*. Richard also, on [book] 4 of the *Sentences*, dist. 35, art. 1, q. 1, at the end, answering the arguments, says that on account of the sin against nature too one can proceed to divorce; but such specific mention is not made of it, both because it is an unnameable passion, and because it happens more rarely, and because it does not so cause uncertainty of offspring; and in this he rests and ends the question. For God is indignant against such a vice, as

appears in the deluge, Genesis [6], as Methodius says, and in Sodom and Gomorrah with three neighbouring cities, as was said, of which Genesis 19; and in Onan, son of Judah, Genesis 38. Nature rises up [against it]. 223. Hence the Master of the *Scholastic Histories* says that this vice was so punished on the night of the Lord's Nativity that all sodomites in the whole world were slain together. And in Wisdom 5 it is said: "He will arm the creature for the revenge of his enemies, and the whole world shall fight with him against the unwise" — of whom the Apostle says, "God delivered them up to a reprobate sense" (Romans 1); and above he had said, "For professing themselves to be wise, they became fools"; and he adds, "Wherefore God gave them up to the desires of their heart, unto uncleanness, to dishonour their own bodies among themselves"; and below, "For this cause God delivered them up to shameful affections. For their women have changed the natural use into that use which is against nature. And in like manner the men also, leaving the natural use of the woman, have burned in their lusts one towards another, men with men working that which is filthy, and receiving in themselves the recompense which was due to their error." Against such wicked and pestilent persons the laws also are armed, that they be at once extinguished by the ultimate punishment (Cod., *De adulteriis*, l. *Cum vir nubit in feminam*; and in the said Authentic *Ut non luxurientur contra naturam*, coll. 6; and C. 6 q. 1, [c.] *Infames*, verse *Alii prohibentur*, and § *Tria*, and there the Archdeacon; and in the said c. *Clerici*, above, *De excessibus praelatorum*; and C. 32 q. 7, c. *Usus*, and c. *Sunt enim*, with the following chapter). And that it is the greatest sin among the species of lust, Thomas pursues in II-II, q. 154, penultimate and last articles. Innocent also, in *On Contempt of the World*, coming, among the various species of lust, to the species against nature, on that word of the Apostle, "men with men working that which is filthy," says: "What is filthier than this filthiness, what more criminal than this crime? In the Law the lying of a male with a male and the intercourse of a man with a beast are joined as if equal. For thus it is read in Leviticus, ch. 20: 'You shall not lie with a male in womanly intercourse, because it is an abomination; you shall not lie with any beast, nor be defiled with it.' Certainly it subjoins an equal penalty: 'If one,' it says, 'shall lie with a male in womanly intercourse, both have committed an abomination; let them die the death. He that lies with a beast, let him die the death; the beast also kill ye.' He that has ears to hear, let him hear; nay, let him who is foolish come to his senses. The penalty has taught what this fault has merited: for the Lord rained upon Sodom and Gomorrah brimstone and fire from heaven. God willed to commit the execution of this penalty to none of the angels or of men, but reserved the vengeance of this crime to Himself, according to that: 'Vengeance is mine, and I will repay.' And therefore the Lord rained from the Lord, that is, from Himself, not cloud or dew, but brimstone and fire: brimstone upon the stench of lust, fire upon the ardour of desire, so that the penalty might be like the fault. Nor is He said to have sent, but to have rained, so that by the very word He might mark the greatness and abundance of the penalty. His eye spared no one, but He extinguished all together. Lot's wife also, who looked back, He changed into a statue of salt; and not only the cities but the whole region round about He turned into the Dead Sea and the valley of salt pits." It is a fearful thing, then, to fall into the hands of the living God (Hebrews 10); "but a certain dreadful expectation of judgment, and the rage of a fire which shall consume the adversaries," namely of God and of nature and of every virtue and grace, as such enemies of God are; who, the greater the patience of His long-suffering He shows, the harsher the vengeance of His severity He inflicts, according to that of the Apostle to the Romans 2: "Do you despise the riches of His patience and long-suffering? Do you not know that the benignity of God leads you to penance? But according to your hardness and impenitent heart, you treasure up to

yourself wrath against the day of wrath and revelation of the just judgment of God, who will render to every man according to his works."

There follows the twelfth principal case, which is the impossibility of intercourse, concerning which three things are principally to be seen: namely, first, what such impotence is; second, how many are its species; third, how it induces an impediment. 224. To the first it is answered that the impossibility of intercourse is a defect of mind or body, or of both, by which someone is impeded from being carnally joined with another. So says Raymond in the treatise or *Summa* on matrimony, in the title *De impedimento coeundi*, near the beginning. And such an impediment proceeds rather from the disposition of nature than from the constitution of the Church. For since matrimony is principally made from two causes, namely either for the cause of receiving offspring or for the cause of avoiding fornication — the first appeared in the state of innocence, when the Lord said, "Increase and multiply, and fill the earth, and subdue it, and rule," etc. (Genesis 1); the second appears from innate concupiscence after original sin, because as soon as they knew themselves naked, they sewed together fig leaves and made themselves aprons (Genesis 3); for *perizomata* are loin-cloths or breeches or girdles sewn from leaves, by which only the genitals are covered, as Papias says. Here also the Apostle spoke, 1 Corinthians 6, reporting what Adam said in the state of innocence for procreating children: "A man shall leave father and mother and shall cleave to his wife, and they shall be two in one flesh" (Genesis 2). But for remedy the same Apostle adds, 1 Corinthians 7: "It is good for a man not to touch a woman; but for fear of fornication," namely to avoid it, "let every man have his own wife, and let every woman have her own husband." Therefore the impossibility of intercourse removes both causes by nature, because one can neither beget offspring nor cause the spouse to avoid incontinence.

To the second it is answered that the species of impotence of intercourse are principally two. The first is natural, as the impotence of a boy, or the coldness of an old man, or also coldness of complexion, or narrowness in a woman. The second is accidental, as castration in a man, or destruction of the womb in a woman, or other unfitness of the woman, or a common impediment through sorcery, which is done through diabolical spells, of which in c. 1, and in c. *Laudabilem*, and in c. *Quod sedem*, and in c. *Consultationi*, and in the last chapter, and throughout, above, *De frigidis et maleficiatis*; and C. 33 q. 1, c. *Si per sortiarias*, and throughout; and C. 30 q. 2, c. 1, where it treats of children.

To the third it is answered that natural impotence of intercourse can be perpetual and temporary. Natural perpetual impotence, which is in a cold man, not only impedes matrimony to be contracted but also dissolves it when already contracted (C. 33 q. 1, c. 1 and 2; and in the said c. *Laudabilem*, above, *De frigidis et maleficiatis*). But natural and temporary impotence, which is in a boy, impedes as long as it is present. Hence when potency supervenes the impediment ceases (C. 30 q. 2, c. [1]), because when the cause ceases the effect ceases, as in c. *Cum infirmitas*, below, same title. And of this case it appears also in the said c. *Quod sedem*, above, *De frigidis et maleficiatis*. But of the natural impotence which is in an old man, some say that if there were such coldness by reason of old age as could in no way be helped, either by art or by nature, then it would have to be said, as of natural coldness, that such a one by contracting would bind himself to the impossible, which cannot be, as in c. *Nemo potest ad impossibile obligari*, *De regulis iuris*, in the Sext, and in l. *Impossibilium*, Dig., *De regulis iuris*. The gloss, however, on the said c. *Quod sedem* says that old men who have failed in natural heat can contract, as in l. *Sancimus*, Cod., *De nuptiis*, and C. 27 q. 1, [c.] *Nuptiarum*; for in old men it is said

to be "the compliance of law and the solace of humanity," as there and C. 31 q. 1, [c.] *Aperiant*, and c. *Quod si dormierit*. For there is scarcely anyone so old that he could not be helped by some benefit [of warmth] and be warmed by spices, and so in some way be moved. Moreover, granted that he were in no way moved, from the appearance of the body and excessive age such a quality can well be evident in him and the impotence of intercourse be known; therefore one contracting with such a one is not deceived, as is one contracting with a young man otherwise impotent. Hence, if it pleased a girl to receive such an old man as husband and she cannot have him [as husband], let her have him as a father or an uncle; as we say of a man, that she whom he cannot have as a wife he may at least have as a sister, as in the said c. *Laudabilem* and in c. *Consultationi*, above, *De frigidis et maleficiatis*.

But concerning the aforesaid, several things are to be asked, at least twelve. 227. First I ask how impotence of intercourse will be proved. Answer: it can be proved in three ways.

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First, by inspection of the body, as in c. *Proposuisti*, above, *De probationibus*, and in the last chapter, above, *De frigidis et maleficiatis*, and the gloss on c. *Laudabilem*, same title, on the word *iudicium*. Second, by witnesses: namely, that the oath be given to the one alleging the impediment, namely impotence of intercourse, with the seventh hand of kinsfolk. That is, when husband and wife concordantly confess the impotence and that they never knew each other, and [there are] kinsfolk, or neighbours of good repute if kinsfolk are lacking: each of them, touching the holy Gospels, says on oath that they never knew each other by carnal intercourse, and those seven likewise will swear that they believe them to speak the truth, as in c. *Laudabilem* and in c. *Litterae*, above, *De frigidis et maleficiatis*. Third, it can be proved by way of a judicial command: as when the judge gives them an oath that for three years they must live together and faithfully apply themselves to conjugal acts; and if, the three years having elapsed, they have been unable to come together in carnal intercourse, the [claim] is held [proved] and the impediment is held as proved, as in the said c. *Laudabilem* and in the last chapter, same title. Richard also holds the aforesaid on [book] 4, dist. 34, art. 1, q. 1.

But c. 1, above, *De frigidis et maleficiatis*, seems to stand against the above opinion, where it is said that if they have lived together for a month, or for three, or for a year, and applied themselves to the conjugal act, and have been unable to have intercourse together, they can be separated. Answer: on account of the difficulty of understanding the said decretal, the Doctors read and understand the aforesaid decretal variously. For the aforesaid decretal has three parts. The first says that when the confession of both spouses concurs concerning impotence of intercourse, separation of the matrimony takes place. The second says that if the woman says she is unknown and alleges impotence of intercourse, but the husband says the contrary and that he knew her, the husband is to be believed, because he is the head of the woman; and so it is concluded that they ought not to be separated, as in § *Illa autem*. The third part says that if the woman alleges the impediment of impotence of intercourse and can prove this by right judgment, the matrimony must be separated at the instance of the woman, as appears in the verse *Si autem statim*, which is at the end of the decretal. We see, then, that the cases are different. For concerning the first case the gloss does not declare otherwise. Innocent, however, says that the beginning of that decretal speaks when both confess the impotence of the husband; and then, if for one month they have applied themselves together to carnal intercourse — even if he does not appear impotent through smallness and dryness of the

member, and also [even if] the woman is shown uncorrupted, even if this does not appear, but they say the husband is impotent — then it is necessary that these things be proved with the seventh hand of kinsfolk, as in the said c. 1. Which understanding Hostiensis also holds. But the last chapter, above, *De confessis*, seems to stand against this understanding, because one stands by a confession against oneself. Hence, if both confess the impotence, what further need is there to seek the oath of kinsfolk? Answer: it is special in a matrimonial cause, lest there be collusion between the spouses, as in c. *Super eo*, above, *De consanguinitate et affinitate*; for one must not lightly stand by the confession of spouses breaking a matrimony. But if they confess that by equal consent they vowed continence and wish to observe continence, then their confession is firmly to be believed (C. 33 q. 5, [c.] *Quod Deo*). Otherwise, if they confess for matrimony, one stands well by their confession, but not against matrimony, as in c. 2, above, *De clandestina desponsatione*. Second, the last chapter, *De frigidis et maleficiatis*, seems to stand against the above opinion, where it is said that they should stand in probation [three years]. Solution: say that there it speaks of those bewitched, but in c. 1 it speaks of the cold. Hence, since coldness is a defect from nature, but sorcery is a defect from accident, therefore greater proof is required in an accidental defect than in a natural defect, because nature affects more strongly than accident, and a natural defect can be evident more easily than an accidental one. Or, second, it can be said that the last chapter speaks of those not having full puberty, c. 1 speaks conversely, in which case so much proof is not required. Or, third, say that the last chapter speaks when no or few signs of coldness appear, c. 1 when many. Or, fourth, the last chapter speaks when they have stayed together beyond a year, in which case there is great presumption against them; therefore a longer proof is required; for the text there says that the woman alleged after seven years had elapsed, etc.; but in c. 1 it is said "for a month or a year." Or, fifth, in the last chapter such a period of three years is given when the coldness cannot otherwise be proved; in c. 1 so much time is not required, because it can otherwise more easily appear. All the aforesaid solutions are Innocent's, on the said c. 1. Or, sixth: either, beyond the oaths of kinsfolk, evident proof of coldness and impotence appears, because perhaps the husband has a dry member and is already fully adult, and another proof of three years is not required, as in the said chapter; or evident impotence does not appear, and then either three years are awaited, as in the said last chapter, or the oath of seven kinsfolk is required, as in the said c. *Laudabilem*; and so the first part of c. 1 is understood. Conclude, then, that if both confess the impotence, or if they have stayed together for three years and applied themselves to intercourse and the proof of kinsfolk intervenes, then they are to be separated, whether evident signs of coldness appear or not, provided it appears that the woman is uncorrupted, as in the said last chapter. Distinguish, then, conclusively four cases.

The first is when both confess the impediment and have lived together beyond a year; and still the proof of the seventh hand of kinsfolk and the awaiting of three years are required, by the said last chapter; and this on account of the presumption resulting from the long preceding cohabitation. Or they have lived together for a year or a month, and so within a year; and then sometimes no or few signs of coldness appear, and the awaiting of three years and the oath of kinsfolk are required; and this will be the right judgment by which the impotence of intercourse is said to have to be proved, in c. 1 at the end and in c. *Laudabilem*, same title.

The second case is when some signs of coldness evidently appear, as that he has a member dry and small; and the oaths of kinsfolk suffice, without awaiting three years. The aforesaid proof of kinsfolk is, however, required, because although the member were small and dry, yet it would be possible that

he could emit seed, as he emits urine; and so such proof of kinsfolk, with the aforesaid evident signs, will be the true judgment which the aforesaid decretals require, namely c. 1 and c. *Laudabilem*. Nor understand a difference in this, that c. 1 at the end says "right judgment" [and] c. *Laudabilem* says "by just judgment," because right and just sound the same in effect. Hence Anselm says: "Justice is rightness of will kept for its own sake"; to which D. 45, [c.] *Omnis qui*.

The third case is when the signs are not evident, yet it appears that the woman is a virgin; and then, when the impediment of sorcery is alleged on account of an accident, the oaths of kinsfolk and the probation of three years are required, as in the said last chapter; and such will be the right or just judgment that is required in the aforesaid.

The fourth case is when the signs are not evident and the impediment of coldness is alleged; and then, when they are young and not in full puberty, the probation of three years is required, as in the said last chapter, and the oaths of kinsfolk, as in the said c. *Laudabilem*. And so the said c. 1 ought to be understood, and all things are plain and the matter declared, according to Innocent and Antonius de Butrio on the said c. 1. Hostiensis, however, says that in this last case the term of three years will not be necessary, but an arbitrary term will be given by the judge, and they will swear that within the said term they will with all their strength faithfully apply themselves to intercourse for consummating the matrimony, the husband by acting, the wife by suffering, not withdrawing but embracing and enticing in every way, confession having been made of their sins humbly and devoutly, as in c. *Si per sortiarias*, C. 33 q. 1. And if, when the term comes, they return saying that they kept this and could not be made one flesh, then they will bring seven kinsfolk, or, these lacking, seven neighbours of good repute, who will swear that they believe them to have sworn and said the truth; and so the matrimony is dissolved, as in the said c. *Laudabilem* and C. 33 q. 1, c. 1 and 2. And so c. 1 and the last, above, *De frigidis et maleficiatis*, are to be understood, according to Hostiensis. And note what Innocent says on the said c. 1, namely that it is of no force if they stayed together less than a month; because, according to Lord Antonius, it requires that they have stayed at least a month for the aforesaid decretal to have place; otherwise, he himself says, he would destroy the text. I believe, however, that Innocent understood, when he said "it is the same if for one day, it is the same if for 100 years": namely, when it is established of the truth that he is naturally impotent, he will be as impotent if he stays with his wife a hundred years as if he stays one day. The decretal, however, makes express mention of a month, or of three months, or of a year, for a more certain experience of the truth. 229. Conclude, then, that in order that separation of matrimony be made from impotence of intercourse through coldness, it is required that the impotence be indefinite as to all women, and so universal; therefore impotence relative to some one woman does not suffice. It is also required, when they have lived together a month or a year and not beyond, that both confess the impotence, and that proof be made by right judgment, which will be by the oaths of kinsfolk, or by the probation of three years, or by the concurrence of both, according to the division of the aforesaid cases. And so there are four requisites, namely: impotence, cohabitation for a month or a year,

common confession, and judicial proof. I counsel the judge, however, to follow a superabundance of proofs, because where the danger is greater one must act more cautiously, as in c. *Ubi periculum*, *De electione*, in the Sext; D. 42, [c.] *Quiescamus*; C. 7 q. 2, last chapter; and Dig., *De Carboniano edicto*, l. 1, § 1. But because in the separation of matrimony great danger is at stake — for the Lord said, "What God has joined, let not man put asunder" (Matthew 19) — therefore it is better to abound in the

caution of proofs than to fall short (argument from C. 2 q. 4, [c.] *Habet hoc proprium*; and D. 42, [c.] *Quiescamus*, in the gloss, argument that...; and Dig., *De statu hominum*, l. *Non sunt*; and C. 11 q. 3, [c.] *Nolite*; and C. 11 q. 3, [c.] *Excommunicatorum*; and above, *De dolo et contumacia*, c. *Cum olim*; on which the Archdeacon on D. 50, [c.] *Presbyteros*, toward the end; and what is noted on c. 1, above, *De treuga et pace*, and on c. *Quia propter*, above, *De electione*, in the gloss, saying, as below, same [title], toward the end, there: "superfluous things do not vitiate," etc.). And therefore a provident and discreet judge will provide for the truth through a threefold proof, because "a threefold cord is not easily broken" (Ecclesiastes 4; and above, *De treuga et pace*, c. 1). Let there, then, be a threefold cord for the cautious judge for proof of coldness: cohabitation of three years, inspection of the body, and the oath of kinsfolk, as Innocent holds on the said c. 1.

Richard also, on [book] 4 of the *Sentences*, dist. 34, art. 2, q. 1, says that either the coldness of the husband supervened upon a matrimony already lawfully contracted, whether consummated or not consummated, and such coldness does not impede matrimony, according to the common opinion — although some say that if it is perpetual and precedes the consummation of the matrimony, on account of it, if it can be proved, the matrimony can be dissolved. Or it precedes the contracted matrimony; and then I say that if it is temporary, to which a remedy can be applied by nature or by art, it does not dissolve matrimony if it is contracted; yet a man does wrong by contracting as long as he is in that state, unless great necessity or utility requires it. But if it is perpetual, so that a remedy cannot be applied either by nature or by art, then it impedes matrimony to be contracted and dissolves it when already contracted, as in the said c. 1, above, *De frigidis et maleficiatis*. The reason of which is, he says, that in the contract of matrimony the contracting parties implicitly bind themselves to render the debt to each other if it is asked; but no one can bind himself to the impossible. And this coldness, he says, can be proved truly, as when the husband proves by sufficient witnesses that before he contracted matrimony he was deprived of the genital members; or presumptively, namely when they have lived together for three years and in good faith applied themselves to carnal intercourse, and yet the woman was not known by the husband (he alleges the aforesaid c. *Laudabilem*). And then either both cry out to judgment and profess the impediment; and then, on account of the danger of collusion, each will swear that in good faith they applied themselves to the carnal office and could not come together. There will also swear with them, as to belief, seven persons, kinsfolk or neighbours of good repute knowing their persons and state, as in the said c. *Laudabilem* and in c. *Litterae*, same title. But if the woman calls for separation, saying she has not been known by her husband, the husband asserting the contrary, then the husband is believed, because he is the head of the woman, as in the said c. 1, § *Illa autem*; which is to be understood unless the woman wishes to prove by inspection of her own body that the husband has lied. But if the husband says he has not known his wife and asks to be separated from her, the wife contradicting and asserting the contrary, then the husband alone is not believed, but it falls on him to prove. But how he could prove this, he says, I do not see, unless by proving himself deprived of the genital members before he contracted matrimony; or unless perhaps, if he took the wife as a virgin, he asks that she be inspected; and if she were found intact, then the husband would seem to have proved his claim — unless perhaps the woman repelled the husband [on the ground] that he did not in good faith apply himself to the carnal office. And separation having been made, licence to contract is given to the woman, as in c. 1 and in c. *Laudabilem*, same title; but the cold man will remain without hope of marriage; and if he has contracted with another and known her, he will be compelled to return to the first, as in the said c. 1 and in c. *Laudabilem*,

same title. The reason of which is, he says, that then it will be established that the Church was deceived in judging perpetual an impediment which was temporary. But certainly, although he does not allege the aforesaid reason, the text of the *Decretum* brings in the examples of Gregory, C. 33 q. 1, [c.] *Quod autem interrogasti*, § *De his requisisti*, when it says: "Therefore, if the husband wishes to take another wife, the reason is manifestly clear: because, at the devil's suggestion, through the tinder of hatred, he held her in loathing, and therefore he contrives to put her away by the falsity of a lie."

Second I ask, concerning the second part of the aforesaid decretal [c.] 1, above, *De frigidis et maleficiatis*: 230. granted that the woman was a widow or otherwise corrupted when she contracted, and alleges the impotence of her husband and says that she has not been known by him, but the husband says the contrary — how can it be proved through inspection of the woman's body that the husband has lied, according to the aforesaid saying of Richard? Answer: in such a case such proof would be impossible; therefore the saying of Richard, and also of the other Doctors who say this, must be restricted to the case of virginity. And therefore it must be said that in such a case the husband is to be believed, as the text says in the said chapter, § *Illa autem*. For if she could prove herself a virgin, it is plain that she would have proved that the husband lied, as in c. *Proposuisti* and in c. *Causam*, above, *De repudiis*. And understand what the text says there, "if after a year or half [a year] she cries out to the bishop," etc. — that such a time suffices when the truth was established, namely that she had been known; but otherwise, if she were a virgin, not only after a year or half but even after three years the woman could reclaim, as in the Authentic *De nuptiis*, § *Per occasionem*, collation 4, and in the said c. *Laudabilem*. And so the gloss holds on the said c. 1, § *Illa autem*, on the word *tacuit*, which begins *Ergo videtur*; and so much more strongly after two years, as in l. *In causis*, Cod., *De repudiis*. Innocent, however, says that the true understanding of that § *Illa autem* is that if the woman has lived together a year or half before she reclaims, she cannot afterwards reclaim when the husband asserts intercourse, because she is not believed, both on account of the husband's assertion and on account of the presumption of the elapsed time in which she did not reclaim; yet also on account of the favour of matrimony, and because everyone is presumed potent unless the contrary is proved (D. 50, [c.] *Quia tua*); and because it is not likely, since the goad of the flesh is wont to buffet, that she would wish to stay so long a time with a eunuch. Nor then will the aforesaid indications of the husband's coldness and of her virginity avail her, because it can be that on account of the husband's small member the woman still appears intact; or otherwise deception of the eye is feared; or on account of cohabitation of so long a time the woman is presumed to have consented to wish to have him as a brother, since she cannot have him as a husband, as in the said c. *Consultationi*. Likewise, because it is possible that the woman is a virgin and yet the husband has the power of intercourse, and has not known her because he wished to cleave to another. Likewise, because that proof by inspection of the body can be fallacious, because the eye and the hand are often deceived (C. 27 q. 1, [c.] *Nec aliqua*). Hence, when the woman alleges coldness and the husband denies it, it must be noted that either the woman lived a short time with the husband — and I say "short," according to Lord Antonius de Butrio and others agreeing, up to two months — and then, if she proves herself a virgin from inspection of the body and proves the coldness by true judgment according to the diversity of the aforesaid cases, when both confess, let them be separated; and so the aforesaid decretal [c.] 1, at the beginning and at the end, above, *De frigidis et maleficiatis*, speaks properly. Or she lived with him long, namely for a year or half, and so did not cry out at the beginning, and afterwards the woman alone cried out, the husband asserting intercourse; and then it must be noted that either the woman

was not a virgin when she contracted, and she is not admitted to prove the contrary from inspection of her body — and so the second part of the aforesaid decretal [c.] 1 can be understood; but proof by inspection of the husband's body would well be admitted if the defect were evident, as because he has a dry member, or like a wart, which they call a *porrum*. It must be attended to, however, as Lord Antonius says, that some have the member retracted into the body and are wont to put the member out in length in the manner of an animal; and in such a case she will be admitted to prove. Or the woman lived together long and is still a virgin; and on this the Doctors vary. For some say that she is heard proving herself a virgin by inspection alone; but this is not admitted, because by this the impotence of the husband is not necessarily concluded. Some, on the gloss, say the contrary. Lord Antonius says: I believe that if she wishes to prove herself a virgin from inspection of her body and an evident defect of the husband's member, I say she can; which the Doctors also intended on the said c. 1. But if the woman wishes to prove only by inspection of her body and the oath of kinsfolk, then Innocent there seems to hold that they ought not to be separated on account of the aforesaid presumptions; and this is safer, in favour of matrimony. Hostiensis, however, says that the woman can prove and will be heard proving herself a virgin from inspection of the body and by the oaths of kinsfolk. But Innocent [holds] the contrary, and his opinion is more common. It is also more cautious that it be proved by awaiting three years, and that it also be proved by the concurrence of all the aforesaid, because it is better to abound than to fall short in caution.

Third I ask, concerning the third part of the said decretal [c.] 1: what if the woman, inspection of the body excluded, with the oath of seven kinsfolk proves the husband impotent, and the husband with the oath of [seven]

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kinsfolk wishes to prove himself potent — is he to be admitted? Innocent says there that he is (argument from above, *De sponsalibus*, c. *Cum in tua*); which is to be understood when the husband simply says that he knew her, but the woman swears the contrary with seven kinsfolk. For if then the husband likewise swears with seven kinsfolk that he knew her, since the husband is the head of the woman, as in the said § *Illa autem*, and because the cause of matrimony is favourable, one will stand for the matrimony. But if within two months the woman cries out and can prove herself a virgin by inspection of the body and the other indications mentioned above, the woman is to be heard notwithstanding the husband's assertion, and so one will proceed to the separation of the matrimony. And this is the true understanding of the end of the said decretal [c.] 1, when it says: "For if it can be proved by right judgment, you can be separated, and she, if she wishes, may marry in the Lord."

Fourth, principally, I ask concerning natural impotence of intercourse whether narrowness of the woman impedes matrimony. Answer, according to Richard on [book] 4 of the *Sentences*, dist. 34, art. 2, q. 2: either that narrowness is such that it can be helped by the company of her husband, or by nature, or by the art of surgery without danger; and then it does not impede matrimony, although the woman does wrong by contracting as long as she is in such a state. Or no remedy at all can be applied; and then, if such narrowness supervened upon a matrimony lawfully contracted, whether consummated or not, it does not dissolve the matrimony, according to the common opinion — although some say that if the narrowness is perpetual and precedes the consummation of the matrimony, if it can be lawfully proved, the matrimony will be separated on account of it. But if it

precedes the contract of matrimony, then it impedes matrimony to be contracted; and if in fact it has been contracted, it is to be dissolved by the judgment of the Church, the impediment being lawfully proved. Hence that c. *Consultationi*, above, *De frigidis et maleficiatis*, when it says that the Roman Church has been wont to judge in like cases "that those whom they cannot have as wives they may have as sisters," is counsel, not precept, as the gloss says there. But separation having been made, licence will be given to the husband to contract with another, as in c. *His litteris*, same title; the woman, however, must remain without hope of marriage; so that if afterwards she contracted with another and was known by him, and so through use of the second was made knowable, she must be given back to the first, as in c. *Fraternitatis*, same title. But if through use of the following one she was not made knowable to the first, or she was made knowable, yet not without grave danger to the woman — which can happen on account of inequality of members, or for some other cause — then she would not be given back to him. For a woman is not said to be unfit for matrimony on account of coldness as she is through narrowness, because the woman in intercourse is passive. Hence for rendering the debt to the husband it suffices that she suffer the action of the husband in the natural member; and therefore such coldness in a woman does not impede matrimony.

Fifth, principally, I ask: suppose that a man knowingly contracted with a woman unfit and incapable of intercourse, or conversely a woman knowingly contracts with an impotent man — is there true matrimony between such? Answer: the Doctors on c. *Consultationi*, above, *De frigidis*, seem to hold that there is not, but there is a certain obligation that they live together in chastity and dwell as brother and sister. Hence they say that as long as they so help [each other], they are to be tolerated; but if either of them lived dishonestly, the bishop will provide by his noble office, as in c. 1, above, *De officio ordinarii*, and c. *Licet*, same title. And if the potent husband contracts with another and knows her, the second matrimony holds, as in c. *Si inter virum* and in c. *Is qui fidem*, above, *De sponsalibus*. For although one under age ought not to contract, yet it is valid if he contracts, as in c. *De illis*, above, *De desponsatione impuberum*. The Doctors say, however, that such a one contracting is bound to feed and govern the narrow woman. Hostiensis says more, namely that if the one potent for intercourse cannot be continent, licence to contract is to be given him (D. 28, [c.] *De his qui sunt*).

Sixth I ask whether every impotence in a woman renders her incapable of matrimony. Answer: some say that only a narrow woman cannot contract, but another, although impeded, can contract. Hostiensis, however, and better, says the same is so in every other impediment: as if she is so narrow, or so wide, that in fact she cannot be known, or if from some other hidden infirmity she is rendered unknowable in whatever way — if the impediment is irreparable by the help of physicians she cannot contract, as in c. *Ex litteris*, above, *De frigidis et maleficiatis*, and in c. *Consultationi* and in c. *Fraternitatis*, same title.

Seventh I ask how the impediment of coldness can be proved before three years. Answer, according to the Doctors on c. *Laudabilem*, above, *De frigidis et maleficiatis*: it will be proved by inspection of the body, as because the husband has a dry member, or the woman appears wholly narrow and unfit, as in c. *Fraternitatis*, same title; or because both jointly confess the impediment and many signs of coldness appear, and then the oaths of kinsfolk will be furnished. The Doctors say, however, on the said c. *Laudabilem*, that if the impotence of intercourse is wholly open and clear, as in a dry man or a narrow woman, then the oaths of kinsfolk will not be required, because such is an infallible proof, according to Innocent and his followers. Lord Antonius, on the said c. *Laudabilem*, concludes by

distinguishing, saying: sometimes before three years the impediments appear wholly open and clear, as because the woman is narrow; and then they are separated from this alone, because this is the most open proof, and three years are not awaited, nor are the oaths of kinsfolk required, according to Innocent and the Doctors. It is the same if the husband has a dry member, so that the impotence of intercourse is clearly evident. It will be the same if the husband has the virile parts cut off, or is castrated of both testicles, because from such things the most evident proof can be had. The Doctors say the same if a sentence appears already given for separation from another wife on account of coldness, or conversely on account of the narrowness of the woman. Sometimes certain proof of impotence cannot wholly be had, although a likely and evident [proof] is had, as because the husband has a dry member, but it is not wholly evident whether he can have intercourse; and then from such evidence and likely conjecture the oath of kinsfolk is required, as the Doctors say on c. 1 and on the said c. *Laudabilem*, above, *De frigidis et maleficiatis*. Sometimes impotence appears through doubtful signs which conclude presumptively, and they are several; and then Hostiensis says that either they are in half-full puberty, for example because the husband is 14 or 15 years old and is also said to be cold, and then one waits until full puberty, as Lord Antonius says on c. 2, above, *De desponsatione impuberum*, and on the said c. *Laudabilem*; and if he is 15 years old, one will wait for three years, as in the Authentic *De nuptiis*, § *Per occasionem*; if he is [16] years old, one will wait for two years, as in l. *In causis*, Cod., *De repudiis*; but if he is 17 years old, one will wait for a year; and if he is 18 years old, one will wait for one or two months at the discretion of the judge, with the oath of kinsfolk, according to Hostiensis on c. 1, above, *De frigidis et maleficiatis*. But if they were of full age, the oath of kinsfolk being furnished, the matrimony will be separated without awaiting other time. But if no signs of coldness appear, or if some appear but light, then the awaiting of three years with the oath of kinsfolk is required. It is safer, however, as I said, rather to abound in proofs than to fall short.

Eighth I ask whether one stands by the statement of matrons concerning the narrowness of a woman without an oath. Answer, according to the gloss on the said c. *Fraternitatis*: not; but first an oath must be given them by the judge that they go and diligently look and faithfully inquire and report whether the woman is knowable or not; and that such matrons be chosen from the parish, at least two or three, or more for more abundant caution — women honest and of good repute, because neighbours from the parish are presumed to know the truth better and to have knowledge of the impediment through concurrent report, and greater through experience, than strangers, as in c. *Postquam* and c. *Scriptum*, above, *De electione*. And let the judge be careful not to choose matrons from the kindred of those whose impediment is treated, lest suspicion arise in their report on account of their consanguinity or affinity; add what is noted on c. *Super eo*, above, *De consanguinitate et affinitate*. Let the judge also be careful not to choose young women, because they will easily err through inexperience; nor choose those too old, lest from defect of sight they easily fall into error: for such things are to be proved with hand and eye, as in c. *Proposuisti* and in c. *Causam*, above, *De probationibus*. Add what is noted on the last law, Cod., *De probationibus*, where it is said that in criminal matters proofs clearer than all light are required. But since a matrimonial cause is of great danger and great importance and of great weight on account of the sacrament and fidelity of matrimony and the legitimacy of offspring, and from an unjust divorce one easily falls into a criminal cause, namely adultery, by contracting with another man or another woman — therefore let the cautious judge diligently take care that he not be deceived by the reports of the matrons. Some also say that if an adjuration is made by the judge to the women on their faith to inquire and faithfully report, such adjuration is held in place of an oath,

as in c. *Constitutus*, above, *De appellationibus*; of which in c. *Ad aures*, above, *De his quae vi metusve causa fiunt*. And Hostiensis counselled that the woman, before she is inspected, be washed in hot water and remain there long under faithful guard, lest on account of women's medicines

fraudulently applied, the judgment of the matrons be deceived. Which, however, is to be understood when virginity is in question, so that honest matrons may make the test with an egg whether the woman is a virgin or corrupted, as in l. 1, Dig., *De ventre inspiciendo*. Such women or matrons ought also to be chosen sufficiently honest, not base women or bawds, who would perjure themselves for the least thing and would easily let themselves be corrupted for a small price to make a false report, as in the Authentic *De lenonibus*, collation [3]. Let the judge, then, whose conscience is burdened and to whose discretion the examination of the aforesaid is committed, apply all the diligence he can in seeking out the truth, so that he can say with the Psalmist: "Neither is it my iniquity nor my sin; without iniquity have I run and directed my steps." About which Hostiensis says much on the said c. *Fraternitatis*, above, *De frigidis et maleficiatis*.

Tenth, principally, I ask: suppose that a sentence of divorce has been given on account of the coldness of the husband or the narrowness of the woman; afterwards the husband is found to be potent, or the woman fit for conjugal company; and the time for appealing from that sentence has already elapsed, nor was there an appeal within the time. Can such a sentence, which has already passed into a judged matter, be retracted by force of the truth newly appearing? It seems at first that it cannot, as in c. *Cum inter*, above, *De re iudicata*. Answer: it is a principle in a matrimonial cause that a sentence given in the aforesaid cause concerning divorce for impotence or the aforesaid incapacity does not pass into a judged matter, as in c. *Lator* and in c. *Consanguinei*, above, *De re iudicata*. And the reason is that the cause of matrimony is such an act that the parties cannot acquiesce in its sentence, as the gloss says on c. 1, above, *De frigidis et maleficiatis*. For when it appears that the Church or the ecclesiastical judge was deceived, the matrimony already separated through error must be restored and brought back to its former state, as in c. *Fraternitatis*, above, *De frigidis et maleficiatis*, and there also the gloss, which says that when an error is detected, in such a cause the sentence is retracted, as in the said c. *Fraternitatis*, verse *Quamvis*, and in c. *Significantibus*, above, *De purgatione vulgari*. It must be noted, however, concerning the said gloss, that it may be more soundly understood: 238. for sometimes a sentence was given not wholly from certain proof, as is proof by inspection of the body, which deceives and is deceived; and then, the error being detected, the sentence is retracted, as in the said c. *Fraternitatis* and in the said c. *Significantibus*; and Dig., *De iureiurando*, l. *Admonendi*, bears on it. Sometimes a sentence was given upon complete proof, and then it is not retracted when an error is found, as in the said c. *Cum inter*. It fails in a matrimonial cause, in which the sentence does not pass into a judged matter, as in the said c. *Lator* and c. *Consanguinei* and in the said c. *Fraternitatis*. Innocent assigns a third case in which the sentence is retracted, namely when something is proposed in the second judgment which had not been proposed in the first; he alleges c. *Cum Ioannes*, above, *De fide instrumentorum*. There is also a fourth case, namely when the injustice of the first sentence is notoriously established, because the truth discovered ought always to prevail (D. [8], [c.] *Veritate*; and in l. 1 and throughout, Cod., *De sententiis ex falsis instrumentis latis*); to which the said c. *Fraternitatis*, where the falsity of the first sentence is notoriously evident. From which note that a sentence against what is notorious is invalid; and by this that common saying is limited, that an unjust sentence is not retracted unless it is appealed — which is true unless the injustice is notoriously established through evidence of fact. And this is the reason why a sentence which

someone confesses to be unjust is retracted, as Innocent notably writes on c. *Quia plerique*, above, *De immunitate ecclesiarum*, and on the said c. *Fraternitatis*. But what if the injustice is established in judgment through proof judicially made? Innocent on the said c. *Fraternitatis* seems to hold the same as in the preceding notoriety, because judicial proof passes into notorious proof; of which enough by the Doctors, and most of all by Lord Antonius on c. *Quoniam contra falsam*, in the last gloss, above, *De probationibus*; and on c. *Cum Bertholdus*, above, *De re iudicata*; and on c. *[Ex] tenore*, above, *De appellationibus*; on c. *Cum dilecta*, above, *De rescriptis*; and on c. *Sicut appellationem*, in the gloss, *De appellationibus*, in the Clementines; and on c. *Vestra*, above, *De cohabitatione clericorum et mulierum*. And so it seems that injustice directly [shown] by proofs is retracted as unjust; which is notable. But whether a sentence given against what is notorious holds, Lord Antonius pursues enough on c. *Ab excommunicato*, above, *De rescriptis*, and on c. *Cum inter*, above, *De re iudicata*; and Innocent on c. *Cum super*, in the addition, above, *De concessione praebendae*, and on c. *Per tuas*, below, *De sententia excommunicationis*. And there is a text that it is invalid in c. *Sollicitudinem*, above, *De appellationibus*, and in c. *Inter cetera*, above, *De re iudicata*.

Eleventh, principally, I ask: a divorce has been made by a sentence given upon the impotence of the husband or the incapacity of the woman; afterwards the husband became potent, or the woman capable; must the first matrimony be restored, granted that both contracted a second time? I answer, according to Innocent and his followers on the said c. *Fraternitatis*, that in whatever way the impediment is established to have ceased — whether by divine miracle, or by the help of physicians, or by human company — the first matrimony must be restored, unless it appears that the husband is wholly impotent toward every woman, and the woman incapable toward every man. Hostiensis says the same, adding that however grave the danger was in removing the impediment, yet [if] it has been removed, in whatever way it was removed, the wife is always to be restored to the first husband; because if she is knowable by the second, then also by the first — unless clear experience showed the contrary, because perhaps the husband had a member out of proportion to the woman's member. Therefore the gloss says on the said c. *Fraternitatis*, verse *Quamvis*, that if the first husband could not know her without grave danger, then she would not have to be given back to him, even if afterwards, through the habit of the second husband, she was made fit for the first. Which, however, I do not believe; because, according to Innocent and Hostiensis, since she was made fit for the first, in whatever manner and way, she is to be restored to that first, because it has already been detected that the defect was reparable, and so not perpetual but temporary; and consequently it appears that there was no matrimony with the second.

Twelfth I ask: a woman separated on account of narrowness contracted with a second; after the first intercourse she was asked back by the first and given back; but the first did not find her capable for him; is she to be restored to the second? Answer, according to the gloss on the said c. *Fraternitatis*: yes; and the same if after the second and third intercourse of the second, and so on to infinity, according to Johannes. The gloss, however, says that she ought to be restored to the first husband only up to the third time and not beyond, but she must remain with the second after the second time, because only two sentences are to be given after the first, since it is not lawful to appeal a third time (C. 2 q. 6, [c.] *Si quis in quacumque*; and above, *De appellationibus*, c. *Suam nobis*). This saying was Tancred's, with whom the gloss rests on the said c. *Fraternitatis*, on the word *fornicario*, toward the end of the gloss which begins *Quia si legitime contraxisset*. From which gloss note a remarkable limitation to what is said daily, that a sentence given in a cause of matrimony does not pass into a judged matter:

because this is true of a single sentence through the lapse of the term for appealing; but through a double confirmation after the first sentence it well passes into a judged matter, as in c. *Cum cessante*, above, *De appellationibus*, with what is noted there by the Doctors. And understand that an interlocutory does not pass [into a judged matter] as to the judge; yet, twice confirmed, it is not retracted, as in c. *Cum appellatione*, *De appellationibus*, in the Clementines; and Bartolus and Dynus note it on l. *A divo Pio*, Dig., *De re iudicata*; which note. But Lord Antonius on the said c. *Fraternitatis*, toward the end, says he does not believe the gloss speaks truly in a matrimonial cause, because no bond, however multiplied, can confirm an act from which arises a sin not remissible by the parties or by the judge. Likewise, in what the gloss directly says, it does not please the Doctors in either opinion, because it is absurd and dishonest that a woman be thus shamefully exposed to two, nor does it pass with little shame to both spouses. Hence, as soon as she appears known by the second, the first husband and she and the second husband are inspected; and if they have similar members, it is presumed that she is knowable by the first, and so she is to be given back to him. Hostiensis, however, says that she will be restored to the first, with whom she will stay for three years, the second being forbidden to contract with another in the meantime; and if she can be known by the first within three years, let her remain with him; but if not, let her be restored to the second without hope of restitution to be made thereafter, and the impediment will be presumed to have been perpetual, as is decided of sorcery in the last chapter, *De frigidis et maleficiatis*. But if in the meantime the second contracts with another, they will be separated and will remain separated until three years elapse; and so it will appear whether the cause of the impediment was temporary or perpetual. Because if the first knows her restored to him, the second contracted matrimony will hold, although the one contracting must do penance. But if she cannot be known by the first, the second matrimony will be separated, [namely that] contracted by him who had first contracted with her who was married to an impotent man, from whom, separated, she will be restored to him for whom she was made capable by his use. And so there will be separation of the first matrimony contracted by the impotent man, and of the second contracted by the potent man. The same is to be said of the second wife of the first. And so such matrimonies hang upon the event.

It remains now to see of accidental impotence of intercourse, which also can be perpetual and temporary. Perpetual, as of castration in a man, or of destruction of the vessel in a woman, so that she is made irreparably unfit. Temporary, as of sorcery;

Summa on Matrimony, part 26

Concerning impotence through castration, I ask whether one castrated or cut can contract matrimony. I answer: some are castrated, or eunuchs, or cut before they have contracted matrimony; and some are castrated or made eunuchs after they have contracted matrimony by words *de praesenti*, whether they consummated it or not. In the first case, either he is deprived of both testicles or of one only. If of both, he cannot contract; and if he contracted with a woman not knowing, the matrimony will be dissolved; if with one knowing, and they concordantly arrange to live as brother and sister in continence, they can also contract, according to some. But if he lacks one testicle only, he can without doubt contract, according to what is noted by the gloss on C. 27 q. 1, [c.] *Si qui matrimonium*, where the gloss says of these castrated men: some are castrated, some are born chaste, that is, born cold; these cannot contract (below, next question, [c.] 1); but the others, castrated, namely *spadones*, well

can (argument from C. 27 q. 1, [c.] *Nuptiarum bonum*; below, next question, [c.] *Quod Deo*; Dig., *De iure dotium*, l. *Si servum*, § *Si spadoni*). Others say better that neither can these contract, since they cannot know a wife, and three goods are required in matrimony, in fact or in kind (C. 27 q. 2, [c.] *Omne*). Or you may say that if he has an erect rod, whether he emits seed or not, there is matrimony there: for such a one satisfies the woman, as the woman satisfies the man, whether she emits or not; nor is it required that in matrimony there always be hope of children, because it suffices that they do not avoid offspring, as above, same question, [c.] *Solet quaeri*. The common opinion is what I said: if he is deprived of both testicles, etc.; of which the Doctors treat on c. *Quod sedem*, above, *De frigidis et maleficiatis*. But in the second case, when matrimony was lawfully contracted by words *de praesenti*, whether it was consummated by carnal intercourse or not, before the cutting or castration supervenes, then the matrimony is by no means separated on account of this, although the husband has been made unfit for rendering the debt to the wife (C. 32 q. 7, [c.] *Hi qui*; and above, *Ut lite non contestata*, c. *Quoniam frequenter*). And this is to be understood also of any other impediment supervening after matrimony, as the Archdeacon holds on the said c. *Si qui*, and Raymond in the *Summa* on betrothal, under the title *De impotentia coeundi*, § *Vidimus*.

But can such persons enter a monastery? Answer: if the matrimony is not consummated before the impediment supervenes, one can enter religion even against the will of the other, as in c. *Verum*, above, *De conversione coniugatorum*, and in c. *Commissum*, above, *De sponsalibus*. But if the impediment of castration supervened after the matrimony was consummated, although the matrimony ought not to be dissolved, yet if by an equal vow they consent to keep perpetual continence, and so promise and vow in the hands of the diocesan, one can enter religion even while the other remains in the world (C. 27 q. 2, [c.] *Si quis coniugatus*, and the following chapter). But if after matrimony contracted by words *de praesenti* and consummated castration supervened, and the woman committed adultery, sentence having been given against her, her husband can enter religion even against her will (C. 27 q. 2, c. *Agathosa*). 244. But must he who contracted matrimony by words *de praesenti*, if he was castrated after the matrimony was contracted, be compelled to enter a monastery so that the woman can marry, since the matrimony was not consummated by intercourse? Answer: it must be said not, according to Huguccio. For although he cannot use the matrimony perfectly, yet besides the mutual service of carnal union, spouses are bound to each other in many things (C. 27 q. 1, [c.] *Nuptiarum bonum*; C. 33 q. 5, [c.] *Quod Deo pari*); and Huguccio notes this on C. 27 q. 2, [c.] *Cum ergo*. 245. Moreover, Papias says that some *spadones* have intercourse and emit seed, although vain and invalid for generating. And the Archdeacon [and] the Parmese, on the said c. *Si qui*, C. 32 q. 7, says he has in fact seen some cut of both testicles who know women, and the women admit that they emit seed like those having virile parts, although that seed is useless. And I testify that I in fact saw, while I was in the world, and kept in my house, a man and woman joined in matrimony and concordantly admitting that they had intercourse like other married people, although the husband was cut of both testicles and not able to generate. And after I was in religion I saw a brother cut of both testicles admitting that he had many times suffered nocturnal pollutions in sleep, and saying that he many times endured troubles of the flesh. Isidore also, *Etymologies* book 10, c. 1, under the letter E, at the end, says that a eunuch emits a fluid useless for generating. 246. And it is to be noted that our Saviour designates three species of eunuchs, Matthew 19, saying: "For there are eunuchs who were born so from their mother's womb; and there are eunuchs who were made so by men; and there are eunuchs who have made themselves eunuchs for the kingdom of heaven. He that can take, let him take it."

And so He designates the cold, because they were born so; the *spadones*, because they were castrated by men with a *spada*, that is, an iron instrument — as also some are castrated for the guarding of women, as were the eunuchs of King Ahasuerus (Esther 2). Third, He designates the continent, who have castrated themselves for the kingdom of heaven, of whom Isaiah 56: "And let not the eunuch say, Behold I am a dry tree. For thus says the Lord to the eunuchs: They that shall keep my sabbaths and shall choose the things that please me and shall hold fast my covenant, I will give to them in my house and within my walls a place, and a name better than sons and daughters; I will give them an everlasting name which shall never perish." As if to say: these will serve me in the contemplative state, which is the best in the Church militant, continuable also in the Church triumphant, since the Lord said to Martha, Luke 10: "Mary has chosen the best part, which shall not be taken away from her." A eunuch is called from *eu*, which is "good," and *nice*, which is "victory": because they obtain a great victory who have known how to tame the concupiscences of the flesh. Of the aforesaid eunuchs it is also treated in C. 32 q. 7, [c.] *Omnes causationes*, toward the end, where, under the example of three eunuchs, by the example of three eunuchs it infers the blessedness of virginity, which is held by no law of the flesh; where the gloss treats of the aforesaid; but originally they are the words of Jerome in the letter to Amandus the priest; it agrees with C. 35 q. 5, [c.] *Tunc salvabitur*, § *Qui sitit*; and D. 55, [c.] *Si eunuchus*, where a eunuch is not forbidden even the episcopal dignity, if otherwise he is worthy to be promoted, whether he was so born or cut. Where the gloss says that it is not necessary to keep that flesh or dust, as common people say, to hang it from the neck. Note that although a eunuch is said to be defective in body (Dig., *De aedilicio edicto*, l. *Si...*), yet sometimes he is reputed more precious (Dig., *Ad legem Aquiliam*, l. *Si servus*, § *Et si puerum*). 247. But he who has had himself castrated, or has castrated himself with his own hand, thinking that by this he can cut off carnal concupiscences, is made irregular, even if he castrated himself after the priesthood (D. 55, [c.] *Si quis per aegritudinem*, etc., [c.] *Si quis abscidit*, etc., and the following). Of the aforesaid eunuchs Azo also treats in the *Summa*, Cod., *De eunuchis*, and there Baldus de Perusio; and Goffredus in the *Summa*, *De frigidis et maleficiatis*, § *De castratis*; and Bartolus, Dig., *De liberis et postumis*, l. *Sed est quaesitum*, § *Spadonem*; and Dig., *De aedilicio edicto*, l. *Aediles*, § *Officium*; and Dig., *De re militari*, l. *Qui cum uno*, 248. where it is proved that one who has no testicle cannot be made a soldier, but one who has one well can. It is also treated of the aforesaid in Dig., *De verborum significatione*, l. *Spadonum*, where the diversity of *spadones* is treated.

But suppose that a man cannot generate, or a woman conceive: does matrimony hold between such? Answer: it does. For although in the matrimony of such the cause of offspring is lacking, yet the cause of avoiding fornication is not lacking; which are the two principal matrimonial causes excusing intercourse (C. 32 q. 2, [c.] *His ita respondetur*). Hence a matrimony contracted on account of the beauty of the woman, or on account of riches, or on account of power, or on account of peace and the like, also holds (C. 32 q. 2, [c.] *Solet quaeri*; and C. 27 q. 1, [c.] *Nuptiarum bonum*); and it appears by the example of Jacob, who served fourteen years for Rachel, who was of a beautiful countenance and comely to behold, and the days seemed to him few because of the greatness of his love (Genesis 29). And in Deuteronomy 21 Moses says on God's behalf: "If you see among the captives a beautiful woman and love her and wish to have her as wife, you shall bring her into your house," etc. 250. But can a woman rendered incapable of matrimonial embraces on account of the destruction or deformity of the natural member contract; or, if she contracted, must she be separated? Answer: if the impediment was present before the matrimony was contracted, and she is wholly and irreparably

incapable, she cannot contract; and if she contracted she must be separated, as in c. *Ex litteris* and in c. *Fraternitatis*, above, *De frigidis et maleficiatis*.

Concerning the impediment of sorcery I ask whether such an impediment dissolves matrimony. Answer: either the sorcery is perpetual or temporary. If perpetual, it impedes and dissolves (C. 33 q. 1, at the beginning, and c. *Si per sortiarias*). But if it is temporary, it neither impedes nor dissolves, as in the said laws and in the last chapter, above, *De frigidis et maleficiatis*. 251. Some, however, say that no sorcery can be perpetual, because whatever is bound is dissoluble, as in the Authentic *De nuptiis*, § *Nuptias*, collation 4; and therefore such say that the aforesaid c. *Si per sortiarias* does not hold, because at least it could be loosed by him who made the sorcery. Which, however, is ridiculous and false: for sorcery could be perpetual, as because something was given to eat or drink, or because the sorcerer is dead, or because the sorcery is lost, or also because the sorcerer knows how to bind but does not know how to loose; and so the man and woman will be perpetually impeded, as Goffredus says in the *Summa*, *De frigidis et maleficiatis*, § *De maleficio*. 252. Second I ask: matrimony was contracted by words *de praesenti*, every impediment ceasing; afterwards sorcery was made, the matrimony not having been consummated by

carnal intercourse: does such sorcery dissolve the matrimony? Answer: not; for no supervening impediment can rescind a matrimony which was once lawfully contracted (C. 32 q. 7, [c.] *Si qui*; and C. 32 q. 5, [c.] *Horrendus*, and c. *Si uxorem*).

Third I ask how it can be known whether the sorcery precedes or follows the matrimony contracted by words *de praesenti*. Answer: it can be known by the revelation of him who made it; and then supervening sorcery will not dissolve the matrimony, by the laws alleged above in the immediately preceding question. But if it cannot be established whether it precedes or follows, then, in favour of another, more useful matrimony, it is presumed to have preceded — [that is, to have preceded] the consummated matrimony, as because they cannot be joined on account of sorcery, even if it preceded the matrimony lawfully contracted: for matrimony is confirmed by the office of the flesh, as the gloss says on C. 33 q. 1, § 1; and it is added that before it is confirmed the impossibility of the office loosens the conjugal bond; of which the Master of the *Sentences* touches in [book] 4, dist. 34, c. 2, and there Richard, art. 3, q. 1. Others say that either the impediment is alleged on the part of the woman, and it is distinguished whether it is reparable or not, as in the said c. *Fraternitatis*; or sorcery is alleged on the part of the man, and then the matrimony is dissolved without distinction, as in the said c. *Si per sortiarias*. But this is not a good opinion, because man and woman ought not to be judged unequally, nor is a greater cause to be given in one than in the other (C. 32 q. 1, [c.] *Si quis uxorem*). Others say that the sorcery is presumed perpetual since they have already lived together three years and could not be joined; if, however, it is discovered that it is not perpetual, then the matrimony is restored.

Fourth I ask concerning the way of knowing whether sorcery is perpetual or temporary. Answer, according to the determination of holy Mother Church: if sorceries, although hidden, yet by the just judgment of God permitting and the devil procuring, present an impediment so that the spouses cannot have intercourse, because they did not keep the due form of the Church — because they did not give themselves to prayers for two or three days and keep entire chastity, according to what is noted in C. 30 q. 5, [c.] *Aliter*; and Tobias 8, where the Archangel Raphael seized the demon and bound him in the desert of Upper Egypt, who by the name of Asmodeus had killed seven men to

whom Sara had been betrothed; but because they had so taken up marriage as to shut out God from themselves and from their mind, and so to give themselves to their lust as the horse and mule, which have no understanding, therefore by the just judgment of God the demon received power over them and killed them as soon as they had gone in to her (Tobias 3 and 6, where Raphael says to Tobias: "But you, when you have taken her, going into the chamber, for three nights be continent from her, and you shall give yourself to nothing else but to prayers with her. And when the third night is past, you shall take the virgin with the fear of the Lord, moved rather for love of children than for lust, that in the seed of Abraham you may obtain a blessing in children") — therefore, if, the aforesaid not having been kept, and no lawful confession, nuptial blessing and reception of the most holy Body of the Lord having preceded, they sought indiscreetly and irreverently to join themselves in the heat of lust, and they find themselves impeded by sorcery, by the just judgment of God permitting, so that they cannot have intercourse: then those to whom these things happen are to be exhorted that, with contrite heart and humbled spirit, they make a pure confession of all their sins to God and the priest, and with tears poured forth and more abundant alms and prayers and fasts make satisfaction to the Lord, and with devotion and reverence together receive the saving Host; and, fortified by exorcisms and the other medicines of the Church, let such ministers of the Church strive to help them, as far as the Lord shall assent to their prayers and supplications. And a term of three years having been imposed, during which they must continuously, with an oath, live together and faithfully apply themselves to conjugal intercourse — when this term is completed, if before the judge they profess that they have faithfully carried out what was imposed on them and yet could not have intercourse, they confirming it on oath with the hands of seven kinsfolk, as is said, the sentence of divorce will be pronounced by the ecclesiastical judge, according to what is noted in C. 33 q. 1, [c.] *Si per sortiarias*, joined with the last chapter, above, *De frigidis et maleficiatis*, and in c. *Laudabilem*, same title, and in the Authentic *De nuptiis*, § *Per occasionem*.

Fifth I ask whether those separated on account of sorcery, if after they have contracted another matrimony they know each other carnally, are to be called back to the first matrimony. At first it seems not, by the said c. *Si per sortiarias*, at the end, where it says: "But after they have sought other nuptials, while those to whom they have been joined are living in the flesh, they will not be able to be reconciled to the former whom they had left, even if the possibility of lying together has been restored to them." Conversely, it seems they are, since it appears that the sorcery was not perpetual after she was known by the same first husband, as we say of those separated on account of coldness (C. 33 q. 1, [c.] *Quod autem interrogasti*). Answer: such are to be brought back to the first matrimony, because the sentence of divorce between them was given through error, because the impediment which was judged perpetual according to presumption was not perpetual according to truth; and such an impediment does not dissolve matrimony unless according to the truth of the matter it is perpetual. When, therefore, the first wife has been known, the error of the perpetuity of the impediment is detected, and therefore the first matrimony must be restored, as in c. *Laudabilem*, above, *De frigidis et maleficiatis*. The contrary does not stand in the way, because, according to the Master of the *Sentences*, that Archbishop of Reims, by name Gnarus, spoke there more from rigour than from canonical equity, as the same Master says in [book] 4 of the *Sentences*, dist. 34, c. [3]; on account of which the saying of the aforesaid Archbishop is not so strictly held. Hence the gloss says there, namely on the said c. *Per sortiarias*, at the end: "here he should rather be called Ignarus than Gnarus." Lord Antonius de Butrio on c. *Fraternitatis*, above, *De frigidis et maleficiatis*, says that sorcery in

doubt is not presumed perpetual, on account of its dissolubility; yet if proof has been made over three years, it is presumed perpetual. And if it is said that it is still dissoluble, it is answered that it is not dissoluble except by a miracle, as because it can be loosed by one only, or because it depends on the power of one only; for what rarely happens is called a miracle (D. 93, [c.] *Legimus*, verse *Quid mihi profers*, where "everything that is rare is more sought after"; the gloss says: for what rarely happens is a miracle, in the Authentic *De consulibus*, § *Itaque*, coll. 4). 256. But what is required for something to be called a miracle the Archdeacon notes on C. 1 q. 1, [c.] *Teneamus*; and *De reliquiis et veneratione sanctorum*, c. 1, in the penultimate gloss, in the Sext; and C. 26 q. 5, [c.] *Nec mirum*, and there the Archdeacon sets out whence it is called a miracle, how it is done, how it is proved, and whether it is necessary for a miracle to be done in an instant. And Thomas touches on the grace of miracles, and whether the wicked can work miracles, II-II, q. 178. Lord Antonius also says on the said c. *Fraternitatis*, a little before the middle, that the impediment is judged perpetual because the sorcery or impediment is not loosed except by the powers of herbs or other things; and it can most of all be called perpetual when he who made it is dead, or is not found, or does not know how to destroy it, or cannot — most of all when it is given in food or drink. All these proceed, he says, so that the matrimony is dissolved by sorcery when the sorcery preceded; otherwise if it followed, because it is not dissolved by this (C. 32 q. 7, [c.] *Hi qui*; and C. 32 q. 5, [c.] *Si uxorem*). 257. And if it is doubted, he himself says, whether the sorcery preceded or followed, who will prove it? Some say that it ought to be presumed that it preceded, so that it may thus be dissolved, lest they remain impeded (argument from Cod., *De aedilicio edicto*, l. 3, book 10). Nor does c. *Licet ex quadam*, at the end, above, *De testibus*, stand in the way, because that is true when the matrimony can have effect, namely the avoidance of fornication or the good of offspring, which in such a case it cannot have on account of the impotence of intercourse. From which Lord Antonius himself notes that the saying is limited that "it is presumed for matrimony," namely [matrimony] capable of the goods of matrimony; otherwise the contrary; which is to be noted from the sayings of the Doctors. He himself adds: I think that the one asking for divorce is constrained to prove that the sorcery preceded; otherwise the defendant would be absolved, because when the plaintiff does not prove, the defendant is absolved, as in c. *Ut nostrum*, above, *Ut ecclesiastica beneficia*, with similar places. But if someone asks for some woman as wife, perhaps the saying of the Doctors could proceed. And if both consented to the separation, the saying of the Doctors could still proceed. Hostiensis also holds this on the said c. *Fraternitatis*, and Thomas on [book] 4, dist. 34: namely, that if after three years the impediment lasts, the sorcery is presumed to have been perpetual; and if the sorcery was universal, in respect of any person whatever, then, if she marries another, it is shown that the impediment was not perpetual; hence she must return to the first. But if the sorcery was particular, namely in respect of a special person, then, since licence to contract with others is given to both, they cannot return to the former matrimony, since the first matrimony was null and the second is true. And so the said c. *Si per sortiarias*, at the end, can be understood — yet so that if the woman herself procured the sorcery, she cannot ask for divorce, because she came to this by her own fault; therefore it must be imputed to her (D. [5]0, [c.] *Si evangelica*; and what is noted on the said c. *Si per sortiarias*, and in c. *Damnum*, *De regulis iuris*, in the Sext). Innocent, however, on the said last chapter, above, *De frigidis et maleficiatis*, says: "it seems better that no matrimony be separated on account of sorcery, and the aforesaid c. *Si per sortiarias* does not hold"; and he says the aforesaid chapter speaks of one naturally cold. Johannes Andreae extends the matter enough there. What Lord Antonius says pleases me more, because they cleave more to the

sayings of the theologians, who consider more the end and effect of matrimony. And the gloss also on the said last chapter, above, *De frigidis*

et maleficiatis, in that the text says that the husband asserted that he had power to know others, understands that the impediment was through sorcery and not through coldness; and so the theologians commonly understand it on [book] 4 of the *Sentences*, dist. 34. And there Richard, art. 3, q. 1, holds the same as I said above in the determination of this question, same art., q. 10: namely, that if after he so contracted with another he knew the first, he remains with her, the second being dismissed.

Sixth I ask whether by the reception of holy orders a matrimony preceding [carnal] intercourse is dissolved. Some say that it is, as by entry into religion, because by this the vow of continence is solemnized; and so they say c. *Ex publico*, above, *De conversione coniugatorum*, ought to be understood, namely that it has place also in the solemnization of the vow through the reception of holy orders. But say that today the contrary is clear by the Extravagant of John XXII which begins *Antiquae*, by which it is determined that espousals *de praesenti* are not dissolved by the reception of holy orders; and so also Johannes Andreae says he disputed on c. 1, *De voto*, in the Sext. What is noted in c. *Ex parte* [2], above, *De conversione coniugatorum*, and C. 27 q. 2, [c.] *Desponsatam*, supports this; for Christ also said: "What God has joined together let no man put asunder" (Matthew 19). But if holy orders preceded the matrimony, then it is true that the vow of continence is understood to be solemnized by the reception of holy orders, and afterwards he cannot contract matrimony, as in c. 1, *De voto*, in the Sext; and if he contracts, not only must the matrimony be dissolved, but he is also excommunicated by the very fact, with all who knowingly take part in the contract of such a matrimony, as in c. *Eos qui*, *De consanguinitate et affinitate*, in the Clementines. How a married man can be promoted to holy orders I said above in the eighth principal case, namely on the impediment of orders, § *Circa hoc*.

Seventh I ask whether one seeking separation on account of impotence of intercourse is compelled to state the cause, namely from frailty or from sorcery. Answer: not, according to the Doctors on the said last chapter, above, *De frigidis et maleficiatis*, where the text says: "because her said husband did not have the power of intercourse" (to this, above, *De iudiciis*, [c.] *Dilecti*), because any cause suffices, provided it is perpetual, as in c. *Quod sedem*, above, *De frigidis et maleficiatis*, according to Hostiensis. Johannes, however, says on C. 33 q. 1, c. 2, that there is a difference whether one acts on a certain cause or simply: because in the first case, when one has acted on one cause, one could act again on another; but in the second case one seems to have brought all one's right into judgment, and therefore, losing, one would not be heard further (Dig., *De exceptione rei iudicatae*, l. *Et an eadem*, § *Actiones*; and above, *De sententia et re iudicata*, [c.] *Abbate sane*); and Johannes on the said c. 2, C. 33 q. 1, which begins *Pone quod mulier*, alleges for this, above, *De causa possessionis et proprietatis*, c. *Cum super electione*, and Cod., *De annali exceptione*, last law. It is otherwise, however, in a personal action (Dig., *De exceptione rei iudicatae*, l. *Et an eadem*, § *Actiones*); so the gloss says there.

Eighth I ask from what time the three years begin to run. Answer: according to the gloss on C. 33 q. 1, in the first gloss, at the end, the three years run from the time when they tried to have intercourse, as is gathered from the Authentic *De nuptiis*, § *Per occasionem*, coll. 4. Others say that it begins to run

from the confession and the precept, as appears in the last chapter, above, *De frigidis et maleficiatis*, where the text says "who after several terms," etc., as if by the very fact that they have confessed a term is to be fixed by the judge. And Hostiensis says that this is safer: because if sin is the cause, the time which preceded penance profits nothing, nay it harms, because sins are the graver the longer they hold the unhappy soul bound, as in c. *Non debet*, above, *De consanguinitate et affinitate*, and in the last chapter, above, *De consuetudine*. Others say the three years are to be computed in whatever way they have stayed living together. Others say the time is to be computed from the day of the suit being moved. But say with Vincentius, as the truth to be held, that the three years are to be computed from the day on which the precept was given to them and they began to do penance; nor in such a case is it lawful for the judge to cut short the time of three years, lest prejudice be generated to the matrimonial cause.

Ninth I ask: what if the husband is suspected of causing the woman to be corrupted by another, perhaps on account of her great dowry or inheritance? Answer, according to Hostiensis on the said last chapter, above, *De frigidis et maleficiatis*: recourse must be had to the counsel which is set down in c. *Cum locum*, above, *De sponsalibus*: namely, that the judge provide with every better precaution that the woman be honourably kept in a house in which there is nothing to be feared, even with the said husband with whom she contracted, enjoying common security under the faithful company of kinsmen or kinswomen, until the said three years are completed and the said cause obtains its due effect.

Tenth I ask: what if it rests with one of them that they do not dwell together for three years? Answer, according to Hostiensis and other Doctors on the said last chapter, above, *De frigidis et maleficiatis*: he who will not cohabit is to be excommunicated, and a suitable caution is to be exacted that they cohabit and in good faith apply themselves to conjugal intercourse (argument from above, *Ut lite non contestata*, c. *Quoniam frequenter*, last §; and Dig., *De aqua cottidiana et aestiva*, l. 1, § *Duo autem*, and § *Quod autem*); and if they do not fear the ecclesiastical judge and the sentence of excommunication, they are to be handed over to the secular court, as in c. *Cum non ab homine*, above, *De iudiciis*. And the same will be done against him who, although he cohabits, refuses to attempt conjugal intercourse.

Eleventh I ask: what if the husband or wife says that he so abhors the marriage that he does not find in his heart the will to attempt conjugal intercourse? Answer: he is no less to be constrained; because, since it once pleased him to consent to matrimony, it has become necessary for him to obey, as in l. *Sicut ab initio*, Cod., *De actionibus et obligationibus*, and in c. *Quod semel*, *De regulis iuris*, in the Sext — unless perhaps there were an evident cause of honour, as appears from what is noted in c. 1, above, *De coniugio leprosorum*, at the end. For although wives are bound to follow leprous husbands, and husbands leprous wives, and to treat them with conjugal affection, if they cannot be induced to this, because perhaps they abhor the disease of leprosy, yet it is more strictly enjoined on them that each keep continence while the other lives, to which they are to be constrained under the bond of excommunication. And understand cautiously: for although the healthy one is not bound to stay in the same bed and house with the leper, he is nevertheless bound, when it is demanded, to render him the conjugal debt, as in c. 2, at the end, above, *De coniugio leprosorum*. Let the judge therefore beware that in such a case of the proposed question he does not dissolve the matrimony unless the aforesaid solemnities to be observed have been observed. And so in this case, as in many others, one is deprived of his right without fault but not without cause, as in c. *Sine culpa*, *De regulis iuris*, in the Sext,

and in the concordances alleged there in the gloss; and this is because the Church does not follow the truth, which it does not know, but follows the opinion which it presumes, and therefore it is many times deceived, as in c. *A nobis* [2], below, *De sententia excommunicationis*.

Twelfth I ask: suppose that the matrimony was separated on account of sorcery which was believed perpetual; the husband after the divorce received holy orders, after the reception of which he knew the woman from whom he had been separated: must he return to the matrimony with the wife? Answer, according to Richard on [book] 4 of the *Sentences*, dist. 34, art. 5, q. 2: he must, because the error in the sentence of divorce is clear, since the sorcery was reckoned perpetual which nevertheless had been temporary. Hence after the matrimony was contracted they always remained, according to the judgment of God, true spouses. Hence the husband, by receiving holy orders, could not generate prejudice to the wife; nor yet did he sin in receiving them, because through invincible or probable ignorance he was juridically excused. But whether by receiving holy orders he prejudiced himself as to this, that it is not lawful for him to demand the debt from the wife, is called into doubt. For it seems to some that it is not lawful for him to demand, although he is bound to render, because the vow which is annexed to holy orders held as to that which was in the power of the husband, although it did not hold as to that which was in the power of the woman; and it is in the power of the husband to demand, but as to rendering the debt the husband's body remained in the woman's power, by the sentence of the Apostle, 1 Corinthians 7. Others, however, say that by receiving holy orders he made prejudice neither to himself nor to the woman as to this, that it is not lawful for him to render and to demand; because invincible or probable ignorance rendered him exempt from both prejudices: for unless he had reckoned the bond of matrimony between himself and the woman to be loosed, he would by no means have received holy orders. Hence neither did he intend to bind himself to the vow of continence except with an implicit condition, namely if he were wholly and according to the truth freed from that marriage. Nor does it stand in the way if it is said that before the consummation of matrimony he could enter religion, as in c. *Ex publico* and in c. *Verum*, above, *De conversione coniugatorum*, and in c. *Commissum*, above, *De sponsalibus*, therefore also receive holy orders; for such an argument does not conclude, on account of dissimilarity: for through profession, tacit or express, in any of the approved religious orders, according to the truth of the matter the matrimonial bond is seen to be dissolved between the spouse and the woman, since the matrimony was not consummated. But he who after the reception of holy orders knew his wife carnally truly consummated the matrimony. Hence afterwards it is not lawful for him to enter religion against the will of his wife; but it would well be lawful by common agreement and an equal vow of continence (C. 27 q. 2, [c.] *Agathosa*, and c. *Si quis coniugatus*; and C. 33 q. 5, [c.] *Quod Deo pari consensu*).

Thirteenth I ask: suppose that he who received holy orders before the consummation of matrimony will not enter religion, and the woman asks the judge that he be compelled to the consummation of the matrimony: is he bound to enter religion, or is he to be compelled to consummate the matrimony? Answer, according to Richard on [book] 4, dist. 34, art. 3, q. 2, at the end: on this there are various opinions. For some say that he is bound to enter religion, and to this he must be compelled by the judge, but he ought not to be compelled to consummate the matrimony; because, since a way lies open to him by which he can lawfully keep the vow of continence which is annexed to holy orders, he is bound to choose that way: for anyone vowing is bound to do whatever he can to observe the vow which he has made. Hence the Psalm says: "Vow" — namely of counsel — "and pay" — namely of precept. And Deuteronomy 23: "When you have made a vow to the Lord your God, you

shall not delay to pay it," etc. See what I said above in the [relevant] case, namely on the impediment of the vow. Others, however, say that if he, in receiving holy orders, believed that by this the matrimony between himself and the woman could be dissolved, because he was ignorant of the law, then he is not bound to enter religion, but is to be compelled to the consummation of the matrimony, unless the woman wishes to be continent. For since the vow of profession in religion is far stronger and stricter than the vow of continence only, it seems hard to say that he intended to bind himself to this either explicitly or implicitly; because in vows the intention of the one vowing is to be observed (C. 32 q. last, last c., at the end, and there: "are vowed without condition," etc.). Yet it will not be lawful for him to demand the debt from his wife, because this was in his power, and therefore he could bind himself to this. Of which Brother John of the Order of Preachers notes enough in the *Summa Confessorum*, book 4, title *De impotentia coeundi*, qq. 17–18, and title 19, qq. 4, 5 and 6.

Fourteenth I ask: what if after the sentence of divorce was given the husband entered religion and was made a priest, and afterwards it is established that the Church was deceived in the sentence of divorce: is the husband to be restored to the wife who seeks him back? Answer, according to Raymond: he is, even if he had made profession; because after the matrimony was consummated he could generate prejudice to the wife neither by entry into religion nor by the reception of holy orders, since he does not have power over his own body, as the Apostle says, 1 Corinthians 7; and therefore he is bound to render the debt, but he ought not to demand it, because in this he could well prejudice himself, since this consists in his power, as was said above.

Fifteenth I ask, the terms of the preceding question being presupposed: suppose that the woman does not seek back her husband but intends of her own accord to keep continence, while the husband wishes to seek back his wife: is he to be heard? Answer: not; because by professing and receiving holy orders he could well prejudice himself, as was said above: for even if from the beginning they had agreed with an equal vow to keep continence, either one could well have entered religion and solemnly professed (above, *De conversione coniugatorum*, c. *Ex parte abbatis*, and c. *Uxoratus*, with many concordances).

Sixteenth I ask: suppose that the woman, believing the divorce justly celebrated, entered a monastery, and the husband likewise entered religion or was bound by holy orders: when the truth about the unjust divorce has been discovered, can the wife seek back her husband? Answer: not, because a false cause does not impede the monastic vow, as in c. *Magnae*, above, *De voto et voti redemptione*: for by entry into a monastery each could prejudice himself, so neither can demand; therefore neither is bound to render, as in c. *Quidam*, above, *De conversione coniugatorum*, and in c. *Ex parte*, same title, and in c. *Placet* — there better — and in c. *Consuluit*, same title. Lord Antonius de Butrio on c. *Fraternitatis*, above, *De frigidis et maleficiatis*, says at the verse *Et si praedicta*: there is a certain vow with passage to religion, and this impedes matrimony to be contracted and dissolves it after it is contracted; but as to whether a matrimony contracted before the vow is dissolved, he says: either intercourse preceded, and the vow does not dissolve; or intercourse did not precede, and then the vow dissolves the matrimony, as in c. *Ex publico*, above, *De conversione coniugatorum*, with similar places. There is a certain solemn vow of continence alone, and then such a vow impedes matrimony to be contracted and dissolves it after it is contracted, but not [a matrimony contracted] before, whether with intercourse or without intercourse, as in the said c. *Fraternitatis*, and in c. *Insinuante*, above, *Qui clerici vel voventes*, and in c. *Rursus*, same title, and in c. *Dudum*, above, *De conversione coniugatorum*. There is a certain

simple vow, and this impedes [matrimony] to be contracted but does not dissolve it once contracted, nor does it dissolve [when made] after the contract, as in the said c. *Rursus*, above, *Qui clerici vel voventes*, and through the whole title, and in c. *Quod votum*, *De voto*, in the Sext. And let the aforesaid suffice concerning the aforesaid cases in which matrimony is said to be impeded and dissolved.

It remains now to see the two cases in which the Church presents an impediment, so that one acting contrary sins mortally, but does not on that account dissolve the matrimony, provided it was otherwise lawfully contracted. And therefore the verses say:

The Church's ban, and holy season too, Impede the making, yet let the made hold true.

And this is that third thing which I said above, near the beginning of the treatise on matrimony, was to be considered, namely the norm or the authority of the superior. Concerning which, that we may follow the order of the verse, because it says "the Church's ban," it is to be known that this phrase "the Church's ban" has two principal heads. The first is concerning clandestine espousal; the second is concerning matrimony contracted against the interdict of the Church. Concerning the first, three things are principally to be asked: namely, first, in how many ways a matrimony is called clandestine; second, whether a manifest matrimony prejudices a clandestine one; third, what is the penalty of those contracting secretly.

[269.] Clandestine matrimonies are principally so called in two ways. In one way when they contract secretly and without the presence of witnesses, so that thereafter lawful proof does not appear, as in c. 2, above, *De clandestina desponsatione*. In another way matrimonies are called clandestine when they are contracted without the solemnities, as in c. *Cum inhibitio*, above, *De clandestina desponsatione*, and C. 30 q. 5, [c.] *Aliter*. And note that the priest ought not to be present at such a prohibited marriage, because it is not fitting that so great a sacrament should grope in darkness; and through priests and honest persons such groping of theirs is to be corrected by penance (what is noted in the said c. *Cum inhibitio* and in c. *Illud*, above, *De clerico excommunicato ministrante*, supports this). And therefore a matrimony is called clandestine even if it is contracted in the presence of one priest; and a priest presuming to be present at such matrimonies is suspended from the office of priest for three years, as in the said c. *Cum inhibitio*, verse *Sane*. And Hostiensis says notably that he is said to presume who comes against the canons from certain knowledge, as is noted above, *De maioritate et obedientia*, c. *Illud*. And Lord Antonius on the said c. *Cum inhibitio*, verse *Si quis*, notes that affected ignorance is equated to knowledge as to the penalty, as the text proves there when it says "or at least they seem affecters of ignorance." In both preceding cases, however, the matrimony holds, if another lawful impediment does not stand in the way, as in cc. 1 and 2, above, *De clandestina desponsatione*, and C. 30 q. 5, [c.] *Nostrates*, at the end. Otherwise, he seems to act secretly who conceals what he ought to make manifest (Dig., *Quod vi aut clam*, l. 3, last §, and l. *Servius*). 270. From the aforesaid it is clear that in a matrimonial cause the testimony of one person, even a priest, is not relied on, as is gathered from the said c. *Cum inhibitio*, near the beginning, where: "forbidding also that anyone," etc.

Concerning the same I ask whether a rule can be given comprehending several cases, for understanding that a matrimony is clandestine beyond the aforesaid two ways. Answer, according to Lord Antonius de Butrio on the said c. *Cum inhibitio*, after the middle, where "fifth I ask": that generally it can be held as a rule that every matrimony contracted against a prohibition of the Church, special or general, tacit or express, or against the form given by law, can be called clandestine as to the effect that, an impediment subsisting, the offspring is illegitimate and penance is imposed

on those contracting; which note well. And therefore clandestine matrimony is principally included in two ways. First, as it is distinguished against provable, of which it was said above. Second, as it is distinguished against solemn, and this in three ways: first, against the solemnity of which C. 30 q. 5, [c.] *Aliter*, where certain extrinsic solemnities are expressed; second, against the solemnity of which in the said c. *Cum inhibitio*; third, against the solemnity of which in c. 2, above, *De desponsatione impuberum*, namely when a person of age bound to another contracts without the licence of the bishop (to this, above, *De divortiis*, c. *Ex litteris*, § *Sane*). Likewise when someone under age contracts, although it concerns the first espousals, as in the said chapter, above, *De desponsatione impuberum*. Likewise if against an interdict made specially, as in c. *Tua fraternitas*, above, *De sponsa duorum*. Likewise if against an interdict made generally, as in c. *Capellanus*, above, *De feriis*; whether expressly, as above, *De matrimonio contracto contra interdictum ecclesiae*, through the whole [title]; or tacitly, as in c. *Laudabilem*, above, *Ut lite pendente*. And note that there are also several things which impede matrimony to be contracted but do not dissolve it once contracted, such as certain crimes; likewise espousals previously contracted with another; likewise catechism; likewise a simple vow; of all which it was said above in their places. In all the aforesaid cases, however, where some matrimonial solemnity was lacking, the matrimony holds as to God, another impediment ceasing,

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though, on account of the clandestinity, for the children born in the meantime: if the matrimony was contracted in a prohibited degree, even ignorantly, the offspring received from such a clandestine or interdicted union is judged wholly illegitimate, as in the said c. *Cum inhibitio*, verse *Si quis vero*. And similarly, if both parents, knowing the impediment, presumed to contract even without an interdict, and even in the sight of the Church, the offspring is also judged illegitimate, in the same place.

Second I ask concerning the way of taking care lest matrimony be contracted clandestinely. Answer: the way is laid down in the said c. *Cum inhibitio*: namely, that when matrimonies are to be contracted, they be publicly proposed in the churches by the priests, a competent term being fixed beforehand, so that within it whoever wishes and is able may oppose a lawful impediment; and the priests themselves nonetheless diligently investigate whether any impediment stands in the way; and if a probable conjecture appears, they are not to delay to forbid the matrimony. In some parts, however, these banns are not customarily made, but only espousals are contracted solemnly and publicly for some months before the matrimony is contracted, and in the meantime it can be made manifest whether any impediment intervenes. And so also in some parts they do not keep the solemnity of the nuptial blessing, of which in cc. 1 and 2 and through the whole [title], above, *De secundis nuptiis*; and Thomas treats it on [book] 4 of the *Sentences*, dist. 42.

Third I ask whether any custom impedes matrimony to be contracted or dissolves it once contracted. Answer, according to Hostiensis on c. 1, above, *De cognatione spirituali*: if the custom is approved by the Pope, it impedes and dissolves wherever canonical constitution has so decreed, for the approval of the Pope has the force of a constitution, as in c. 1 and in c. *Super eo*, and there through Innocent, and in c. *Quod dilectio*, above, *De consanguinitate et affinitate*. But if it is neither approved nor reproved by the Pope, then, to avoid scandal, it impedes [matrimony] to be contracted but does not dissolve it once contracted, as in the said laws and in c. *Quod dilectio, De consanguinitate et affinitate*; of which in the *Summa Confessorum*, book 4, title 3, *De impedimento matrimonii in genere*, q. 2.

Fourth I ask: suppose that the Church commands one of the spouses to cohabit with the other, and the one commanded knows that an impediment is present: is he bound to obey? Answer, according to Hugolinus on C. 35 q. 6, c. *Multorum*: as to supplying necessaries and cohabitation he is bound to obey the Church, but not as to rendering the debt, even if he is excommunicated, as in c. *Inquisitioni*, below, *De sententia excommunicationis*; of which in the *Summa Confessorum*, book 4, title 2, *De matrimoniis*, q. 63, which begins *Quid de illo*, verse *Noverit etiam Ugolinus*. Understand cautiously when he says "as to cohabitation": because if the impediment were hidden — as because perhaps she was previously known by the brother of the husband with whom she has in fact contracted — it would not be safe to cohabit with him; because not only under the precept of the Church, but even without a precept, she could hardly escape intercourse, and so would commit incest, adding evil upon evil many times; and she ought rather to suffer death than act against conscience, as in c. *Litteras*, and there through the gloss and Doctors on § *Porro*, above, *De restitutione spoliatorum*, and in the said c. *Inquisitioni*, and there you have concordances in the gloss, below, *De sententia excommunicationis*. Therefore it is more cautious to evade cohabitation with such a husband than to expose oneself to so great a danger.

Fifth I ask: because in the said c. *Cum inhibitio* priests and regulars are forbidden to be present at clandestine matrimonies, is it similarly understood to be forbidden to laymen? Answer, according to Hostiensis: from the mind of the said chapter the edict is understood as general (he alleges Cod., *De falsa moneta*, l. 1, and c. *Quanto*, below, *De sententia excommunicationis*). Lord Antonius on the said c. *Cum inhibitio* says: I do not believe that the penalty has place, by the rule *In poenis*, Dig., *De regulis iuris*. Add: for penalties are odious, and odious things are to be restricted, as in c. *Odia*, *De regulis iuris*, in the Sext; and in penalties the more benign interpretation is to be made (Dig., *De regulis iuris*, l. *Factum cuiusque*, § *In poenalibus*, and c. *In poenis*, *De regulis iuris*, in the Sext); what is noted in l. *Aut facta* and in l. *Absentem*, Dig., *De poenis*, supports this; for in penalties extension from like to like has no place, nor ought they to go beyond their proper case (*De poenitentia*, dist. 1, [c.] *Poena*; to this Dig., *De legatis* 3, l. *Non aliter*), because in penalties above all the words are to be understood as they lie, and penalties are to be softened rather than sharpened (Dig., *De poenis*, l. *Praeses*). But certainly all the aforesaid laws speak as to temporal penalties; but where it treats of sin — because where the danger is greater, one must act more cautiously, as in c. *Ubi periculum*, *De electione*, in the Sext — therefore, although the penalty fixed in the said c. *Cum inhibitio*, namely of suspension for three years, does not have place in a layman, yet in that which can include mortal sin, even a layman participating in the crime with the criminal incurs the same sentence, as in c. *Si concubinae clericorum* and in c. *Nuper*, below, *De sententia excommunicationis*. And therefore I do not counsel even a layman to presume to be present at a clandestine matrimony, unless there are as many co-witnesses as can sufficiently prove the matrimony even before the judge, as at least two or three, because "in the mouth of two or three every word stands" (Deuteronomy 17; and l. *Ubi numerus*, Dig., *De testibus*); and so the clandestine as distinguished against the provable would cease, as I said above; of which in c. 2, above, *De clandestina desponsatione*.

Sixth I ask whether clandestine espousals pass in any case into presumed matrimony. Answer, according to Hostiensis: they do, as is noted in c. *Is qui fidem* and in the last chapter, above, *De sponsalibus*; and so the reason is the same in clandestine espousals which have passed into matrimony as in clandestine matrimonies; therefore it will be the same as to the penalty contained in the said c. *Cum inhibitio*; but not the same in espousals which have stood within the proper bounds of espousals. But as to penance to be enjoined, Lord Antonius says that the said c. *Cum inhibitio* has place even in

clandestine espousals standing within the proper terms of espousals, although a greater penance is to be imposed for a clandestine matrimony than for clandestine espousals.

Seventh I ask whether the public proposal of a matrimony to be contracted ought to be made in several churches, or whether it suffices in one only. Answer: Innocent says on the said c. *Cum inhibitio* that it seems it ought to be made in several churches, because the text says there "in the churches." But say, according to Lord Antonius and others, that it suffices to be made in one only, provided it is made publicly in a gathering of the people, so that the report can easily reach all, as in c. 1, above, *De postulatione praelatorum* — even if it were made outside the church in public places, as for example at sermons or other honest gatherings, according to what is noted in c. *Responso*, below, *De sententia excommunicationis*. But in the said c. *Cum inhibitio* it is said "in the churches by priests" because there for the most part men come together to celebrate the divine mysteries; and therefore in like manner, although it is said "by priests," it is not however necessary that the banns be made by several priests in the same church or in several churches; but it suffices that it be announced in one by one priest, referring each to each according to the different parishes. And therefore Innocent, more cautiously as to law, subdistinguishes, saying that either they are of the same parish, and both have their old relations from there, and it suffices that the banns be made in one church; or they are of different parishes and have old kinsfolk or relations in different parishes, and then it ought to be made in several, because there are those who better know their kinsmen or affines (above, *De testibus*, c. *Licet*; and above, *Qui matrimonium accusare possunt*, c. *Videtur nobis*): for if a Scot contracted with a Lombard woman, who would know, if the announcement were made in a Lombard church? Sometimes, Innocent says, the contracting parties have had several dwellings, because they had an old one in one place and a modern one in another; and then publication would have to be made in both places — of the old, because there the degrees would be better known; of the modern, because there it is better known whether he has contracted with another. Innocent, however, concludes that although by law this is good counsel before the fact, yet after the fact it is better to say that if it is made only where their old dwelling is, it suffices for the children not to be called illegitimate, since by reason of the cessation this constitution judges illegitimate only the children of those who contracted in a prohibited degree. Hence if they have kinsfolk dwelling in various places, publication will not have to be made everywhere. For it would be hard, if one tried to contract matrimony with such persons, to send banns into Scotland and Lombardy and France and Germany. It is not necessary, therefore, to subtilize the matter so much on account of the illegitimacy of the children, as above; and therefore after the fact, as far as can be, negligence ought to be tolerated. 279. A good precaution, however, is that of certain bishops who, as Innocent says, do not admit strangers to contract matrimony unless they have presented testimonial letters from their own judge or bishop. Add what is noted in the penultimate chapter, above, *De eo qui duxit in matrimonium quam polluit per adulterium*. The like is said of clerics not presenting letters commendatory, that without them bishops are not to receive strange clerics, as in cc. 1 and 2 and in c. *Tuas*, and almost through the whole [title], above, *De clericis peregrinis*; and in c. *Fraternitati*, above, *De clericis non residentibus*; and D. 68, [c.] *Inter episcopos*, with similar places.

Eighth I ask whether such publication, if it happens in a second matrimony, excuses the offspring if afterwards another matrimony appears publicly contracted with another before this second. Answer, according to Innocent: either sentence was given on the first matrimony and there was no appeal, and so they were separated, and the spouses publicly contracting the second are without doubt excused

and the offspring will be legitimate, because nothing can be imputed to them. Or no sentence of separation had been given on the first matrimony, and they contracted the second, and the woman believed the matrimony separated: she is still excused from adultery, because it is not committed without guile (Dig., *Ad legem Iuliam de adulteriis*, penultimate law; C. 34 q. 2, [c.] *In lectum*); yet the offspring will not on this account be legitimate, as Innocent says, because she ought to have investigated more clearly. Or the woman knew of the first matrimony, and knew nothing nor heard anything of a separation, but only contracted publicly: and then she is not excused, nor does it suffice that she contracted publicly, because she ought to have inquired more diligently about a just or lawful separation, as in c. *In praesentia*, above, *De sponsalibus*, and C. 35 q. 1, c. 1. And Innocent says that publication works little as to other impediments besides blood, except that it makes it presumed that, if they had known the impediment, they would not have had it published. But this presumption is taken away by the publicity [of the fact] that he had contracted with another (Dig., *De iuris et facti ignorantia*, l. *Regula*). Or the first matrimony and the second were publicly contracted, the woman probably being ignorant of the first, as because they were of different provinces, and the first matrimony had been contracted in one and the second in another: and then the penalty would not have place in the woman, and the children would be legitimate, as in c. *Ex tenore*, above, *Qui filii sint legitimi*, and in the said c. *Cum inhibitio*, above, *De clandestina desponsatione*.

Ninth I ask what term was to be fixed for speaking about an impediment. Say that the term will be threefold (below, *De sententia excommunicationis*, c. *Sacro*), or as has been defined by synodal statute; otherwise the term will be judged arbitrary. The bishop, however, can change the statutory term, because he is above the statute; but one inferior to him cannot do this (Dig., *De arbitris*, penultimate law; and above, *De maioritate et obedientia*, c. *Cum inferior*). The Archdeacon, however, says the contrary on c. *Licet canon*, *De electione*, in the Sext, through the saying of Innocent on c. *Dilectus*, above, *De temporibus ordinationum*, where he says that a bishop does not dispense against his own statute. The rule, however, is to the contrary, because it belongs to him to take away whose it is to establish, as in l. 1 and through the whole [title], Cod., *De constitutionibus principum*. On the aforesaid question Johannes Andreae varies his opinion: for on c. *Dilectus*, *De temporibus ordinationum*, he says yes, and on c. *Cum ad monasterium*, on the last gloss, at the title, above, *De statu monachorum*, he seems to hold the contrary. I believe that from certain knowledge, and a just cause moving the bishop's mind by reason of the person, of piety or of necessity, the bishop can dispense, according to what is noted in C. 1 q. 7, [c.] *Pro persona*, § *Nisi rigor*, and the following chapter up to § *Ecce*, and through the Archdeacon on c. *Tali*, same case and question; and D. 50, [c.] *Si quis diaconus*, on the gloss noting dispensation, and c. *Domino*; and D. 45, [c.] *Omnis*.

Tenth I ask who are admitted to denounce an impediment of matrimony upon the said public proclamation. I answer: all, because this is as it were a public crime; nay, anyone at least is bound to denounce, as in c. *Tua*, above, *De cognatione spirituali*. Kinsfolk, however, are admitted rather than strangers (C. 35 q. 6, c. 1). Hence Goffredus says that when one accuses and fails, the rest are repelled, because a popular action perishes and is consumed by a single person acting, unless he shows collusion (Dig., *De procuratoribus*, l. *Non cogendum*, § *Qui ita*; and Dig., *De iureiurando*, l. *Eum qui*, § *In popularibus*). This does not please [me] in a matrimonial cause, because the sentence does not pass into res judicata, as was said above through the aforesaid. Goffredus also says that this cause can be pursued through a proctor; the case is in c. *Tuae*, above, *De procuratoribus*.

Eleventh I ask: what if a matrimony was contracted clandestinely with some persons present and knowing: ought such to be admitted to accuse or testify against it during life, or even after the death of the contracting parties? Answer: not; because he who knew did not need to be informed (Dig., *De actionibus empti et venditi*, l. 1). Likewise the announcement is made only for the sake of those who are ignorant; for those who know are in guile, and guile outweighs fault; and because, since it was done publicly, contradiction is not admitted (C. 8 q. 1, [c.] *Licet*; otherwise *Lator*). And the gloss on the said c. *Cum inhibitio* says that they ought not to be admitted because they are not without suspicion; and there is a text in c. 1, above, *Qui matrimonium accusare possunt*.

Twelfth I ask whether the aforesaid penalty contained in the said c. *Cum inhibitio* has place whatever the impediment may be. Answer: it does, although Vincentius restricted it to the impediment of consanguinity only, on account of the beginning of that chapter; which, however, appears better in c. *Ex tenore*, above, *Qui filii sint legitimi*.

Thirteenth I ask: what if one of the parents knows the impediment and the other does not? Answer: although some say that the son will be illegitimate as to the one knowing, but legitimate as to the one ignorant, yet it is to be held with the gloss on the said c. *Cum inhibitio*, which says the contrary, because it would be a kind of monster that someone should be in part legitimate and in part illegitimate, as that someone should be in part free and in part slave (Dig., *De statuliberis*, l. *Si duobus*; and better, Dig., *De liberali causa*, l. *Cum duobus*). And it hints at this when it says "both parents" in the said c. *Cum inhibitio*, § *Si quis vero*, where it says: "in like manner the offspring is to be considered illegitimate if both parents, knowing a lawful impediment, apart from any interdict, presumed to contract even in the sight of the Church." Johannes also holds this on C. 24 q. 1, cc. 1 and 2, according to Lord Antonius de Butrio on the said c. *Cum inhibitio*, at the end; but because in the aforesaid allegation no mention is made of the matter, therefore I believe the allegation was removed by the fault of a scribe. Nevertheless the ordinary gloss on the said c. *Cum inhibitio*, § *Si quis vero*, on the words "if both parents," holds well that in such a case the children are legitimate, by the said c. *Ex tenore*, above, *Qui filii sint legitimi*; and it is reasonable enough in favour of legitimacy, for favourable things are rather to be extended than restricted, as in c. *Odia*, *De regulis iuris*, in the Sext.

Fourteenth I ask: when no impediment exists between the contracting parties, why ought they to be punished in the matter of clandestine espousal? Answer: they ought to be punished for the transgression of the prohibition, because they contracted against the interdict of the Church. Hence although no impediment exists, yet a cause of punishment exists, namely contempt of the edict, because the command of the judge ought not to be contemned (Dig., *Ne quid in loco publico*, last law; and c. 1, above, *De matrimonio contracto contra interdictum ecclesiae*). From which the penultimate gloss on the said c. *Cum inhibitio* gathers an argument that the judge can punish one who contemns coming at his citation (Dig., *Si quis in ius vocatus non ierit*, l. 2), even if the plaintiff has no right; of which, however, it is treated more fully in c. *Praeterea*, above, *De dilationibus*, and in c. *Veniens*, above, *De accusationibus*.

Fifteenth I ask whether in such matters dispensation can be given to priests or regulars who presumed to be present at clandestine matrimonies and contemned to forbid such unions, since the text says in the said c. *Cum inhibitio*, § *Sane*, that such are to be suspended from office for three years. Answer: dispensation can be given even by the bishop, since the canon does not reserve it, as in c. *Nuper*, § *In secundo vero casu*. A statute of an apostolic legate could, however, stand in the way, if it

dictated that the absolution of such persons be reserved to the Apostolic See. Hostiensis, however, says that such are not excommunicated, although in some places by custom they are avoided as excommunicated; which custom is to be kept, according to him, since it induces them more easily to make satisfaction. And he understands such custom to be kept both concerning those contracting clandestinely and those present; and he says that in that case also one inferior to the Pope ought not to absolve women, since women principally sin more in such matters, and because otherwise fraud would more easily be done to the law, because clandestine matrimonies are more easily contracted with little women present. Chapter *Mulieres*, below, *De sententia excommunicationis*, does not stand in the way, because it speaks of women striking clerics; therefore it is not extended to those otherwise excommunicated, as in l. *Non aliter*, Dig., *De legatis* 3, and in c. *Quae a iure*, *De regulis iuris*, in the Sext.

Sixteenth I ask: because at the end of the said c. *Cum inhibitio* it is contained that if anyone, to impede a lawful union, has put forward a malicious impediment, he will not escape canonical vengeance, I ask what such vengeance will be, namely with what penalty such persons are to be punished. Answer, according to the gloss there: the penalty is arbitrary, since it is not fixed by law; hence it is understood to be left to the judgment of the judge, as in c. *De causis*, above, *De officio delegati*. Vincentius, however, says, and well, that he is also bound to [pay] the interest as one denouncing calumniously, as in c. *Pastoralis*, above, *De iure patronatus*; yet if the one denouncing calumniously were a cleric, he would be suspended from office and benefice, as in c. 2, *De calumniatoribus*.

To the second principal question, namely whether a manifest matrimony prejudices a clandestine one, it is answered that it does; and therefore clandestine matrimonies are forbidden by the Church, because if those contracting secretly are at variance in the confession of the matrimony and will not cohabit with conjugal affection, the Church cannot compel them, since the truth of the contract is not established to the Church, as in cc. 1 and 2, above, *De clandestina desponsatione*. For the Church through defect of proof sometimes deceives and is deceived, as in c. *A nobis* [2], below, *De sententia excommunicationis*, because it cannot divine, as in c. *Ut nostrum*, above, *Ut ecclesiastica beneficia*, and Dig., *Ad legem Aquiliam*, l. *Si putator*. Hence as the judge hears, so he judges, and so according to what is proved (*De consecratione*, dist. 5, last c.; C. 15 q. 5, [c.] *Presbyter*; and l. *Illicitas*, § *Veritas*, Dig., *De officio praesidis*, where [it says] that it is incumbent on the judge to judge according to the acts and what has been enacted; to this C. 11 q. 3, c. *Quamvis*, and c. *Grave*, and c. *Summopere*, with many similar). And therefore, granted that the clandestine matrimony is true (C. 32 q. 5, § *His ita*), yet because it is not the right that fails but the proof, as in l. *Duo sunt Titii*, Dig., *De testamentaria tutela*, therefore, proof failing, the Church cannot [pronounce] for the

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matrimony when the spouses deny it; and therefore the Church presumes concubinage and separates those so joined (C. 30 q. 5, [c.] *Aliter*).

To the third principal [question] it is answered that the penalty of those contracting secretly, as to the offspring, if the matrimony cannot stand by law, is illegitimacy, as was said above. But as to the contracting parties themselves the penalty is arbitrary, even if the matrimony holds by law, as was said above, same [matter], q. 14.

It follows to see concerning the second prohibition of the Church, which is that matrimonies not be contracted against the interdict of the Church. Where first it is to be known that the interdict of the Church or of the judge impedes matrimony to be contracted but does not dissolve it once contracted. Hence a penalty is imposed on those contracting against such an interdict, and they are separated from each other until the cause of the interdict has been examined and decided, as in c. 1, above, *De matrimonio contracto contra interdictum ecclesiae*. Concerning which matter I shall ask about several things.

First I ask whether a sister is bound to matrimony by a promise made by a brother, as by a promise made by a father. Answer: it is special in the father that he can contract matrimony in the name of a daughter who knows and does not contradict, so that the daughter is bound by the father's contract (Dig., *De sponsalibus*, l. *Sed quae patris*; and Cod., *De nuptiis*, l. *Vidua*). Hence Innocent says on the said c. 1, above, *De matrimonio contracto contra interdictum ecclesiae*, that unless the sister consents with heart and mouth, and so expressly, she is not bound by the brother's contract, because it is special in the father for a child of either sex. But if the sister expressly consents, the contract can be made through a brother as through another proctor with a special mandate, as in c. *Si de procuratore*, in the Sext. It would be the same also in a tutor or curator, because he could not contract unless the male or female committed to their tutelage or care expressly consented (Cod., *De sponsalibus*, l. *Si puella*). Chapter [*Ad id quod*], *De sponsalibus*, does not stand in the way where it says "through your [letters]," because there, in the matrimony contracted through a stepfather, carnal intercourse intervened; otherwise it would not have been judged a matrimony. Hostiensis, however, says that tacit consent, provided it can be proved, makes a matrimony, as is noted in c. *Cum apud* and in c. *Tuae*, above, *De sponsalibus*, and in the last chapter, above, *De coniugio leprosorum*: for since the woman is of age, her consent is attended to according to the canons, and not the father's, as in c. 1, above, *De desponsatione impuberum*. Hence if the sister is present and does not contradict, she is presumed to consent (Dig., *Mandati*, l. *Qui patiur*); and so tacit consent suffices, as is proved in the said c. 1, above, *De matrimonio contracto contra interdictum ecclesiae*, where it adds "and she cannot for many days [refuse] the gifts and presents of the man," etc. The gloss on c. 1, *De desponsatione impuberum*, in the Sext, also holds this; but there Johannes Andreae in the *Novella* holds that in others than the father tacit consent alone, namely by non-contradiction, does not suffice, but some act designating express consent is required; to which what is noted in the gloss on c. *Ex parte* [2], *De sponsalibus*, supports.

Second I ask whether by the receiving of pennies, and by embrace or kiss and the like, espousals pass into matrimony. Answer: if espousals *de futuro* are by interpretation of law held for espousals *de praesenti* as to the words, then espousals pass into matrimony through gifts and the like aforesaid, as in the said c. 1, *De desponsatione impuberum*, in the Sext. But if, as to the words and as to the truth, the law interprets the espousals as *de futuro*, then they will not pass into a husband [matrimony] through gifts and the like aforesaid, as in the said c. 1, above, *De matrimonio contracto contra interdictum ecclesiae*, and in the last chapter, above, *De sponsalibus*; and what is noted in c. *Is qui fidem*, at the end, same title, and in c. *Attestationes*, above, *De desponsatione impuberum*, supports this.

Third I ask who can forbid matrimonies. Answer: generally the Supreme Pontiff can forbid, and so the universal Church, as when the Church makes a constitution that matrimony not be contracted within certain degrees, as in c. *Non debet* and in the last chapter, above, *De consanguinitate et affinitate*; or when it makes a constitution concerning the twelve principal impediments aforesaid, which are contained

in those verses, *Error, conditio, votum*, etc. And then such an interdict of the universal Church not only impedes matrimony to be contracted but also dissolves it once contracted (C. 35 q. 3, [c.] *Contradicimus*). Sometimes, however, the interdict of the Church is a simple prohibition and without a constitution; and then such an interdict, although it impedes, yet does not dissolve; but on those acting against the interdict penance is imposed on account of contempt of the precept, as in c. 1 and c. 2, above, *De matrimonio contracto contra interdictum ecclesiae*. Yet if a cause of perpetual impediment underlies it, then the matrimony will be made void, not on account of the interdict but on account of the cause, as in c. *Ex litteris*, same title. And so such an interdict can be made by the bishop, to whom the cognizance of matrimonial causes belongs: for since matrimony is a great sacrament in the Church of God, as the Apostle says to the Ephesians 5, and is had above, *De bigamis*, c. *Debitum*, it is fitting therefore that questions which arise about matrimonies be brought to the bishop (D. 5, [c.] *Perlectis*). If, however, by approved custom archdeacons took cognizance of matrimonial causes, as above, *De restitutione spoliatorum*, c. *Litteras*, or archpriests, above, *De consanguinitate et affinitate*, c. *Ex litteris*, bishops can still forbid that some be joined in matrimony, as the Doctors note on the said laws; to which what is noted by Hostiensis on c. *Ad dissolvendum*, above, *De desponsatione impuberum*, supports — he holds against the gloss there, which says that even if the interdict were made by the Pope the matrimony is not dissolved; hold what I said above. But as to other acts concerning matrimony, you have a good text and gloss in c. 3, above, *De in integrum restitutione*, and in c. *Quanto*, above, *De consuetudine*.

Fourth I ask concerning the manner of proceeding against those coming against the interdict of the Church. Answer: the manner is that they be separated; and if, canonical monitions having preceded, they will not be separated, they are to be excommunicated until it is examined whether the impediment which is alleged subsists, as in the last chapter, above, *De matrimonio contracto contra interdictum ecclesiae*.

Fifth I ask whether such a one excommunicated for a time, the time having elapsed, is freed without other absolution. Answer: he is, as the gloss on the said last chapter says; yet it says that it is safer to be absolved for caution. According to Johannes Andreae, he says there that absolution from the sentence of excommunication is necessary, because in removing it a certain form is required, as in c. *Cum desideres* and in c. *A nobis* [2], § *Forma*, below, *De sententia excommunicationis*; but in a sentence of interdict or suspension absolution is not necessary, because in relaxing them a solemn form is not observed, but it suffices to say "I absolve you" or "I relax the interdict" in the report; of which in Clem. 1, *De decimis*, and in c. *Veniens* [2], *De testibus*; and what is noted in c. *Cum bonae memoriae*, above, *De aetate et qualitate*, supports this. By these it seems to be concluded that in a sentence given by the Pope, whose words are not subject to the disposition of law, he is absolved when the time has elapsed (argument in Clem. *Si summus Pontifex*, *De sententia excommunicationis*). Lord Antonius limits this to be true if the will of the Pope were established; but in doubt he seems to wish to use ordinary power, as it is submitted to law, and not ordained power; and so it will be the same in the Pope, lest the form of the Church be violated.

Sixth I ask: if appeal has been made from a sentence given on a matrimonial cause, can the judge from whom [appeal was made], while the appeal is pending, involve himself in the said cause? Answer: even if he has deferred to the appeal, he can involve himself by forbidding things to be attempted and fixing a term; but he cannot involve himself in the cognizance of the cause after the

appeal, especially if he has deferred to the appeal (C. 2 q. 1, [c.] *Nomen*; and above, *De officio legati*, c. *Licet*; and above, *De appellationibus*, c. *Interposita*; and in c. *Cum appellationibus*, in the Sext). Innocent, however, on c. *Ex litteris*, *De matrimonio contracto contra interdictum ecclesiae*, says it is special in favour of matrimony and on account of the danger of souls. Johannes Andreae refers to what is noted in c. *Cum teneamur*, above, *De appellationibus*, and in c. *Cum appellationibus*, *De appellationibus*, in the Sext. Lord Antonius on the said c. *Ex litteris* says that the judge from whom [appeal is made], even if he has deferred to the appeal, can, while a lawful appeal is pending, forbid things to be attempted, and his power lasts as to those things which tend to a readier outcome of the appeal, provided he does not assume the cognizance of the business to the prejudice of the appeal, as in c. *Cum sit Romana*, and in c. *Cum teneamur*, and in c. *Qua fronte*, above, *De appellationibus*.

It remains now to see concerning the holy season, which is the last impediment prohibiting, like the two immediately preceding, but not resolving or dissolving. Concerning which three things are principally to be asked. The first is what such holy seasons are as to the contracting of matrimonies; the second is what is forbidden in such seasons; the third is what is the reason for such a prohibition. 296. To the first I answer that the seasons of holy days in which matrimonies are forbidden are those written below: namely, from the first Sunday of Advent up to the octave of Epiphany inclusive are holy days, for so long that feast lasts; hence it is called the feast of the Epiphanies of the Lord (to which, above, *De treuga et pace*, c. 1, and C. 32 q. 5, [c.] *Decernit*); and this according to Hostiensis on c. *Capellanus*, above, *De feriis*. There, however, Johannes Andreae says that although the custom of many places approves this, yet it does not seem to be approved by law; and truly concerning the octave of Epiphany it is not found forbidden in law: for if the canon had wished this, it would well have expressed it, as it expressed concerning the octave of Easter (C. 33 q. 4, [c.] *Non oportet*); and the theologians on [book] 4 of the *Sentences*, dist. 32, where the matter is treated, make no mention of the octave of Epiphany. But Richard says there, art. 5, q. 1: "From the Advent of the Lord until after Epiphany." The Master of the *Sentences* also, in the same place, last chapter, says the like, reporting the decree of the Council of Lérida (C. 33 q. 4, [c.] *Non oportet*).

where it is also said: "From the Advent of the Lord until after Epiphany." It does not say in the plural "Epiphanies," but in the singular "Epiphany"; and so the argument of Hostiensis does not seem to have place. Nor does Thomas say otherwise than the canon alleged. And therefore, where custom does not constrain — since the law does not constrain — I would say it need not be minded. Second, there are holy days as to matrimony from Septuagesima Sunday up to the octave of Easter inclusive, that is, after Low Sunday. Third, from the first day of the Rogations up to seven days after Pentecost inclusive the holy days last, according to Hostiensis, who also says that in certain parts by custom, after Advent, the time of weddings does not begin except on the Sunday on which the Gospel "A marriage was made in Cana of Galilee" is sung, which is sung on the first Sunday after the octave of the Epiphanies; and these abstain beyond what the canon commands. Others begin on Low Sunday (*in albis*) and on the Sunday after Pentecost, and these seem to violate the canon: for in the said c. *Non oportet*, C. 33 q. 4, it is said "up to the octave of Easter," and in the said c. *Capellanus*, above, *De feriis*, it is said "up to the eighth day after Pentecost." But nonetheless, as to the Sunday after Pentecost, according to the custom of the Roman Church it is declared in the aforesaid c. *Capellanus*, at the end, that the feast of Pentecost lacks an octave, and therefore the eighth day is not included in such a kind of holy days.

To the second I answer that in such seasons matrimonial consent is not forbidden as to contracting matrimony: for matrimony can be contracted at any time, as in the said c. *Capellanus*, because matrimony is contracted by consent alone (C. 27 q. 2, [c.] *Sufficiat*); and consent to a sacrament, as to a good thing, is lawful at every time, because at every time it is lawful to do good, according to the sentence of the Lord, Luke 14 and Matthew 12, when He said, "It is lawful to do good on the sabbath," and John 5, of the sick man cured on the sabbath. But the nuptial solemnity is forbidden, and the act of carnal intercourse for the beginning of the consummation of matrimony, and so the leading of the bride into the bridegroom's house; although Hostiensis and some followers seem to hold that both the consent and the solemnity are forbidden on the aforesaid days, because on such days the Church does not interpose its authority, and without the authority of the Church matrimony is not to be contracted, otherwise it is judged clandestine — although a matrimony otherwise contracted holds, nor is one contracted clandestinely dissolved, as in the said c. *Cum inhibitio*, above, *De clandestina desponsatione*. But in truth Hostiensis was rather severe in straining the textual letter of the canons and decrees: for as far as can be gathered from the text of the said c. *Non oportet*, with the three following, C. 33 q. 4, and from the text of the whole title above, *De matrimonio contracto contra interdictum ecclesiae*, and from the said c. *Capellanus*, above, *De feriis*, only the leading of the bride and the celebration of the nuptials are understood to be forbidden; and so the modern Doctors commonly hold on the said c. *Capellanus*.

To the third I answer that the reason for such a prohibition is that in these three seasons three most solemn festivals occur: namely, in the season of Advent occurs the festival of the Nativity of our Lord Jesus Christ, with the Circumcision and the Epiphany; in the season of Septuagesima occurs the memory of the passion, death and resurrection of our Lord Jesus Christ; in the season of the Rogations occurs the festival of the Ascension of our Lord Jesus Christ and the feast of Pentecost. At which three solemnities, namely of the Nativity, the Resurrection and Pentecost, the faithful have been accustomed to receive the holy Eucharist (*De consecratione*, dist. 2, [c.] *Et si non frequentius*, and c. *In cena Domini*; and below, same title, c. *Omnis utriusque sexus*, verse *Suscipiens reverenter*). Therefore in those seasons the faithful ought more than at others to give themselves to acts of devotion and to apply themselves more diligently to spiritual exercises. But through the solemn celebration of nuptials — on account of the feasts which are there very often made indiscreetly, and in some parts with greater expenses than the dowry and the gift on account of marriage, so that wanderings and dissipations are very much practised — contemplations of the heavenly joys are almost wholly dissolved. But those seasons are ordained rather for lamentations, so that due preparation may be made for the reception of so most excellent a sacrament, as the Apostle says, 1 Corinthians 11: "But let a man prove himself, and so let him eat of that bread and drink of the chalice." For, as Augustine says in the book of *Questions of the Old and New Testament*, for a Christian it is sometimes lawful to come together with his wife, sometimes not lawful: for on account of the days of procession and of fasts it is sometimes not lawful to come together, because one must abstain even from lawful things for a time, so that what is asked may more easily be obtained (C. 33 q. 4, [c.] *Christiano*, and c. *Quotiescumque*, where the same Augustine is alleged, saying that one must abstain even from one's own wife on the day of the Lord's Nativity and the other festivals) — although commonly this is held as counsel for those who have long been in matrimony. But as to the new leading [of a bride] and the new lying-together of spouses it is a precept, as the gloss says on the said c. *Capellanus*, on the words "at whatever time," when it says that only the solemnity of nuptials is forbidden on these days, lest

they be carnally joined; the like in c. *Ex litteris*, above, *De matrimonio contracto contra interdictum ecclesiae*. Thomas also holds this on [book] 4 of the *Sentences*, dist. 32, when he says that when new brides are led home, the mind of the spouses is wont from the very novelty to be more occupied with the care of carnal things and to be more dissipated; on account of which it is forbidden to celebrate nuptials in the aforesaid seasons. And therefore he adds that on those days it is not forbidden to other married people to demand the conjugal debt, because there is not so great a distraction of minds in rendering or asking the debt as in the celebration of new nuptials and in the new consummation of matrimony — although the exaction of the debt by way of counsel is forbidden on solemn days and fasts, on account of the word of the Apostle, 1 Corinthians 7, saying: "Defraud not one another, except perhaps by consent for a time, that you may give yourselves to prayer"; of which in the aforesaid c. *Christiano* and c. *Quotiescumque*. From which Thomas says on [book] 4, dist. 32, that one who demands, led by some infirmity, as for example concupiscence, without contempt of the season and of the exhortation of the Church, sins only venially; but one who, being asked, renders, if he cannot cautiously and without danger evade and put it off, does not sin by rendering. Richard also holds this on [book] 4 of the *Sentences*, dist. 32, art. 1, q. 1, saying that to forbid married people the exaction of the debt in a sacred season would be in a way to set a snare for them, because the corruption of the flesh moves concupiscence not only in a season not sacred but also in a sacred one; and therefore holy Mother Church does not forbid but dissuades, because giving oneself to the works of the flesh much impedes the lifting of the mind to God. Hence John on Matthew says: "Lawful marriages lack sin; yet at the time when those conjugal acts are performed the presence of the Holy Spirit will not be given, even if he seems to be a prophet who complies with the office of generation"; and it is had in C. 32 q. 2, [c.] *Connubia*, where the gloss says that although one sometimes merits in such an act, the presence of the Holy Spirit is not given as to working miracles and the power of prophesying, because there is a certain stupor there and the man is made wholly fleshly, etc. Therefore on account of this it is counselled, but not commanded, to abstain. And with the aforesaid we are content regarding the dispatch of the first part of this treatise on matrimonies.

The second part of this work was said to be the commendation of the same sacrament, namely of matrimony, when the Apostle says: "This is a great sacrament" — "this," he says, "is great" (Ephesians 5), as was alleged above. In this second part also three things are principally to be investigated: the first is the commendation of matrimony; the second is its observance; the third is its transgression. Concerning the first it is to be known that any thing is seen to be the more commendable the more excellent its author is, the nobler its place, the holier its age, the more honourable its subject, the more outstanding its end. From these five, therefore, matrimony comes to be commended: namely, first, from the author, because the most high and best God; second, from the place, because in the earthly paradise; third, from the age, because in the time of innocence; fourth, from the honourableness of the persons, because between Adam and Eve; fifth, from the excellence of the end, because for procreating offspring. Concerning the first I ask:

Whether matrimony was instituted immediately by God. For a doubt arises, because we read in Genesis 2 that Adam said: "This now is bone of my bones and flesh of my flesh; she shall be called woman, because she was taken out of man. Wherefore a man shall leave father and mother and shall cleave to his wife, and they shall be two in one flesh." Answer: God first foretold that matrimony was to be instituted, Genesis 2: "And the Lord God said: It is not good for man to be alone; let us make him a help like unto himself." Second, He instituted matrimony implicitly when it was made, when

from the rib of the sleeping Adam He formed the woman and brought her to Adam. Hence in the same place, namely Genesis 2, it is written: "But for Adam there was not found a helper like himself. Then the Lord God cast a deep sleep upon Adam; and when he was fast asleep, He took one of his ribs and filled up flesh for it. And the Lord God built the rib which He took from Adam into a woman, and brought her to Adam," etc. Third, He also blessed matrimony itself by word; hence Genesis 1: "God said: Let us make man to our image and likeness, and let him have dominion over the fishes of the sea and the fowls of the air and the beasts and the whole earth and every creeping creature that moves upon the earth. And God created man to His own image and likeness; to the image of God

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He created him; male and female He created them. And God blessed them and said: Increase and multiply, and fill the earth and subdue it, and rule over the fishes of the sea and the fowls of the air and all living creatures that move upon the earth." From which words Augustine, *City of God* [book 14], c. 22, says: "We in no way doubt that, according to the blessing of God, 'Increase and multiply and fill the earth,' it is the gift of nuptials, which God established from the beginning before the sin of man by creating male and female." But Adam, God inspiring him, specified and unfolded the institution of matrimony when he said, "This now is bone," etc., as above. In which words the goods of matrimony are expressed more clearly to one who looks rightly: namely, first, the good of the inseparable sacrament, when he said "This now is bone," etc., up to "father and mother," that is, the cohabitation of father and mother; second, the good of faith to be kept, when he said "and he shall cleave to his wife" — therefore not to another's, because then faith would be violated; third, the good of offspring, when he said "and they shall be two in one flesh," that is, of one offspring to be procreated and brought up. Of these three goods the Master of the *Sentences* treats in [book] 4, dist. 31, and there the theologians; and I shall speak below in [the] fifth [point]. It was fitting, moreover, that matrimony be instituted by God and by man divinely inspired, so that the cause might correspond to the effect. For in matrimony there is something which is spiritual power, signifying and effecting, and something which is carnal and human, namely the obligation to the carnal act; and so the spiritual power is the consent, while the carnal power is the act of intercourse. And so it is clear from the aforesaid that matrimony was instituted by God as an office, as the Lord Jesus also declares, Matthew 19, when He had been tempted by the Pharisees whether it was lawful for a man to put away his wife for whatever cause. Jesus answered: "Have you not read that He who made [man] from the beginning made them male and female, and said: For this cause shall a man leave father and mother and shall cleave to his wife, and they shall be two in one flesh?" And so He shows that matrimony was in some way instituted by God immediately, in some way by man divinely inspired, as Richard says on [book] 4, dist. 26, art. 1, q. 3.

Second, matrimony is rendered commendable by the nobility of the place, because it was instituted in the earthly paradise, as appears in Genesis 2. For when first mention is made that God formed man of the slime of the earth and breathed into his face the breath of life, and man became a living soul, it afterwards adds: "And the Lord God had planted a paradise of pleasure from the beginning, wherein He placed man whom He had formed." And below: "The Lord God took man and put him into the paradise of pleasure, to dress it and to keep it." From which words it clearly appears that Adam was

not created in paradise but outside; and when he had been placed in paradise, from him, namely Adam, and in it, namely paradise, Eve was created; and so matrimony was instituted in paradise. 302. Paradise, moreover, as Papias says, is a place in the parts of the east, whose name is turned from Greek into Latin as "garden." Further, in Hebrew it is called Eden, which in our tongue is interpreted "delights"; and both joined make "garden of delights." For it is planted with every kind of wood and fruit-bearing trees, having also the tree of life; there is no cold there, but the perpetual mildness of spring; from its midst a spring bursting forth waters the whole grove. It is divided into four rivers arising [from it]. The entrance of this place was shut off after the sin of man. In paradise, besides the forbidden tree, there were other trees too, from which they took so that their animal bodies might feel nothing troublesome from hunger and thirst; but of the tree of life they tasted for this reason, lest death should creep upon them from any quarter, or they should perish from old age, because they were held in the flower of youth — as if the others were for nourishment, that one for a sacrament; so that there they might be in an intelligible paradise, the wisdom of God. Thus far Papias, who took the aforesaid from the words of Moses saying in Genesis 2 — after he said "And [the Lord God] had planted," etc., he adds: "And the Lord God brought forth of the ground every tree fair to behold and pleasant to eat of; the tree of life also in the midst of paradise, and the tree of knowledge of good and evil. And a river went out of the place of pleasure to water paradise, which from thence is divided into four heads," etc. Peter Comestor also says in the *Historia Scholastica* on those words of Genesis 2, "And the Lord God had planted a paradise of pleasure from the beginning": as if someone asked, did man remain in the place where he was made, namely in the Damascene field? No. Where then was he transferred? Into the paradise which God had planted on the third day, that is, fitted with plants — the paradise with herbs and trees — from the beginning of creation, namely when the dry land appeared and He made the earth bring forth; or "from the beginning," that is, from the first part of the world. Hence another translation has "a paradise in Eden toward the east." But Eden in Hebrew is in Latin "delights"; therefore "paradise of pleasure" is the same as "paradise in Eden," namely in delights; "from the beginning" is the same as "toward the east." It is, moreover, a most pleasant place, separated by a long tract of land and sea from our habitable land, raised up by God so that it reaches up to the lunar globe; hence the waters of the flood did not reach there. And God brought forth in paradise from the ground diverse trees, by which man might be delighted in seeing and sustained in eating. "Brought forth," that is, led far up on high; or "brought forth," that is, brought out for man. In the midst of which, as the worthier, He placed the tree of life and the tree of knowledge of good and evil. The tree of life was so called from the effect which it naturally had, that, being eaten often, it would strengthen man with perpetual firmness, so that by no infirmity or old age or anxiety would he slip into worse or into decline. But the tree of knowledge of good and evil was so called from that which followed the eating: for before, man did not know what evil was, because he had not yet experienced it. We call good health and firmness; evil, sickness and weakness, which he had not yet felt. He had known them indeed by knowledge, because from one of contraries the other is known, but not by experience — as a physician, when he is healthy, knows diseases, but when he is sick knows them more, because he both knows and feels; as it is said of a boy delicately nourished that he does not know what evil is — nay, he does not yet know how great a good it is. Or the evil is called disobedience, the good obedience, because after the eating he knew how great a good obedience is and how great an evil disobedience. Papias, not thinking that this could fit trees, therefore reckoned that both were said of man, because he sees and knows good and evil; and he said that he was called

"tree," that is, bodily, in distinction from spirits, which are not bodily, which live and know good and evil. He taught that it was placed in the midst because man is placed as it were midway between the Creator set above and the sensible things set below him; and he said that the creation of that man was distinguished from the creations of other men through those two additions, "of life" and "of knowledge of good and evil." For as in a sound figure there is first the whole trunk and afterwards at the top a fork, so man now in his first ages lives as it were only as a trunk, not using the powers given for understanding; but when he comes to the years of discretion, then he discerns between good and evil, and then his first works are good or bad. But it was not so done in Adam; rather, when life was given him, the knowledge of good and evil was given — as if to say: man was made bodily, subject to God, set over the animals, and at once he lived and knew good and evil. Brother John of Genoa in his *Catholicon*, beyond what Papias says — Isidore, *Etymologies* 14, agrees with Papias, and in etymology Huguccio, or Hugo, also agrees — beyond these, the aforesaid Brother John says: Note here that paradise is believed to be a certain bodily place situated in a determined part of the earth, most temperate, pleasant, so that man, impeded by no disturbances, might enjoy spiritual delights in quiet. And they reckon this place to be under the equinoctial toward the eastern part, because certain philosophers assert that place to be most temperate; from which place also the Nile, one of the four rivers of paradise, seems to flow. Hence, according to Bede, they hold that paradise is in the east, with a long space of either sea or land lying between it and the regions which men inhabit, secluded and situated on high; hence the waters of the flood did not reach there.

But it is customarily asked how that is to be understood which the Lord said on the cross to the thief: "Amen I say to you, this day you shall be with me in paradise" (Luke 23). To this it can be said that this is not to be understood of the earthly paradise, because the passion of Christ does not lead back to that paradise but to the heavenly one; which paradise indeed can be taken in two ways: according to the rule of fruition, and so the thief, dying, was at once in paradise; or as to the fitting place of glory, and so no one entered paradise before the Ascension, according to that of the Psalmist: "Ascending on high, He led captivity captive," namely Christ. But why God granted man to eat of every tree of paradise except the tree of knowledge of good and evil, Gregory says in the last [book] of the *Moralia*: "The Lord granted all the trees of paradise for food when He forbade one, so that His creature, which He did not wish to be extinguished but to be advanced, He might restrain from one the more easily the more widely He loosed it to all." Isidore also adds in book 14 of the *Etymologies*: "For paradise is enclosed

on every side by a flaming sword, that is, girded with a wall of fire, so that its burning almost joins the sky. The Cherubim also, that is, the guard of angels, has been set above the blazing sword to keep off evil spirits, so that the flame may drive back men, and good angels evil angels, lest access to paradise lie open to the flesh or to the spirit of transgression." On the aforesaid words, however, the Master of the *Sentences* says in [book] 2, dist. 29: "But lest he could approach it," namely the tree of life, "God placed before paradise the Cherubim and a flaming sword, turning every way, to keep the way of the tree of life" (of which Genesis 3); which, according to Strabo, can be taken literally in this way: that through the ministry of angels a fiery guard was established there. But Augustine on Genesis says: "For this must be believed to have been done in the visible paradise through the heavenly powers, so that through angelic ministry there might be a certain fiery guard there; yet not in vain, but because it signifies something of the spiritual paradise. For Cherubim is interpreted fullness of knowledge, that is, charity, since love is the fullness of the law. But the flaming sword is

temporal punishments, which are turning, because times are revolving. Those things, therefore, were placed before paradise for the guarding of the tree of life, because one does not return to life except through the Cherubim, namely the fullness of knowledge, that is, charity, and through the turning sword, that is, the endurance of temporal sufferings." The Master also treats sufficiently of paradise, of the tree of life, of the tree of knowledge of good and evil, of the creation of man outside paradise and of the creation of woman in paradise, in [book] 2 of the *Sentences*, dist. 17 and 18, and there fully the theologians. You see therefore how noble the place was where matrimony was first instituted; and so it is established that by reason of such a place the sacrament of matrimony is judged more commendable.

Third, matrimony is rendered commendable by the age, because in the time of innocence. Where it is asked whether matrimony was instituted before sin. A doubt arises, because matrimony is of natural law, which inclines to perfection through free choice: for the nature of the genus and species inclines to acts of generation for the preservation and enlargement of the same genus and species, as appears in Dig., *De inofficioso testamento*, l. *Nam etsi*; and the Philosopher, *Ethics* 8, c. 1[2], says that children have from their parents being, nourishment and discipline. The authority of sacred scripture is added, Ecclesiasticus 7: "Honour your father, and forget not the groanings of your mother. Remember that you would not have been born but through them, and make a return to them as they have done for you." And Tobias said to his son, Tobias 4: "When God shall take my soul, bury my body, and you shall honour your mother all the days of her life; for you must be mindful what and how great perils she suffered for you in her womb." From which words appears the natural inclination not only to the production of offspring but also to its nourishment and instruction, as Richard sufficiently proves on [book] 4 of the *Sentences*, dist. 26, art. 1, q. 1. The Philosopher also says, *Politics* 1, c. 1, that male and female are not capable of generation without each other; and *Ethics* 8, c. 12, he says that friendship between husband and wife seems to exist according to nature. But nature is so today after sin as it was before sin — I do not say as to quality, but as to essence. And so it seems that matrimony ought not to have been instituted before sin. Further, where there is no disease, medicine is not required, according to what the Lord said: "They that are well have no need of a physician, but they that are sick" (Matthew 9, and the like in Luke 5). But before sin there was no disease of concupiscence; therefore no medicine was necessary. But the sacraments are ordained for healing, according to that of Ecclesiasticus 38: "The Most High has created medicines out of the earth, and a wise man will not abhor them"; and below: "By these he shall cure and shall allay their pains, and of these the apothecary shall make sweet confections, and shall make up ointments of health"; which words the theologians commonly understand of the sacraments of the Church. Answer: although all the other sacraments were instituted after sin, yet the sacrament of matrimony alone is read to have been instituted before sin — not, however, as a remedy, but as an office — as Hugh of St Victor says, book 2 *De sacramentis*, part 11, c. 1; and the Master of the *Sentences* reports it in [book] 4, dist. 26, c. 1, where he adds: 305. "But the institution of marriage is twofold. One before sin, as an office, in paradise, where there would be an undefiled bed and honourable nuptials, from which they would conceive without heat and bring forth without pain. The other after sin, as a remedy, made outside paradise, for avoiding unlawful motion. The first, that nature might be multiplied; the second, that nature might be supported and vice restrained. For both before sin God said, 'Increase and multiply,' and after sin almost all men were consumed by the flood." Augustine also proves the aforesaid on Genesis and in the book *De nuptiis et concupiscentia*. The Master adds in c. 2: "The first institution had a

precept, the second an indulgence. For we have learned from the Apostle that marriage was granted to the human race on account of avoiding fornication (1 Corinthians 7). But an indulgence, because it does not choose the better things, has a remedy, not a reward; for what is granted according to indulgence is voluntary, not necessary; otherwise he would be a transgressor who did not do it." Richard also says in the same book and distinction, art. 1, q. 2, that matrimony was instituted implicitly even in paradise as to a remedy, when God said to the woman, Genesis 3: "I will multiply your sorrows and your conceptions; in sorrow you shall bring forth children, and you shall be under your husband's power, and he shall have dominion over you"; and to Adam He said, "Because you have hearkened to the voice of your wife," etc. And it adds below: "And Adam called the name of his wife Eve, because she was the mother of all the living. And the Lord God made for Adam and his wife garments of skins," etc. From which words, gathered together, it can appear that God intimated that their future union would now be not only as an office but also as a remedy. When He said to Noah and his sons, "Increase and multiply and fill the earth," etc. (Genesis 9), the multiplication of men is accomplished by the union of male and female, as was said above. From which the Master of the *Sentences*, as above, says that as before sin it was said to the first parents under precept, "Increase and multiply," so after the flood also it was said under precept to Noah and his sons; but once man was multiplied, it was granted according to indulgence, not according to command. Some, however, say that matrimony was instituted also by Christ, when He said in Matthew 19: "What God has joined together let no man put asunder"; and below: "Whoever shall put away his wife, except for fornication, and shall marry another, commits adultery." But certainly to one who looks rightly it clearly appears that by those words He did not institute matrimony, but showed it instituted from the beginning, as He had premised: "He who made [them] from the beginning," etc.; and therefore, wishing to show that matrimony lawfully instituted could not be separated, He so spoke to instruct those who did not think rightly about the separability of matrimony.

Fourth, matrimony is rendered commendable by the honourableness of the persons, because between Adam and Eve, who at that time before sin lived together in such sincere virginity and entire modesty that they did not even reckon what nakedness was. Hence Moses writes, Genesis 2, at the end: "And they were both naked, namely Adam and his wife, and were not ashamed" — and rightly, because they had nothing to be ashamed of. For shame arises from sin; and therefore after sin, when they knew themselves to be naked, they sewed fig leaves together and made themselves aprons (Genesis 3). For a *perizoma*, as Papias says, is a garment or girdle by which only the genitals are covered, like breeches. Hence also Papias says: shame is from the remembrance of sins; or it is confusion proceeding from an unseemly thing, or from fear of an unseemly thing. Since, therefore, honourableness is the same as a state of honour, and he is called honourable who has nothing of baseness: therefore, since matrimony was instituted before sin, as appeared above, it follows that it could not have been instituted in a more honourable time and between more honourable persons. From which Bernard says on that verse of the Psalm, "Man, when he was in honour, did not understand": "In what honour he dwelt in paradise and in the place of pleasure! His life felt nothing of trouble or want; surrounded with fragrant apples, propped up with flowers, crowned with glory and honour, and set over the works of the hands of his Maker. But more he excelled by the mark of the divine likeness, and his lot and fellowship was with the people of the angels and with all the soldiery of the heavenly host. But he changed this glory into the likeness of a calf that eats hay. Alas, vile and tearful change: that man, dweller in paradise, lord of heaven, household citizen of the Lord

of Sabaoth, brother of the divine spirits and co-heir of the heavenly powers, by a sudden change found himself, on account of infirmity, lying in a stable, and on account of his bovine likeness needing hay, and on account of untamed wildness bound in a manger, as it is written: 'With bit and bridle bind fast their jaws.' I see the first man clothed with four virtues: what did he lack whom mercy guarded, truth taught, justice ruled, peace cherished?" etc. Thus far Bernard on the Canticle. Behold therefore what honourableness there was before sin in those between whom matrimony was first instituted. Therefore matrimony is commended the more laudably; as Augustine says in book 11 of the *City of God*: "So great is the force of probity and honourableness that all, or almost all, human nature is moved by its praise; nor is it so far vicious by baseness as to lose wholly the use of honourableness." And Ambrose, book [2] *De officiis*, says: "So great is the splendour of honourableness that tranquillity of conscience and security of innocence make life blessed." O would, then, that our first parents had persevered in such grace of honourableness! For they would have begotten children without any sin and stain; and even in paradise, had they not sinned, they would have come together in carnal union, and there would have been there an undefiled bed and intercourse without concupiscence, and with the genital members

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as they would have commanded the others, so that they would have perceived there no unlawful motion; and as we move some members of the body by others — as we join hand to mouth without the heat of lust, or hand to hand — so they would have used the genital members without any itching of the flesh; for this deadly sickness is in human members from sin. The first parents, therefore, and the other descendants would have begotten children in paradise through undefiled intercourse and without any corruption, as Augustine says on Genesis, and the Master reports in [book] 2 of the *Sentences*, dist. 20. Hence, if they had not sinned, they would have commanded the genital members as they do the feet, and would neither have sown with heat nor brought forth with pain; and since the little ones would have been small, the omnipotence of the Creator could have made them grown as soon as they were born, etc. We now have the fourfold commendation; let us follow the remaining one.

Fifth and last, for brevity's sake, matrimony is rendered commendable by the excellence of the end: for matrimony was principally instituted for generating offspring. 306. There are, however, three goods of marriage, as Augustine says on Genesis, and the Master of the *Sentences* reports in [book] 4, dist. 31, c. 1, saying: "The nuptial good is threefold, namely faith, offspring, sacrament. In faith it is attended to that, after the conjugal bond, he or she not come together with another; in offspring, that it be lovingly received and religiously brought up; in the sacrament, that the marriage not be separated, and that the man or woman dismissed not be joined to another even for the sake of offspring. Separation, however, is twofold: bodily and sacramental. They can be separated bodily on account of fornication, or by common consent for the sake of religion, whether for a time or until the end of life. But sacramentally they cannot be separated while they live, if they are lawful persons. For the conjugal bond remains between them, even if, departing from each other, they have cleaved to others; as the apostate soul, as it were withdrawing from the marriage of Christ, even when faith is lost, does not lose the sacrament of faith which it received by the laver of regeneration."

Concerning the aforesaid goods excusing matrimony it is to be known that, as the goodness of a creature is twofold — namely one essential, another accidental — so also the good of matrimony is twofold: namely essential, which is divided into the three aforesaid; and accidental, which is manifold and indefinite, as the reconciliation of enemies and the restoration of peace, which are honourable causes for contracting matrimony; although there are also other less honourable causes through which some contract matrimony, as the beauty of the man and the woman, gain also and the possession of riches, regard for kindred whether from nobility or from numbers or power, and the like; of which the Master treats in the said *Sentences*, dist. 30, penultimate chapter, and Augustine treats in *De bono coniugali*. 308. The number of the essential goods of matrimony can be taken in three ways: namely, first, on the part of the cause of matrimony; second, on the part of the effect; third, on the part of the nature of the good itself. In the first way: as was seen above, nature inclines to matrimony, and so it regards the good of offspring; likewise right reason, and so it regards the good of faith; likewise because by divine law, which instituted it to signify something, and so it has the good of the sacrament. In the second way thus: in matrimony three things are to be considered, namely the bond, the use of the bond, and the fruit to which the use is ordained. By reason of the first the good of matrimony is the sacrament; by reason of the second it is faith; by reason of the third it is offspring. In the third way thus: according to the Philosopher, *Ethics* 8, c. 2, good is threefold: useful, delightful and honourable. According to the useful, in matrimony there is the good of offspring; according to the delightful, the good of faith; according to the honourable, the good of the sacrament. These, however, are said by appropriation, because in each of the three aforesaid goods the character of the delightful, useful and honourable can in some way be found, according to Richard on [book] 4 of the *Sentences*, dist. 31, art. 1, q. 2.

But I ask which of the aforesaid goods is more principal among them. Answer, briefly: that is more principal in matrimony without which matrimony cannot be; and this is the sacrament; therefore in matrimony the sacrament is more principal than faith or offspring, and this in a twofold respect: first, because it is worthier; second, because it is more essential. That it is worthier is clear, because the good of faith and the good of offspring belong to matrimony inasmuch as it is a certain office of nature, but the good of the sacrament belongs to matrimony inasmuch as it is a sacrament of grace; but grace is worthier than nature; therefore, etc. That the sacrament is more essential to matrimony than faith and offspring is clear, because the sacrament belongs to matrimony by reason of inseparability, according to Augustine, book 9 on Genesis, well before the middle. But inseparability is more essential to matrimony than the good of offspring and the good of faith; [for] after matrimony is contracted, the good of offspring and the good of faith can be separated from it, the bond of matrimony nevertheless remaining: for if the spouses procure poisons of sterility, even by agreement between themselves or by common concord, the matrimony previously contracted is not on that account dissolved — although if such an agreement had intervened in contracting, there would have been no matrimony. So also, if the spouses are separated on account of fornication, the bond of matrimony still remains between them, so that while they live neither is at all permitted to contract with another man or woman; yet there does not remain between them the mutual obligation to demand of each other the use of their body, even if one of them demanded it. But inseparability so adheres to matrimony that without it matrimony cannot be, and inseparability belongs to the sacrament; therefore the sacrament is recognized to be more principal than faith and offspring. So Richard also holds on [book] 4 of the *Sentences*, dist. 31, art. 1, q. [3].

Of the aforesaid three goods it is also treated in the Decretum, C. 27 q. 2, c. *Omne*, and C. 32 q. 2, [c.] *Sicut*, at the end. Gandulphus, however, said that there are only two goods of matrimony, namely faith and offspring, but that the sacrament itself is not a good of matrimony unless it is understood intransitively, that is, the good which is matrimony, because the sacrament of matrimony is nothing other than matrimony itself. But say that the sacrament of matrimony is here called the inseparable union of souls, or also mutual service, both of which are goods of matrimony. Without these goods matrimony cannot be contracted, but afterwards it can be without them. So says the gloss of Bartholomew of Brescia on the said c. *Omne*, where you see that it reproves the opinion of the aforesaid Gandulphus. And note what it says here, namely on the said c. *Omne*, because there it speaks of the matrimony of the glorious Virgin with Joseph. Note also that the Archdeacon says on the said c. *Omne*, reporting Augustine, that although matrimony is contracted without the intention of offspring, but not with the intention of avoiding offspring, it is nonetheless matrimony, as for example because one contracts with a sterile woman or an old woman. 310. But if one contracts with the intention of avoiding offspring, then it is not matrimony (C. 32 q. 2, [c.] *Solet quaeri*; and above, *De condicionibus appositis*, last c.). And the distinction is to be made, according to the Archdeacon, in the good of faith; but in the good of the sacrament the will is always necessary, otherwise it is not matrimony, according to him — and well, because without mutual consent matrimony cannot be, since consent is of the substance of matrimony, and so of necessity to be present, as in c. *Tua nos*, near the end, and c. *Cum apud*, above, *De sponsalibus*. But the form is required through words expressing consent *de praesenti*, as in c. *Si inter virum*, above, *De sponsalibus*, and in c. *Licet*, above, *De sponsa duorum*; and I said above in the same treatise, q. 3, namely how matrimony ought to be contracted, § *Circa hoc*. 311. But what if at the time of the contract of matrimony the will was present to keep the aforesaid goods, and afterwards it was changed: will the matrimony cease? Answer: not; but it suffices that at the time of the contract of matrimony the will of the contracting parties was present to keep them, because once there is a marriage, it never ceases (C. 32 q. 7, cc. 1 and 2; above, *De divortiis*, c. *Quanto*; C. 32 q. 2, [c.] *Horrendus*; and C. 32 q. 1, [c.] *Dixit Dominus*). 312. But what if nothing of the aforesaid goods was thought of by the contracting parties? Answer: the matrimony is still lawful, if nothing else impedes; for it suffices that they do not add a contrary condition. For if they added one, the matrimony would be null: as if the man said, "I contract with you if you avoid the generation of offspring," or "until I find another worthier," or "if you give yourself up to adultery for the sake of gain" (C. 20 q. 4, [c.] *Inter cetera*; C. 32 q. 2, [c.] *Aliquando*, and c. *Solet quaeri*; and above, *De condicionibus appositis*, last c.).

But I ask further whether she is a lawful wife who is married solely on account of incontinence. A doubt arises, because the first institution was made for the sake of offspring and for the sake of the multiplication of the human race, when the Lord said, "Increase and multiply" (Genesis 1); from which Ambrose on Luke says: "It is a shame for women not to have the rewards of nuptials, for whom this is the only cause of marrying" (C. 32 q. 2, [c.] *Pudor*; D. 6, [c.] *Deinde*, supports this). Answer: notwithstanding the aforesaid first institution, matrimony can lawfully be contracted on account of incontinence, since after sin matrimony was also instituted as a remedy, as was said above; from which the Apostle says, 1 Corinthians 7: "For fear of fornication," namely to avoid it, "let every man have his own wife, and let every woman have her own husband." And that the aforesaid matrimony holds appears expressly in the said c. *Solet quaeri*. For it is a great reward for women to conceive and to keep what is conceived (Dig., *De aedilicio edicto*, l. *Quaeritur*, § *Mulier*); and to beget

offspring fell as a blessing in the Old Testament, Deuteronomy 7: "Blessed shall you be among all peoples; there shall be no barren one with you of either sex, as well in men as in your flocks." On account of which also Rachel, being barren, once envied her fruitful sister Leah, Genesis 30: "And Rachel, seeing that she was barren, envied her sister"; and Anna, wife of Elkanah, grieved for a like cause, 1 Kings 1: "Her rival also afflicted her and vexed her exceedingly, insomuch that she upbraided her that the Lord had shut up her womb." Notwithstanding these, however, if it does not rest with the woman that she lacks the fruit of marriage, she is not to be blamed, nor does this present an impediment to a matrimony lawfully contracted, as the gloss holds on C. 33 q. 1, c. 1. But Hostiensis, as Lord Antonius de Butrio reports on the last chapter, above, *De frigidis*, through what is noted in the text and gloss of the said chapter, briefly passing over it, says that the sacrament of matrimony has pre-eminence.

First, by reason of its author, because the other sacraments were ordained by Him [as man], this by God alone; of which above, *De bigamis*, c. *Debitum*; C. 27 q. 1, at the beginning; and Johannes Andreae alleges what is noted by him on c. 1, *De voto*, in the Sext — who thinks better than Hostiensis, although both entangle themselves; and therefore hold what I said above in the first commendation: for there ought to be no doubt that it was instituted by God, and in paradise, and in the state of innocence, as Boniface VIII also clearly asserts in the said c. 1, *De voto*, in the Sext, saying: "But the bond of matrimony

received its unity and indissolubility from the very Head of the Church, the Founder of all things, who instituted it in paradise and in the state of innocence." The aforesaid and very many others, however, are in doubt by what words God instituted matrimony; on which point, although the canonists vary, you nevertheless hold what I said above, because so the theologians commonly hold, and better.

Second, the sacrament of matrimony, according to Hostiensis, has pre-eminence by reason of the state, because it was instituted before sin; of which I said enough above.

Third, according to the same, by reason of the place, because in paradise; of which also enough has been said.

Fourth, by reason of the time, namely in respect of antiquity, according to the same, because from the beginning of the world: from which it appears expressly that the sacrament and order of matrimony excels every sacrament and order in antiquity, and therefore it is supported by the longest prescription.

Fifth, according to the same, by reason of what is signified, because it signifies the matrimony of Christ with the Church and with the faithful soul, as in c. *Debitum*, above, *De bigamis*; of which signification, however, I shall speak more fully below.

Sixth, according to the same, by reason of privilege, because it makes a work which would otherwise be a sin not to be a sin. To which is added what the Lord said, Genesis 2: "It is not good for man to be alone; let us make him a help like unto himself"; and below: "But for Adam there was not found a helper like himself. Then the Lord God cast a deep sleep upon Adam," etc. From which it is to be understood, according to the gloss of Augustine, that when the deep sleep was cast upon Adam he was rapt in spirit, and, being bodily in the earthly paradise, he was nevertheless spiritually present in the heavenly court, and there recognized the virtue of matrimony, that it was the sacrament of that

thing. For the same Augustine says: "The ecstasy is rightly understood to have been sent for this, that the mind of Adam, sharing in the angelic court and entering into the sanctuary of God, might understand the last things. Hence, awaking, with a prophetic spirit he uttered this: 'This now is bone of my bones,' etc. Since Scripture says these words were Adam's, while Christ in the Gospel declares that God spoke them, we are to understand that through that ecstasy Adam said these things divinely: 'This now is bone,'" etc. 316. And so the mutual obligation of one to the other from such a sacrament appears in many ways.

First, as to the sustenance of life and all support, where he says, "This now is bone of my bones": therefore they are to be cherished, sustained and nourished as one's own, because no man ever hated his own flesh, as the Apostle says to the Ephesians, in the penultimate [chapter].

Second, as to intimate love, where [he says] "and flesh of my flesh": therefore do not despise your own flesh (Isaiah 58). On account of which the Apostle also says to the Ephesians 5: "Husbands, love your wives, as Christ also loved the Church"; and below: "that it should be holy and without blemish. So also ought men to love their wives as their own bodies. He that loves his wife loves himself"; and it follows: "For no man ever hated his own flesh, but nourishes and cherishes it, as also Christ does the Church, because we are members of His body, of His flesh and of His bones"; and below: "Nevertheless let every one of you in particular love his wife as himself, and let the wife fear her husband."

Third, as to the indissolubility of the bond, where [he says] "she shall be called woman, because she was taken out of man; wherefore," that is, on account of the indissoluble sacrament, because "what God has joined together let no man put asunder"; in which words also the obligation is attended to.

Fourth, as to the subjection of the woman, when he says "because she was taken out of man," where a certain reverence owed to the husband by the wife is to be attended to, because the husband is the principal part of matrimony, as the head in the whole body; from which the Apostle says to the Ephesians 5: "Let women be subject to their husbands as to the Lord, because the husband is the head of the wife, as Christ is the head of the Church; He is the saviour of His body. Therefore as the Church is subject to Christ, so also let wives be to their husbands in all things."

Fifth, as to the exception, namely of two persons in the ascending and descending line, namely father and daughter, mother and son, where [he says] "a man shall leave father and mother" — as if he had said: these persons excepted, they shall contract among themselves, because in the first age it could not have been done otherwise. Hence it was necessary for Cain to take as wife his own sister by both parents (Genesis 4). And so it appears that from the beginning a perpetual prohibition was made in the ascending and descending line, as I said above in the same treatise, on consanguinity, q. 2: for if the one contracting is commanded to leave father and mother, therefore he is forbidden to contract with them. Hence Master Peter Comestor says in the *Historia Scholastica*: "The name having been given, he at once prophesied, saying: 'Wherefore,' namely because she is from the side of the man, 'a man shall leave father and mother,' namely for the sake of his wife; therefore he said 'and shall cleave to his wife,' as to his own little portion. Or 'for this cause,' pointing to the wife — that is, for the sake of this woman, namely a wife, 'a man shall leave,' etc.; this is done daily by men. Or most of all it is to be understood 'they shall always leave,' that is, they shall not be joined to them, namely to father and mother, in matrimony"; and so then these two persons only were excepted. But afterwards in the Law [more] persons are excepted, as appears in Leviticus 18; but according to the law of the Church still

more are excepted, as in c. *Non debet*, above, *De consanguinitate et affinitate*, and in c. *Iuvenis*, *De sponsalibus*: for kinsfolk and affines up to the fourth degree inclusive are excepted, and those also who are bound by the justice of public honesty; of all which it was treated above in their places. Peter continues: "'For this,' that is, on account of this, namely marriage, etc., 'a man [shall leave] father and mother' — either he shall leave off dwelling with them bodily, or he shall leave them spiritually, because the zeal of a husband toward his wife is greater than the love of children toward parents" — I do not say of parents toward children; for the sap rises from the trunk to the branches and does not go back; and there it did not say, "for this cause parents shall leave children."

Sixth, as to confirmation and the rendering of the debt, where [he says] "and shall cleave," namely through the conformity of the sexes, where [it says] "a man," and where "to his wife"; hence it does not say man to man and wife to wife. From which the Apostle says, 1 Corinthians 7: "Let the husband render the debt to the wife, and likewise also the wife to the husband. The wife has not power of her own body, but the husband."

Seventh, as to the mutual consent by which matrimony is contracted, and the keeping of faith by which matrimony is preserved in justice; therefore it says "and shall cleave to his wife" — "shall cleave," namely by consent and by use intervening in its terms. Thence it follows, "and they shall be two," etc.

Eighth, as to the mutual intention toward intercourse and generation, where it adds "in one flesh," namely of offspring to be generated. Hence the aforesaid Peter says: "That is, both shall unite in one carnal body; or they shall be two in one flesh, namely of the child to be generated; for the flesh of the little one is gathered not from one blood but from bloods. Or, although they are two in person, they shall be one flesh in marriage, because neither has power over his own flesh." Understand soundly what he says, "not from one blood but from bloods," etc., to which that of John 1 seems to give applause: "He gave them power to be made the sons of God, to them that believe in His name, who are born not of bloods, nor of the will of the flesh," namely of the woman, "nor of the will of man." Yet according to the opinion of the philosophers, the blood of the man, namely the spermatic seed, works nothing materially for the conception of offspring, but only formally, as agent; but the blood of the woman, as patient, is the matter of the offspring.

Ninth, as to the signification of the sacrament, namely that the flesh of either not be divided among several, from the aforesaid words, when it says "and they shall be two," namely joined together by consent to the sacrament, and consequently by intercourse for the generation of offspring, "in one flesh," that is, in carnal union in the office of generation. Hence when it says "in one flesh," understand soundly, namely not in several while she lives (D. 33, [c.] *Valentiniano*). Since, therefore, so many obligations intervene, it is no wonder if so great a sacrament is not easily rescinded, as is noted above, *De consanguinitate et affinitate*, c. *De infidelibus*; for between married persons there is an individual union (C. 27 q. 2, § 1); to which above, *De sponsalibus*, the said c. 1, and what is noted above, *De sponsalibus*, c. *Is qui fidem*, and above, *De bigamis*, c. *Debitum*, and above, *De translatione praelati*, c. *Inter corporalia*.

Beyond the aforesaid there occur still eight considerations from which matrimony is rendered deservedly commendable. The first consideration is that the Lord saved this order alone in the time of the flood. For when all flesh had corrupted its way upon the earth, the Lord said to Noah: "The end of all flesh is come before me; the earth is filled with iniquity through them, and I will destroy them

with the earth" (Genesis 6). "And all flesh was destroyed that moved upon the earth, and Noah only remained, and they that were with him in the ark" (Genesis 7). But of the human race it appears that there were no more than eight souls who were saved in the ark upon the waters. Hence when the earth was dried after the flood, the Lord spoke to Noah, saying: "Go out of the ark, you and your wife, your sons and the wives of your sons with you" (Genesis 8). And the sons of Noah were three, Shem, Ham and Japheth, and their three wives, as appears in Genesis 7, where: "In the selfsame day Noah, and Shem, Ham and Japheth his sons, his wife and the wives of his three sons, went in"; which the prince of the Apostles, Peter, also expresses, 1 Peter 3, saying: "In the days of Noah, when the ark was a-building, wherein a few, that is, eight souls, were saved by water." And so it appears expressly that only those who were in the ark, namely in the sacrament and order of matrimony, were saved above the many waters of uncleanness and incontinence of those drowned — which waters, however, could not extinguish the charity of the holy married men and their wives, according to what Solomon says in the last [chapter] of the Canticle: "Many waters cannot quench charity." Let the wretched concubinaries, fornicators, adulterers, the incestuous,

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violators of virgins and widows, harlots, the sacrilegious and sodomites beware, lest they too likewise be drowned in the depth of hell: for neither the fornicator nor the unclean shall possess the kingdom of God, as the Apostle proves to the Ephesians 5 and Galatians 5; and 1 Corinthians 6 he says: "Know you not that the unjust shall not possess the kingdom of God? Do not err: neither fornicators, nor idolaters, nor adulterers, nor the effeminate, nor liers with mankind, nor thieves, nor the covetous, nor drunkards, nor railers, nor extortioners shall possess the kingdom of God." And to the Hebrews, the last [chapter], he says: "Marriage honourable in all, and the bed undefiled; for fornicators and adulterers God will judge."

The second consideration is that the Blessed Virgin Mary, before she conceived the Son of God, professed the matrimonial order, as Luke 1 proves, where: "The angel Gabriel was sent from God into a city of Galilee called Nazareth, to a virgin espoused to a man whose name was Joseph, of the house of David; and the virgin's name was Mary." It is therefore no small praise of such an order, since it was adorned by so great a Virgin; and although she had resolved to keep virginity, she nonetheless consented and submitted herself to the divine will, as the Master of the *Sentences* says in [book] 4, dist. 30, c. 2, where: "It can soundly be believed that not only Mary but also Joseph had resolved within himself to keep virginity, unless God commanded otherwise; and that they so consented to conjugal fellowship that each understood of the other, the Spirit revealing it, that he wished to keep virginity unless God inspired otherwise." Augustine also says this in the book *De nuptiis et concupiscentia*. And so the Master also proves that the marriage between Mary and Joseph was perfect, because "every good of nuptials was fulfilled in those parents of Christ, namely faith, offspring and sacrament. We know the offspring, because it was the Lord Himself; faith, because there was no adultery; the sacrament, because there was no divorce." Thus the Master, same distinction, c. [3]; and Augustine says the same in *De bono coniugali*, and it is had in the Decretum, C. 27 q. 2, [c.] *Omne*. It is therefore a great praise of such a sacrament that it was honoured by such and so great virgins, namely Mary and Joseph.

The third consideration is that Jesus Christ the Son of God would not be incarnate except through a virgin espoused to a man; and so He would not be born into this world according to the flesh He assumed except in the marital order, as appears in Matthew 1, where: "When Mary His mother was espoused to Joseph, before they came together, she was found with child of the Holy Spirit"; and below: "And Joseph, rising up from sleep, did as the angel of the Lord had commanded him, and took unto him his wife; and he knew her not till she brought forth her firstborn son, and he called His name Jesus." From which words Helvidius fell into heresy, whose heresy Jerome refutes excellently in the letter *Against Helvidius, on the perpetual virginity of Blessed Mary*. 319. For the word "till" is taken in the Scriptures sometimes inclusively and sometimes exclusively: inclusively, as in Psalm 109, "The Lord said to my Lord: Sit at my right hand, until I make your enemies your footstool," for there "until" includes all time; but it is taken exclusively in 1 Kings 2, "Until the barren has borne many," for there in fact Anna was barren until she bore Samuel, but after she bore she was no longer barren but fruitful. Of this word "until" the canonists treat on C. 30 q. 5, [c.] *Incerta*, on the words "until the Lord come"; and in c. 1, above, *De iudiciis*; and in c. *De muliere*, above, *De matrimonio contracto contra interdictum ecclesiae*, where "that they separate until"; and fully through Johannes de Imola on Clem. 1, *De decimis*, and on c. *Cum bonae*, above, *De aetate et qualitate*, and on Clem. 1, *De consanguinitate et affinitate*. And of the Nativity of the Lord also it is written in Luke 2, where: "And Joseph also went up," and below: "to be enrolled with Mary his espoused wife, who was with child"; and below: "And she brought forth her firstborn son, and wrapped Him up in swaddling clothes, and laid Him in a manger, because there was no room for them in the inn." 320. O spouses, consider your dignity, consider the glory and honour with which you have been crowned by the Son of God, who adorned your marriage so magnificently! For the sacrament of marriage is the mantle under which the Blessed Virgin lay hidden with the Son of God, and He hid so lofty a gift more cautiously, lest it lie easily open to the enemy of the human race. For it seemed impossible to the devil that a virgin had given birth. Hence Ambrose on Luke says: "Since the reward of marriage and the grace of nuptials is the childbearing of women, it is no mean reason, that the virginity of Mary might deceive the prince of the world"; and it is reported in C. 32 q. 2, [c.] *Pudor*. He believed her to be a woman, namely corrupted. Another reason is given in C. 27 q. 2, [c.] *Inventa*, where: "I say a spouse on account of this, that I might hide her virginity from the devil, yet not destroy the institutes of the law"; where the gloss says, and note, that here something is hidden on account of the malice of him from whom the hiding is done. Sometimes also something is hidden on account of the great excellence of the thing (D. 42, [c.] *In mandatis*); sometimes because the hearers are not capable (C. 8 q. 1, [c.] *Oportet*); hence Christ also said to His apostles, John 16: "I have yet many things to say to you, but you cannot bear them now." Of the aforesaid birth of the most glorious Jesus, namely our Redeemer, and of the true matrimony between Mary and Joseph, and of the manner of conception, and of the perpetual virginity of the Blessed Virgin, and of the remaining consequences, it is treated sufficiently in the Decretum, C. 27 q. 2, [c.] *Sed quaeritur*, with the three following chapters, and in c. *Instituti*, and c. *Genuit Ioseph virum Mariae*, and c. *Priusquam convenirent*, and c. *Si enim cognovisset eam*, and c. *Inventa est*, and c. *Sic quippe*. Accursed enough, therefore, and unhappy are the men and women who choose rather to remain in the abomination and filth and uncleanness of lust under the confusion of the devil than in the order of the glorious Virgin and the sacrament of matrimony, in which the Son of God willed to be born. Alas, wretched stinking harlots, who are not ashamed to remain in brothels or stews, or otherwise prostitute themselves amid all baseness and stench — now to the father, now to

the son, now to two brothers or more, now to kinsmen, now to relations and affines or near ones, now to the unmarried, now to the married; and sometimes they are not afraid to prostitute themselves to clerics and priests, religious, subjects and prelates; and not seldom they submit themselves to lepers and to any diseased and sick persons; and so they do not fear, as far as in them lies, basely to defile the mantle of the Blessed Virgin and the dignity of the Son of God.

The fourth consideration is that Jesus the Son of God, with His mother and His apostles, honoured nuptials by His presence (John 2): "There was a marriage in Cana of Galilee, and the mother of Jesus was there; and Jesus also was invited, and His disciples, to the marriage." For according to Ammonius of Alexandria, Eusebius of Caesarea and Theophilus, from the time of Christ's baptism, the forty days completed, He preached for a year, gathered disciples, and gave the sermon on the mount before He was invited to the marriage and worked the miracle of the wine — although some say that the disciples were then following Him secretly. And note that no mention is made there of Joseph; from which some think that he was already dead and that the Blessed Virgin remained in the keeping of her Son; hence from then onward no further mention of Joseph was made by the Evangelists. You see, therefore, how great is the praise and glory of nuptials, which merited to be adorned by the presence of so great a King with such a company. For, as historians commonly relate, as far as can be gathered from the sequence of the Gospels: in the first year of the Nativity, on the sixth day of January, the Lord was adored by the three kings, the Magi (Matthew 2); at the completion of the twenty-ninth year, on the same day, He was baptized by John (of which Matthew 3, Mark 1, Luke 3 and John 1); a year having revolved, on the same day Jesus and His disciples were invited to the marriage (John 2). Let all bridegrooms and brides, therefore, and consequently married people, rejoice and be glad when they hear their order related as confirmed by the presence of the Lord of the whole world. Let the impious concubinaries, fornicators or adulterers and the like of either sex be confounded thereby and blush, who would rather be guests of the devil and his companions than guests of Christ and His mother and His disciples. Hence, since they shut out Christ with His company from their houses and beds and shut in the devil with their unchastities and lusts, unless they bring forth fruits worthy of penance, nothing else remains but that they be finally shut up in the infernal prison with the devil and his angels, where, hands and feet bound, cast into the exterior darkness, they will be tormented with perpetual fire, according to that of the Psalm: "Let the sinners be turned into hell, all the nations that forget God" (Psalm 9). So also the Lord expresses it of him not having a wedding garment (Matthew 22).

The fifth consideration is that the Lord honoured the aforesaid sacrament of matrimony with His first open miracle, when He turned water into wine, His wonderful and surpassingly excellent power being shown. Hence, when by this He had manifested His glory, His disciples believed in Him (John 2), that is, they were more confirmed in the truth of the faith: for if they had not believed before, they would by no means have followed Him. 321. And note that I said "first open miracle," lest perhaps you slip into the error of the apocryphal little book *On the Infancy of the Saviour*, in which many miracles are set forth as having been done by the Lord before the miracle of the wine. But such a little book is expressly condemned as apocryphal in the Decretum, D. 15, [c.] *In primis*; and Nicholas of Lyra on John, c. 2, says the aforesaid little book is reproved as heretical. But the miracle itself, by which water was changed into wine, shows of how great virtue and merit is the sacrament of matrimony: for water is cheap, but wine precious; so also the carnal work outside the bond of matrimony is cheap indeed and rotten. From which Valerius Maximus says in [book] 9: "For what is

fouler, what more harmful, than these vices, by which virtue is worn away, victories grow languid, glory lulled to sleep is turned into infamy, the strength of mind and body is overthrown — so that you do not know whether to be captured by enemies or by them is to be held more pernicious?" And Innocent, *On the Misery of the Human Condition*, says: "O extreme baseness of lust, which not only unbridles the mind but enervates the body; not only stains the soul but befouls the person. For every sin whatever that a man does is outside the

body; but he who commits fornication sins against his own body' (1 Corinthians 6). Heat and wantonness always go before it, stench and uncleanness always accompany it, sorrow and penance always follow it." And Isidore says among other things: "Among the seven vices the vice of fornication is of the greatest wickedness, because through uncleanness of the flesh the temple of God is violated" (C. 32 q. 7, [c.] *Inter cetera*). How unhappy, therefore, are those who can take delight in matrimony with eternal salvation, and would rather be befouled outside matrimony with the disgrace of everlasting torment!

The sixth consideration is that the Lord approved the aforesaid sacrament by His defence and most true teaching, Matthew 19, saying to the Pharisees who tempted Him whether it was lawful for a man to put away his wife for every cause: "Whoever shall put away his wife, except for fornication, and shall marry another, commits adultery; and he that shall marry her that is put away commits adultery." And so He shows the indissolubility of matrimony, which He also affirms there when He says, "What God has joined together let no man put asunder." Where Jerome says on the preceding words, "and they shall be two in one flesh": "The reward of nuptials — one flesh from two — was made by the wholesome counsel of God, so that the husband might embrace in knowledge a portion of his own body, and not think different from himself what he knew was fashioned from himself. What, therefore, God has joined by uniting so inseparably, let not man put asunder." For the lesser cannot loose what the greater binds, as in c. *Cum inferior*, above, *De maioritate et obedientia*, and D. 21, [c.] *Inferior sedes*. Let married people therefore beware lest, against the sentence of Christ, they tear their flesh by dividing it among strangers, and incur the curse which is set forth against adulterous men and women, Ecclesiasticus 23, when it is said: "To a whoremonger all bread is sweet; he will not be weary of transgressing unto the end. Every man that passes beyond his own bed" — namely by violating matrimony — "despising his own soul," and below: "This man shall be punished in the streets of the city, and he shall be chased as a colt, and where he suspected not he shall be taken; and he shall be in disgrace with all men, because he understood not the fear of the Lord. So every woman also that leaves her husband and brings in an heir by another: for first she has been unfaithful to the law of the Most High, and secondly she has offended against her husband, thirdly she has fornicated in adultery and has gotten her children of another man." As if to say: such an adulteress has sinned against God, the author of matrimony; she has sinned against her husband by breaking faith with him; she has sinned against the sacrament which she violated; she has sinned against herself, whom she basely stained; she has sinned against the adulterer, to whom she subjected herself; she has sinned against the offspring, which she wickedly begot; and she has sinned against another's inheritance, which she unjustly usurped through such offspring. And so it appears that she has enlarged her sin manifoldly through the seven aforesaid degrees — although several other circumstances can aggravate the sin of adultery in various other respects: by reason of time, place, the go-between, male or female, or pander, or by reason of the person with whom one sins, and the like; of which through Augustine in the book *De poenitentia*, and in the Decretum, *De poenitentia*, dist. 5,

[c.] *Consideret peccator*, and the following chapter. Hence in the letter of Clement it is written: "What among all sins is graver than adultery? For it holds the second place in punishments, since the first place is held by those who stray from God, even if they have lived soberly." Where the gloss says: "it is called greatest because it is punished with the greatest penalty" (C. 32 q. 7, [c.] *Quid in omnibus*). And on the preceding chapter, which begins *Inter cetera*, the gloss says the vice of fornication is called greatest because it has under it many species. And on the said c. *Quid in omnibus* the gloss says that adultery is called the greatest vice for the detestation of the crime; there is a similar manner of speaking in C. 32 q. 6, [c.] *Nihil iniquius*. For the gravity of sins is commonly reckoned according to the gravity of penalties; that is, because for a graver sin a graver penalty is to be imposed, according to what is noted in C. 24 q. 1, [c.] *Non afferamus*; of which I said enough in the treatise on blasphemy — see there for fullness, 322. through seventy arguments, by which I proved the sin of blasphemy to be graver than the sin of homicide. But as far as concerns the present purpose, it suffices enough to consider the gravity of adultery in the aforesaid respects. Add what Boniface the martyr wrote to the King of the English, and it is had in D. 56, c. *Si gens*: "It has been spread abroad to us in France [and Italy] that the people of the English, as through those provinces," and below: "from such intermingling with harlots it is to be reckoned that degenerate peoples, ignoble and raging with lust, will be begotten, and at last the whole people, verging to worse and more ignoble things, will finally come to be neither strong in secular war, nor stable in faith, nor honourable to men, nor lovable to God — as has happened to other nations, to the peoples of Spain and the province of the Burgundians, who, so departing from God, committed fornication, until the Judge permitted avenging penalties for such crimes and ignorance of the law of God to come and rage through the Saracens." Where the gloss says: note that on account of sin God permits the penalties of hell (C. 5 q. 5, [c.] *Non omnis*; C. 16 q. 1, [c.] *Et temporis*, and c. *Revertimini*; and C. 7 q. 1, [c.] *Sciscitaris*).

The seventh consideration is that the Church blesses nuptials and matrimonies with a solemn and excellent blessing, and administers the Body of the Lord to the spouses beside the altar at Mass, in the presence of the people standing by, when they have confessed and been absolved and devoutly ask for it in sincerity of faith (C. 30 q. 5, [c.] *Aliter*, where: "and at the proper time let her be blessed in priestly manner, as the custom is, by the priest with prayers and supplications and offerings"). There is added D. 34, [c.] *Fraternitatis*, where it permits [a man] "to marry a virgin with the priestly blessing"; and D. 23, last c., where the text says: "The bridegroom and bride, when they are to be blessed by the priest, let them be offered by their parents or by the bridesmen; and when they have received the blessing, let them remain that same night in virginity out of reverence for the blessing itself." But in the said c. *Aliter* it is said "two or three days"; in both places it is counsel, not precept, as the gloss says on the said c. *Sponsus*. Second or clandestine nuptials, however, ought not to be blessed, as in c. 1 and in c. *Vir autem*, above, *De secundis nuptiis*, joined with the gloss in both places.

But I ask whether, if someone marries a second wife who is a virgin, the blessing ought to be repeated. I answer, according to the gloss on the said c. *Vir autem*, that the custom of places ought to be attended to; hence where there is a custom of blessing, they ought to be blessed. For many approve such a custom, because, as appears from the form of the blessing, the whole of it is poured upon the woman; since, therefore, the woman in the proposed case was never blessed, the blessing will be given, because nothing is understood to be repeated in the man — and this if the Pope knows of such a custom and tolerates it. Peter [of Sampson], however, the Abbot and Hostiensis hold that by law it ought not to be done, through the aforesaid text *Vir autem*, and through the aforesaid c. 1,

and D. 10, § *Leges*, and c. 1, at the end, above, *De cognatione spirituali*, and c. *Super eo*, same title, and c. 2, above, *De temporibus ordinationum*. William, however, and Hostiensis hold that in such a case the custom can be kept without danger and the blessing repeated; to which *De poenitentia*, dist. [5], § *Ex persona*. Thomas on [book] 4 of the *Sentences*, dist. 42, says that second nuptials ought not to be blessed when they occur in both, namely in the man and in the woman; but otherwise if in the man only. A priest, moreover, who presumes to bless second nuptials, suspended from office and benefice, is to be sent with letters of his diocesan to the Apostolic See, as in the said chapter above, *De secundis nuptiis*. And note through the aforesaid gloss on the said c. *Vir autem* that if the Pope tolerates a custom against law in sacramental matters, the custom is valid. Note also that in sacramental matters, for a custom to be valid, at least the tacit consent of the Pope is required; which keep in mind. But where there was no such custom, Lord Antonius de Butrio holds on the said c. *Vir autem*, at the end, that the blessing of the husband had in the first nuptials is transfused into the second wife, a virgin, through carnal intercourse, through which they are made one flesh — as is said of blessed oil, that it is transfused into what is added to it, because the sacred, as the worthier, draws to itself the non-sacred (C. 13 q. 2, [c.] *Non aestimemus*; above, *De consecratione ecclesiae vel altaris*, c. *Quod in dubiis*, at the end; Dig., *De rei vindicatione*, l. *Quae religiosis*). It is otherwise, however, with the consecrated blood of Christ: for if wine is added to the blood, the added wine is not on that account made blood, as in c. *Cum Marthae*, § *Quaesivisti*, verse *Praeterea*, above, *De celebratione missarum*; of which, however, I shall speak below on c. *Omnis utriusque sexus*. As to the present purpose concerning the nuptial blessing, the authority of Paul, 1 Corinthians 7, satisfies enough, when he says: "For the unbelieving husband is sanctified by the believing wife, and the unbelieving wife is sanctified by the believing husband"; which Lord Antonius also alleges where above; to which C. 28 q. 1, § *Si quis super*. But certainly, with reverence, another reason amends the matter: for the Apostle does not speak to this purpose, but speaks of a lawful matrimony, though not ratified, which was contracted between unbelievers, which he dissuades from being easily dissolved while there is hope of the conversion of the one who remained in unbelief through him who was converted to the faith. But it does not on that account follow that a believer, sanctified by the sacrament of baptism, transfuses his sanctification through carnal intercourse into an unbelieving spouse, or conversely. Through which there would also follow a baser inconvenience, namely that a priest through intercourse would transfuse sanctification into a woman consenting with him to intercourse; which is absurd and unseemly to say, and redounds enough to the disgrace of the Christian soldiery. Therefore I hold rather with Thomas, whatever Hostiensis says in the *Summa*, *De secundis nuptiis*, § *An licitum*. Nor do I so absolutely embrace that reason which many allege, that the prohibition of the blessing of a second marriage was made lest the sacrament be repeated, as Goffredus says in the *Summa*, alleging the aforesaid c. *Vir autem*, and C. 21 q. 1, [c.] *Quod quidam*, and *De consecratione*, dist. 4, [c.] *Ostenditur*, and C. 32 q. 7, [c.] *Quemadmodum*. 325. For although some sacraments ought not to be repeated, as are those three, namely baptism, confirmation and holy orders, as above, *De sacramentis iterandis vel non*, c. 1 and throughout; yet the other four are well repeated, namely penance, the Eucharist, extreme unction and the matrimonial order. Therefore on this account the nuptial blessing would not be so absolutely forbidden,

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since it is not properly itself a sacrament, although it is a certain accessory to the sacrament. And therefore it is more pious to believe that Urban III, who forbade such a blessing in the said c. *Vir*

autem, had regard rather to the exhortation to continence than to the repetition of the sacrament; and therefore he says: "But a man or woman passing to bigamy ought not to be blessed by a priest, because, since they have been blessed another time, their blessing ought not to be repeated" — for by saying "their" he includes both, the man and the woman. 326. And so he seems to mean that the husband had another wife with whom he was blessed, and the second wife, with whom he contracted secondly, had another husband with whom she was also blessed; therefore, since each has already had the nuptial blessing, it is not expedient that their marriage be blessed further. In like manner also c. 1, same title, can be understood, when Alexander III says "the chaplain whom it is established celebrated the blessing with a second [wife]," etc.; what is noted in D. 23, last c., C. 35 q. 3, [c.] *Nulli*, and in the laws alleged above supports this. Richard also says on [book] 4 of the *Sentences*, dist. 42, art. 7, q. 2, that the nuptial blessing for one who marries a virgin as second wife is repeated according to the custom of certain places, and this if the Pope knows of such custom and does not contradict; otherwise it is not lawful, as the gloss says on the same chapter, namely *Vir autem*. Let poor concubinaries and fornicators therefore look to themselves, who would rather remain outside matrimony in fornications with mortal sin than in matrimony with saving grace. Since, therefore, such will not receive the nuptial blessing, they will have the curse, as the Psalm says: "And he loved cursing, and it shall come unto him; and he would not have blessing, and it shall be far from him. And he put on cursing like a garment, and it went in like water into his entrails, and like oil into his bones. May it be unto him like a garment which covers him, and like a girdle with which he is girded continually." And so to such persevering in such a state it will be said at the end of the world, when the Lord comes to judgment: "Depart from me, you cursed, into everlasting fire, which was prepared for the devil and his angels" (Matthew 25). But to married people who have faithfully kept matrimony the Lord will say: "Come, you blessed of my Father, possess the kingdom prepared for you from the foundation of the world," as is written there. For the law of the canons of Pope Calixtus renders infamous spouses not lawfully joined, or united without priestly title, without the blessing of the priest (C. 3 q. 4, [c.] *Consanguineorum*); and those consenting and participating in the same are also made infamous, as the text says there; what is noted in c. *Sicut dignum*, above, *De homicidio*, and in c. *Si concubinae clericorum*, below, *De sententia excommunicationis*, with similar places, supports this.

The eighth consideration is that so precious a fruit is generated from matrimony, such as sons and daughters, who, although they are generated sons of flesh and blood, are yet afterwards made sons of God by adoption in the sacrament of baptism. Hence John 1: "But as many as received Him, He gave them power to be made the sons of God, to them that believe in His name; who are born not of bloods, nor of the will of the flesh, nor of the will of man, but of God." Hence the Apostle also says to the Romans 6: "All we who are baptized in Christ Jesus are baptized in His death." And Romans 8 he says: "For whosoever are led by the Spirit of God, they are the sons of God"; and below: "For the Spirit Himself gives testimony to our spirit that we are the sons of God; and if sons, heirs also — heirs indeed of God, and joint heirs with Christ"; and below: "For the expectation of the creature waits for the revelation of the sons of God"; and below: "because the creature also itself shall be delivered from the servitude of corruption into the liberty of the glory of the children of God"; and below: "and we ourselves groan within ourselves, waiting for the adoption of the sons of God, the redemption of our body." And 1 John 3: "Dearly beloved, we are now the sons of God, and it has not yet appeared what we shall be; we know that when He shall appear we shall be like to Him, because we shall see Him as He is." 327. From which authorities it appears that some are called sons of God already gloriously

triumphant in the homeland, as appears through what the Apostle says, "into the liberty of the [glory of the] sons of God." Others are called sons of God who are pilgrims in this world; and these are named sons of God under a threefold distinction. The first under predestination alone, as John 11 says of Caiaphas, who prophesied that Jesus should die for the nation, and not only for the nation, but to gather together in one the children of God that were dispersed. The second by predestination and hope of eternal beatitude, of whom the Lord says, John 13: "Little children, yet a little while I am with you." The third are called sons of God by the merit of faith and present justice, but not by hope of eternal glory; of whom the Lord says in Psalm 88: "I have found David my servant"; and below: "And I will make his seed to endure for evermore, and his throne as the days of heaven. And if his children forsake my law and walk not in my judgments, if they profane my justices and keep not my commandments, I will visit their iniquities with a rod and their sins with stripes; but my mercy I will not take away from him." And so He shows that the soul that sins, the same shall die, as Ezekiel 18 expresses. Of these also John says in his first canonical [epistle], c. 2: "They went out from us, but they were not of us; for if they had been of us, they would no doubt have remained with us; but that they may be manifest that they are not all of us" — namely persevering in the truth of faith, justice and holiness. Of whom, so persevering, he says below: "Know you that every one also who does justice is born of Him"; and he begins c. 3, saying: "Behold what manner of charity the Father has bestowed upon us, that we should be called and should be the sons of God"; and of these he adds, "because we shall see Him as He is" — those persevering in the aforesaid. Hence it follows: "And every one that has this hope in Him sanctifies himself, as He also is holy." And therefore of the difference of the aforesaid he adds: "He that does justice is just, even as He," namely Jesus, "is just. He that commits sin is of the devil, for the devil sins from the beginning"; and below: "In this the children of God are manifest, and the children of the devil." Of the aforesaid degrees Augustine also treats in the book *De correptione et gratia*, and it is reported in *De poenitentia*, dist. 4, [c.] *Si ex bono*, § *Nec vos moveat*, where it is added: "Nor let it move you that to certain sons God does not give this perseverance. Far be it that it should be so, if they were of those predestined and called according to purpose" — the saints who are truly sons of the promise. He means to speak of that of the Apostle to the Romans 8: "We know that to them that love God all things work together unto good, to such as according to His purpose are called to be saints." And Augustine continues: "For when these just live piously they are called sons of God; but those who will act impiously and die in the same impiety, the foreknowledge of God does not call sons" — namely taking the foreknowledge of God in a broad way. Hence he adds: "For there are sons of God who are not yet [known] to us, and are already [known] to God," etc. See it fully where above, through a great treatment, up to § *Filii Dei duobus modis appellantur*, and below, c. *Hoc modo*, at the beginning, where he distinguishes that in the foreknowledge of God they are called sons of God in three ways, as I said above.

From the aforesaid, therefore, I conclude, to the praise and glory of so great a sacrament, that whatever goods can be obtained from God, whether in this world or in the future, according to the order of original justice, are owed to the fruits of matrimony. For whether they be natural goods, of which it was said in Genesis 1, "Rule over the fishes of the sea," etc., and Genesis 2, "Of every tree of paradise you shall eat" — for it is clear that such authority and dominion over temporal, and consequently natural, things was given to Adam and Eve, existing in matrimony, for themselves and for the whole posterity descending from lawful matrimony; or whether they be moral goods, of which is understood that of Genesis 2, "But of the tree of knowledge of good and evil you shall not eat,"

which was afterwards declared to Moses and through Moses to the Israelite people, Exodus 20, in the precepts of the divine law, where "You shall not have strange gods," etc. — for those ten are moral precepts according to all Catholic writers; or whether they be spiritual goods, such as are the theological virtues, which also were put on at the beginning of the nature of the human race, because God created man to His image and likeness (Genesis 1): "to the image," namely through nature, because He gave the soul memory, understanding and will; but according to morals [likeness], He gave the rational, the irascible and the concupiscible; and so He appointed the first three as powers, and the second three as forces of the soul — as if the powers were in habit, the forces in exercise. And although all were given to him freely, yet spiritual goods are rather called gratuitous because they rather make pleasing [to God]; which are principally the three theological virtues, namely faith, hope and charity, which more express and show the likeness of God. Of which the Apostle says, 1 Corinthians 12: "Now concerning spiritual things, my brethren, I would not have you ignorant"; and below: "There are diversities of graces"; and below: "Are all apostles?"; and below: "But be zealous for the better gifts. And I show unto you yet a more excellent way"; and he begins c. 13, saying: "If I speak with the tongues of men and of angels, and have not charity"; and below: "And now there remain faith, hope, charity, these three; but the greatest of these is charity"; and c. 14 follows, saying: "Follow after charity, be zealous for spiritual gifts." Or whether, fourth, they be eternal goods, in which Tobias intended to instruct his son, saying, Tobias 4: "And all the days of your life have God in your mind, and take heed you never consent to sin nor transgress the precepts of the Lord our God"; and below: "For you store up to yourself a good reward"; and below: "Take heed to keep yourself, my son, from all fornication, and beside your wife never endure to know a crime"; and below, at the end, he says: "Fear not, my son; we lead indeed a poor life, but we shall have many good things if we fear God and depart from all sin and do that which is good." And Tobias 13, after the commendation of Jerusalem, namely the one above, of which the Apostle says to the Galatians 4: "But that Jerusalem which is above is free, which is our mother" — for it is interpreted "vision of peace"; but because full peace is not in this life, it was said of that one above — it is fitting to consider what Tobias said where above, where: "I shall be happy if there shall remain of my seed to see the glory of Jerusalem." For then will be fulfilled what David says in Psalm 127: "Your wife as a fruitful vine on the sides of your house; your children as olive plants round about your table. Behold, thus shall the man be blessed that fears the Lord. May the Lord bless you out of Sion, and may you see the good things of Jerusalem all the days of your life, and may you see your children's children, peace upon Israel." This

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last, namely the eternal good, was also indicated to us at the beginning of the nature of the human race in the tree of life, which was in the midst of paradise (Genesis 2); which, however, is announced more expressly many times in the New Testament, and most of all through the Apostle to the Romans 8, when he says: "For I reckon that the sufferings of this time are not worthy to be compared with the glory to come that shall be revealed in us"; and 2 Corinthians 4: "For that which is at present momentary and light of our tribulation works for us above measure exceedingly an eternal weight of glory, while we look not at the things which are seen, but at the things which are not seen; for the things which are seen are temporal, but the things which are not seen are eternal." And that from the beginning the tree of life indicated eternal glory appears through the promise which the Lord makes in Apocalypse 2, saying: "To him that overcomes I will give to eat of the tree of life, which is in the

paradise of my God"; and Apocalypse, the last [chapter]: "On both sides of the river was the tree of life, bearing twelve fruits"; of which fruits I said enough in the sermon on the glory of the Blessed. Then thus: beginnings are of the greatest weight for what follows, as the Philosopher says in *Ethics* 1; but the beginning of the human race for propagation was with matrimony and from matrimony; therefore the middle and the end and what follows ought to be continued with the beginning; and so the whole posterity of the human race ought to have been propagated and continued from matrimony up to the last of men of this world. For every part is base which does not agree with its whole, as Augustine says (D. 8, [c.] *Quae contra mores*). For the beginning is the most powerful part of each thing, as is noted on c. *Sedes apostolica*, in gloss 2, above, *De rescriptis*, and is gathered from *Ethics* 1; the middle in all things is praiseworthy, because every virtue consists in the mean, as in *Metaphysics* 2; but the end is the best part of the whole, from *Topics* 6, from *Metaphysics* 4 and from *Physics* 2. And therefore nature acts for the sake of an end, and the end imposes necessity on the things which are for the end; which whoever denies takes away God's care for beings, as in *Physics* 2. Therefore nature, virtue, grace and glory, according to the order of original justice, ought, by rational rightness, to be ministered to the human race through the sacrament of matrimony, although divine power sometimes dispenses otherwise.

But concerning the aforesaid two difficult questions occur, of which the first is whether according to the law of nature it was lawful for anyone to have several wives; the second, whether it was lawful for anyone by dispensation. 328. To the first I answer that in man there is the nature of the genus, by which he is an animal; and there is another nature of the species, by which he is man. And according to this, in man the law of nature is spoken of in two ways: namely either from the nature of the genus, and so, as is said in the *Institutes* on natural law, "natural law is that which nature has taught all animals" (Dig., *De iustitia et iure*, l. *Ius naturale*); or it is spoken of from the nature of the species, and so the natural law is that which natural practical reason has established to be observed in things to be done. For man is placed in the species of man through the rational soul. Therefore, speaking of the law of nature said in the first way, to have several wives at once is not against the law of nature, as with other animals; and so is understood C. 32 q. 4, [c.] *Obiciuntur*, where it is said that Jacob had four wives because that was then the custom of that age, and therefore it was not a sin — which, however, is to be understood to have been done by divine dispensation, as I shall say below in the following question. And hence Lamech, who was the first who took two wives, sinned mortally, committing adultery, and was well punished with his whole posterity at the time of the flood; of which Genesis 4 and 5. But speaking of the law of nature said in the second way, to have several wives at once is against the law of nature. For natural reason dictates that there ought to be equal obligation as to the use of bodies between husband and wife, in order that there be conjugal fellowship. Natural reason also dictates that no one ought to bind himself to something which can be incompatible with another thing to which he is bound; but it is impossible for one to be bound equally to several women as to one alone, and as one to himself, as the Lord says, Matthew 6: "No man can serve two masters"; and the Philosopher says in *Metaphysics* 1[2]: "Beings do not wish to be ill disposed, nor is a plurality of rulers good." By matrimonial law also the husband is bound to render the debt to his wife when she asks, which is included in that blessing of the Lord by which He said, "Increase and multiply and fill the earth"; of which the Apostle also says, 1 Corinthians 7: "Let the husband render the debt to his wife," and conversely; which they could not observe when several asked this at once; therefore, etc. Natural reason also dictates that the husband ought to tend to this,

that there be peace in his house, which a plurality of wives would much impede, because he could hardly satisfy the wishes of each, and one would suspect another to be loved more than herself. Hence the Lord says, Matthew 6: "For either he will hate the one and love the other, or he will sustain the one and despise the other." If, therefore, the wives contended against the husband and against each other, as the wives of Lamech contended — and contended badly with him, as the Hebrews relate — and Rachel and Leah, although they were sisters, yet provoked each other, since they were wives of Jacob (Genesis 29, 30): "And Rachel, seeing herself without children, envied her sister and said to her husband: Give me children, otherwise I shall die." Similarly also [there was strife] between Sara and Agar her handmaid, whom she gave [to Abraham] (Genesis 16): "And she, perceiving that she was with child, despised her mistress." And Genesis 21: "And when Sara had seen the son of Agar the Egyptian playing with Isaac, she said to Abraham: Cast out this bondwoman and her son, for the son of the bondwoman shall not be heir with my son Isaac" — but the Apostle says "with the son of the free woman," to the Galatians 4. For it is clear that those sharing in the same office easily quarrel with each other; hence a quarrel arose between the herdsmen of the flocks of Abraham and Lot (Genesis 13). What is noted in *De poenitentia*, dist. 1, [c.] *Aut facta*, verse *Qualiter*; D. [5]0, [c.] *Si quis monachus*; and through Johannes Andreae on c. *Proposuisti*, above, *De consecratione ecclesiae vel altaris*, and on c. 1, above, *Ne clerici vel monachi*, supports this. For the governor ought to take care that the parties do not come to arms or to a quarrel, as the gloss notes on the last chapter, above, *De feriis*, and there is a text in l. *Aequissimum*, Dig., *De usufructu*. Much more fitting was it that God from the beginning should provide that discord should not sprout between the husband and his wives; which He also did by forbidding a plurality of wives to one man while one was living, because He made one wife for one man, and for this the Most High decreed: "they shall be two in one flesh" (Genesis 2). It is to be noticed, however, that although it is clear from the aforesaid that to have several wives at once is against the law of nature, yet it is not to be understood that it is directly against the first principle of the law of nature, nor against any of the conclusions so near to that principle that they offer themselves of their own accord to the intellect. For this conclusion, that one man ought to have only one [wife], although it follows from the first principle of the law of nature, is yet a conclusion much removed and not at once accessible to the intellect; but through study or divine illumination it is known to be derived from the first principle of the law of nature, as Richard says on [book] 4 of the *Sentences*, dist. 33, art. 1, q. 1.

To the second question I answer that to have several wives by divine dispensation was once lawful; and so is understood what Augustine says in the book *De bono coniugali*, and the Master reports in [book] 4 of the *Sentences*, dist. 33, c. 1, saying: "For the ancient just it was not a sin that they used several women; nor did they do this against nature, since they did it not for the sake of wantonness but of begetting; nor against custom, because at that time those things were done; nor against precept, because it was forbidden by no law." Understand this soundly, however: because although it had not been forbidden explicitly, it was yet forbidden implicitly, because it was said in the singular, "he shall cleave to his wife, and they shall be two in one flesh" (Genesis 2). But afterwards Moses unfolded this precept in the Law, Deuteronomy 17: "He shall not have many wives, that may allure his mind." And therefore wherever it is found in the Old Testament that holy men had several wives at the same time, it is to be understood to have been done by divine dispensation; which dispensation, both before the Law and after the Law, was possible and fitting as regards the holy fathers. For the possibility of dispensation is clear from this, that although conclusions derived from

the first principle of the law of nature hold uniformly in most cases, yet sometimes they are variable accidentally and occasionally, according to the opinion of the Philosopher, *Ethics* 5; and it appears in c. *Non debet*, above, *De consanguinitate et affinitate*. For circumcision was not given to the first parent, nor through the whole first and second age, and so neither to Noah nor to his sons; but it was given to Abraham in the third age of the world, as appears in Genesis 17. The Philosopher shows such a possibility where above by a comparison: for although the right of the hands is better, yet it happens that some become ambidextrous, and that some so use the left as the right — as Ehud, who, to save the people of Israel from the servitude of Eglon, king of Moab, used either hand as the right for the slaying of Eglon, as appears in Judges 3; and the sons of Benjamin fought as well with the left as with the right (Judges 20); many, however, use the left for the right, and conversely. But the precept of the law of nature about not having several wives is not the first precept of the same law, nor is it one of the near conclusions which almost of their own accord offer themselves to the intellect, but a conclusion derived from the first principle of the law of nature through many intermediate conclusions, as was shown above in the preceding question. And therefore, although in most cases it is to be observed uniformly, yet according to the opportuneness of times, persons, places and business it could be varied without prejudice to the first principle of the law of nature. But to determine such opportuneness does not belong to just anyone, but to the Founder of so great a nature; and therefore in that precept God alone could dispense: for if an equal has no command over an equal, as in l. *Nam et magistratus*, Dig., *De arbitris*, therefore much less can a lesser have it over a greater, as in c. *Cum inferior*, above, *De maioritate et obedientia*; and I have said enough in the treatise on the authority of the Pope and the council, and in the treatise on usury. But the fitting reason for dispensing was the multiplication of offspring to be brought up for the worship of the Lord, because then there was a scarcity of the faithful; and because this precept was only of the law of nature, which is written in the hearts of men, according to what the Apostle says to the Romans 2: "For when the Gentiles, who have not the law, do by nature

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the things that are of the law, these, having not the law, are a law to themselves; who show the work of the law written in their hearts, their conscience bearing witness to them." And therefore the divine dispensation, shown by internal inspiration, sufficed; which was made to the patriarchs and prophets explicitly, but to lesser men implicitly, because by their example, from the same cause, it was lawful for lesser men too to have several wives. Nor does it stand in the way if one says that one woman is more sufficient for several men than conversely, yet it is never read that a dispensation was given for one woman to have several husbands; therefore in like manner it ought not to have been dispensed that one man could have several wives. For to this argument it is answered: when it is said that one woman is more sufficient for several men than conversely, I say that it is true as to the remedy of avoiding fornication, but not as to the office of procreating children; because one man is more able to make several women fruitful than one woman is fit to be made fruitful by several men: it suffices that she be made fruitful once by one, nor can she be made fruitful further after she has once been made fruitful. 330. Yet she can be made fruitful with a fivefold or sixfold birth, as in l. *Antiqui*, Dig., *Si pars hereditatis petatur*, where Paul the jurist says that seven can be born, because there are so many receptacles in women; and Dig., *De solutionibus*, l. *Si pupilli*; and Dig., *De statu hominum*, l. *Arethusa*, where four are spoken of; but in the said l. *Si pupilli* five are spoken of, and in the said l. *Antiqui* seven

are expressed, where it says "many Egyptian women [bear] seven from one womb." And I saw with my own eyes and heard my doctor in civil law, whose wife bore seven; but none survived. And in the parts of Apulia I knew a family which is called "of the Quarti," whose mother bore four males at one time. For impregnation happens to women naturally after menstruation, as the Philosopher says in book 9 *De animalibus*; and the woman is suited for generation according to the nature of the menstrual blood, and not according to the nature of seed; hence the woman is impregnated without effusion of her own seed, because the seed of the woman is not suited for generation — although some say that the woman also emits seed when she conceives. Yet hold it certain that from the male himself is the principle of motion in generation, and the seed of the male is not the matter of what is generated, but is as mover and form; hence the man gives the form and principle of motion to what is generated, but the female gives the body and the matter; and therefore the female cannot generate by herself, because she needs the principle of motion, which is in the male as formally acting, while the matter is in the female as patient, as is fully treated in book 15 *De animalibus*. Therefore the Philosopher says in book 18 *De animalibus* that from one coition he will emit much seed, and because he divides much seed, many children will be generated — whatever the legists think in l. *Cum quidam*, § *Quod si unum*, Dig., *De acquirenda hereditate*. For it is certain that matrimony was instituted more principally for the office, which regards the common good, when the Lord said, "Increase and multiply" (Genesis 1), than for the remedy, which is a singular good because it regards a singular person, and so is a particular good; but universals are preferred to particulars, as in *Posterior Analytics* 1; and note C. 8 q. 1, [c.] *Sunt nonnulli*; C. 7 q. 1, [c.] *Scias*, in the gloss; and above, *De postulatione praelatorum*, c. 3, and c. *Bonae* [1], in the gloss, and so on. Nor does it stand in the way if one says that a dispensation ought not to have been given for a lesser good, namely of offspring, against a greater good, namely of faith and of the sacrament; because when the lesser good is much increased, and the increase is very necessary, and little is taken from the greater good, it is not unfitting that a dispensation be made for the increase of the lesser good with some diminution of the greater. And so it was in the matter proposed: for in that matrimony of the patriarchs the debt was rendered to the wife, although this was not kept so strictly as in monogamy; and therefore the good of the sacrament was not taken away there, because through the plurality of wives was signified the diversity of grades in the Church militant, and it was signified that the Church was to be gathered from persons of diverse nations, according to that of the Psalm: "The queen stood on your right hand in gilded clothing, surrounded with variety" (Psalm 44). Although others also say that the good of offspring to be brought up for divine worship is greater than the good of faith, which is one of the goods of matrimony, and than the good of the sacrament, which is another: for the good of faith principally includes faith toward God, which is greater than faith toward man; therefore for the multiplication of the faithful toward God it was lawfully dispensed against faith toward a singular man — understand, toward man in the common genus of man and woman. But the good of the sacrament is the greater good among the goods of matrimony by reason of its signification, namely because it signifies the matrimony of Christ with the Church; but it is called the greater good instrumentally, because it causes the grace which it confers in the sacrament. Hence, because in the old law matrimony did not confer grace by virtue of the sacrament, it does not follow that before the new law the good of the sacrament was the greater among the goods of matrimony, as in the new law it is the greater among them inasmuch as it confers grace instrumentally. And if God for a special cause were now to dispense that someone should have several wives, the good of matrimony in causing grace instrumentally would not on that

account be less. 331. But if you wish to show the good of the sacrament of matrimony as to the good signified through the sacrament of matrimony, so it is manifest that even in the old law the good of the sacrament was a greater good than any other good of matrimony, because even in the old law it signified the union of Christ and the Church, and also the future union of human nature with the person of the Son of God, which in the new law consummated matrimony signifies to have been accomplished. Thus Richard on [book] 4, dist. 33, art. 1, q. 2.

And notice what Richard says, namely that matrimony instrumentally causes grace as a sacrament and instrumentally confers grace. 332. Although the gloss on [C. 1 q. 1, c.] *His igitur* says, according to Johannes Faventinus, that simony is committed in all the sacraments except in matrimony — perhaps for this reason, because there the grace of the Holy Spirit is not conferred, as in C. 32 q. 2, [c.] *Connubia*, but in the others it is conferred, as in C. 1 q. 1, [c.] *Quicquid invisibilis*. Gratian said that simony is committed there, since it is greater among the sacraments, as I said (C. 32 q. 2, [c.] *Honorantur*). These are the words of the gloss on the said c. *His igitur*. And on the said c. *Honorantur* the gloss refers to the same, saying: therefore for contracting matrimony money can be demanded, nor will it be simony, although matrimony is the greatest sacrament; for such giving is called rather honour than price; so C. 16 q. 1, [c.] *Decimae*; and it is like Dig., *Mandati*, l. *Si remunerandi*. If you ask, says the gloss there, why in this sacrament money rather intervenes than in the others, some say on account of the burdens of matrimony. But certainly by the same reason money can be received for entry into a monastery on account of the burdens which the monastery bears. But this is the reason: because in this sacrament the grace of the Holy Spirit is not conferred, as happens in the others (C. 1 q. 1, [c.] *Multi*, about the middle, and c. *Sicut*, and c. *Quicquid invisibilis*). Yet many things were forbidden in the old law in which [grace] was not conferred, nor is grace conferred even today, as the purchase of burial (C. 13 q. 2, [c.] *Postquam*). Gratian, however, said that for matrimony money could not be given. Thus the gloss there; and below, on the same chapter, on the word *desponsata*, it says: an argument that money can be given to the parents of a girl so that they consent to the matrimony, money intervening, because there grace is not conferred. Hugolinus and the Archdeacon on the said c. *His igitur* reject the aforesaid reason, because grace is not conferred in a tomb either, and yet simony is committed (C. 1 q. 1, [c.] *Dictum*; and above, *De simonia*, c. *Audivimus*, and c. *Sicut*); and so they hold that simony is committed in like manner in the sacrament of matrimony. And it is reasonable enough: for "if of the lesser," etc.; but burial is less than matrimony, because matrimony is a sacrament, while burial is not a sacrament; and yet in burial simony is committed; therefore much more strongly in matrimony (argument in c. *Cum in cunctis*, above, *De electione*). Therefore the gloss also on c. *Quicquid invisibilis gratiae*, C. 1 q. 1, says: note that marriage is not of those sacraments which bestow the consolation of heavenly grace, and therefore a price can intervene in it (C. 32 q. 2, [c.] *Honorantur*). The others are so signs of a sacred thing that they also have its power; this one only by signification. The others [have] signification, but this is perfected by consent; the others had their beginning from canon law, this had its beginning from natural law, as above, *De bigamis*, c. *Debitum*. But that is not a sufficient reason that money intervenes because in it grace is not conferred; for neither in burial nor in a funeral is grace conferred, and yet there is simony (C. 13 q. 2, [c.] *Quaesitum*). Nay, the law says that matrimonies ought not to be venal, as in Dig., *De donationibus inter virum et uxorem*, l. 2. And say that although it is asked in matrimony how much is given for the dowry, this is not simony (argument from *De consecratione*, dist. 1, [c.] *Nemo*): for the bishop does not consecrate a church unless a dowry has been assigned to it, as is said there, and yet that is not

simony. These are the words of the gloss on c. *Quicquid invisibilis*. 333. From which hold that the dowry, or the gift on account of nuptials, and similar gifts which can intervene between spouses, do not savour of simony, because they are not given for a sacred or spiritual thing, but are given by way of a certain new friendship contracted, to this end, that by giving and receiving gifts between friends, friendship may grow more from mutual gifts, and charity also be increased between them; which is most lawful, because what one offers freely he receives freely (C. 14 q. 4, [c.] *Usura*; D. 18, [c.] *De eulogiis*; and C. 1 q. 2, [c.] *Sicut*). Nothing of the aforesaid, therefore, is to be asked about as pertaining to simony. But when it is asked whether simony can intervene in matrimony, it is principally to be referred to the solemnization of matrimony by the priest; and then, if the priest would not solemnize or bless unless a certain quantity of money were paid or promised to him, then I would say that such a one commits simony in this sacrament as in the others, because in the sacrament of matrimony too he intends to sell what is spiritual, as in the others (argument from C. 1 q. 2, [c.] *Placuit*); and the case is in c. *Cum in ecclesiae*, above, *De simonia*, where: "and for the blessings of those marrying, or other sacraments"; and below: "or for burying the dead, or blessing those marrying, or other sacraments, we most strictly forbid that anything be demanded. But if anyone presumes to contravene, let him know that he will have his portion with Gehazi." And so it appears that in such a case simony is committed. Hence the gloss says there on the said word "blessings": so below, same chapter, it is forbidden to receive [anything] for the blessings of those marrying, because through them grace is conferred; but to give or receive something for matrimony is not a sin; and it alleges the aforesaid c. *Quicquid* and the aforesaid c. *Honorantur*, and adds: because although it is a sacrament, yet through it grace is not conferred (argument from C. 27 q. 1, [c.] *Nuptiarum bonum*, and C. 32 q. 2, [c.] *Connubia*); hence it is an argument that the law is not the same in the accessory as in the principal. Thus the aforesaid gloss; from which you see a difference is made between the nuptial blessing and the matter itself in that which is the sacrament. But in truth the laws which it alleges do not prove this directly; for what is alleged by the aforesaid glossators about money

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offered for matrimony refers to the words of Ambrose in the book *De Patriarchis*, which are written in the aforesaid c. *Honorantur*, C. 32 q. 2, where Ambrose says: "The parents of Rebecca are honoured with gifts; the girl is consulted," etc. For it is expressly clear that Ambrose does not say that money was given for contracting the matrimony, but says it was given for honouring the parents of Rebecca; which was perfectly lawful, because such gifts were given freely and consequently received freely, as in the laws alleged above, and in c. *Dilectus filius*, at the end, above, *De simonia*, and in c. *Tua*, same title. For as is originally expressed in the history of sacred Scripture, Genesis 24, the servant of Abraham, sent by him as messenger and procurator to contract matrimony for his son Isaac with Rebecca, daughter of Bathuel, in handing golden earrings and bracelets to Rebecca, made no mention to her of contracting matrimony; nor at the time he handed them did he truly know whether she was the daughter of such a man, but so he supposed from a certain divine illumination. Afterwards, speaking with the father and brother of Rebecca about contracting the matrimony, and the matrimony having therefore been concluded between them, and vessels of silver and gold and garments having been brought forth, he gave them to Rebecca as a gift, as a present on the part of her spouse; to her brothers also and to her mother he offered gifts, as appears from the letter [of Scripture]. And so nothing simoniacal can be imputed from the aforesaid gifts, since the gifts

conferred were destined not for extorting consent to matrimony, but for showing, confirming and increasing friendship renewed from kinship between the aforesaid. I say "renewed" from this, that Abraham and Bathuel were of the same race and lineage. And so nothing can be inferred from the aforesaid for excusing the crime of simony.

To c. *Connubia*, which they allege [to show] that grace is not conferred from matrimony, I answer that that chapter does not prove this either. For there are reported the words of Jerome on Matthew, saying: "Lawful marriages lack sin; yet at that time when conjugal acts are performed, the presence of the Holy Spirit will not be given, even if he who serves the office of generation seem to be a prophet." Behold, Jerome does not say that grace is not conferred from the sacrament of matrimony, but says that in the matrimonial act the presence of the Holy Spirit is not given. And the gloss, explaining there, says: the grace of the Holy Spirit is indeed present, as to those things without which the grace of the Holy Spirit cannot be had, since one may even merit in such an act (C. 33 q. 5, [c.] *Si dicat*); but it is absent when one knows his wife, as to operation, namely as to working miracles and the power of prophesying. For the grace of the Holy Spirit remains in the good as to certain things and withdraws as to certain things, as is read in *De poenitentia*, dist. 2, [c.] *Quaerendum*, and c. *Post discursum*. Or say that the presence of the Holy Spirit is not given as to all things, because there is there a certain stupor and the man is made wholly flesh; and therefore sometimes the presence of the Holy Spirit is not given to that itching, because it is a venial sin. Peter Manducator, however, said that conjugal coition can well be exercised without sin, which I grant — sometimes. Thus the gloss of Bartholomew of Brescia on the said c. *Connubia*. See below, § *Sed adhuc instans*.

But still two principal questions occur concerning the aforesaid: namely, first, whether concubinage or concubinary coition is against the law of nature; second, whether by dispensation it could be without mortal sin. 335. To the first I answer that concubinage, or the concubinary or fornicating act, is against the natural law — not, however, against the law of the nature of the genus, but of the species. For the special reason, namely of the rational nature, dictates that carnal intercourse ought not to be done to the prejudice of the good of offspring, nor that a man deprive himself even for a short time of the use of reason, unless there be another good compensating; but concubinary or fornicating intercourse is to the notable prejudice of the good of offspring. For as Augustine says in book 9 on Genesis, before the middle, the good of offspring is that it be lovingly received, kindly nourished and religiously brought up; which good offspring begotten by fornicating intercourse or concubinary coition lacks in most cases, because in most cases they are less loved by their parents than those born of the lawful bed, and the parents are more easily negligent about their teaching and nourishment. Hence in fornicating intercourse there is no good compensating for the good of the use of reason, of which one deprives oneself for the time one is given to carnal intercourse, as Augustine says in book 14 *De civitate Dei*, c. [1]5. Hence three goods of matrimony are lacking there, namely of faith, of offspring and of the sacrament. Note in c. *Connubia*, C. 32 q. 2, supports this. And it suffices to attend to what happens in most cases, as in l. *Nam ad ea*, Dig., *De legibus*. For it is certain that if human nature had remained in its integrity it would never have come to fornicating intercourse; but on account of the corruption of nature men have unnatural inclinations, according to the Philosopher, *Ethics* 2. Hence concubinage took its name from human law (Dig., *De concubinis*, l. *In concubinatu*; and D. 34, [c.] *Concubinam*, and the gloss there). Hence the canons forbid a concubine unless she has been taken with marital affection as a wife clandestinely, from mutual consent between them; nor is it lawful for anyone who wishes to keep the name of Christian to have [both] a wife and a concubine

(D. 34, [c.] *Concubina*, and c. *Si quis non habet uxorem*, and c. *Christiano*; and C. 32 q. 4, [c.] *Nemo*), where are reported the words of Ambrose in the book *De Patriarchis*, saying: "Let no one flatter himself about the laws of men; [all unchastity is adultery]; nor is that lawful for the man which is not lawful for the woman; the same chastity is owed by the man as by the wife; whatever has been committed with her who is not his lawful wife is condemned by the crime of adultery." [text unclear] Ambrose in the same book says: "It is lawful for no one to know a woman except his wife; and therefore the right of wedlock has been given to you, lest you fall into a snare and sin with another's woman." Augustine also in the book *De bono coniugali* says: "As it is holier to die of hunger than to eat things offered to idols, so it is holier to die without children than to seek offspring from unlawful intercourse."

To the second question, namely whether concubinage could stand by dispensation without mortal [sin], I answer by reporting the opinion of certain men. For some say that it could not be dispensed in fornicating or concubinary intercourse so that it should not always be a mortal sin, because every act taking away the due order of neighbour to neighbour cannot be done without mortal sin by any dispensation whatever, whether made by God or by man, because against the first principles of the law of nature neither man nor God can dispense; for which note D. 8, [c.] *Quae contra mores*, supports this. But concubinary intercourse is of this sort, because it takes away the due order of the parents to offspring illegitimately received, as was said above; and so, as happens in most cases, concubinage takes away the due order of neighbour to neighbour, and thus no dispensation can be made. Yet it could be dispensed in some case, and rarely, by the founder of the law, where the aforesaid order is not taken away, namely because the offspring is lovingly received, kindly nourished and religiously brought up. Therefore, notwithstanding that first opinion, in this case of such rarity dispensation would take away the mortal sin. Richard, however, on [book] 4 of the *Sentences*, dist. 33, art. 2, q. 2, says that the reason why concubinary or fornicating intercourse cannot be done without mortal sin through any dispensation whatever is that in no case can it be done well, nor without corruption of the due order toward God. For such intercourse of a man is always with a woman not his own as to such use, neither simply nor for a time; but whoever uses what is not his own as to use, neither simply nor for a time, corrupts the due order toward the lord of the thing, because the woman is not her own but God's; and so a man carnally coupling with a woman not his own as to such use corrupts the due order toward God. But God cannot bring it about that an act corrupting the due order toward God Himself can be performed without mortal sin. God, however, as Lord superior having over man and woman fullness of power, could bring it about that it should be lawful for a man and a woman to grant each other mutually power over their bodies for a time, although this could not be lawful for them except by divine authority; yet the intercourse of such persons would be neither concubinary nor fornicating, because it would not be with a woman not his own nor with a man not her own; and so such intercourse would then fall in the manner of wedlock, which by divine dispensation would be lawful even for one having another wife, as was said above, because God could dispense that one could have several wives. And so we believe it was dispensed with Abraham concerning Agar, the handmaid of Sara, wife of Abraham himself, of which Genesis 16, where it is expressed that Sara gave her, namely Agar, to her husband as wife, and he went in to her. And so it appears that according to the truth of the matter she was his wife; but because she did not have the authority of mother of the family in the governance of the house and household, nor was her offspring to succeed in the inheritance of Abraham, therefore it was commanded to Abraham that he cast out the handmaid and

her son (Genesis 21); nor would it have been lawful for Abraham to cast her from himself on account of Sara's admonition unless he had had a divine command upon this. But the Lord willed Abraham and Agar to be separated from each other, not as to the bond of matrimony, but as to cohabitation and bed, to signify that mystery which the Apostle explains to the Galatians 4, saying: "It is written that Abraham had two sons, the one by a bondwoman and the other by a free woman"; and he means that the son of the bondwoman signified the Old Testament and the son of the free woman signified the New; and so Ishmael signified the synagogue, which is Agar, bearing unto bondage, and Isaac signified the Church of Christ militant, which is as Sara bearing unto freedom. Hence he says: "But we, brethren, are not the children of the bondwoman, but of the free, by the freedom wherewith Christ has made us free." Nor does it stand in the way if it were said that God dispensed with Hosea the prophet that he should take a harlot; because it is clear that He did not dispense that he should take her as concubine, but as wife. Hence it is expressed in Hosea 1: "And the Lord said to Hosea: Go, take to yourself a wife of fornications and make children of fornications, for the land fornicating shall depart from the Lord." And so it appears how He dispensed: not that Hosea should fornicate with her, but that he should take a harlot as wife, who, being made the prophet's wife, became continent and no longer a harlot. And so from such a dispensation followed the good of offspring

which was the principal thing in matrimony. And the Lord dispensed with him for this purpose, that by reproach he might figure the idolatry of the sons of Israel; hence He said, "for the land fornicating shall depart"; and it adds that the Lord told him to call his son Jezreel, "for yet a little while and I will visit the blood of Jezreel upon the house of Jehu, and I will cause to cease the kingdom of the house of Israel," etc. Concerning the aforesaid history of Abraham there is also [matter] in the *Decretum*, D. [56], [c.] *Ismael*, and C. 32 q. 4, [c.] *Recurrat*, and § *His ita*, and c. *Dixit Sara*, where the words of Ambrose *De Patriarchis* are also reported, quite beautifully. Likewise it is to be understood of Jacob, to whom Rachel his wife gave Bilhah her handmaid, and Leah, his other wife, gave Zilpah her handmaid — namely as spouse, by divine dispensation; of which Genesis 30.

Further, concerning the aforesaid I ask which sons succeed in the paternal inheritance. I answer: those sons who are born of lawful and free matrimony, that is, of a free father and mother (C. 32 q. 4, [c.] *Si dicat*, and the last chapter; and in c. *Nisi cum pridem*, above, *De renuntiatione*, in the gloss which begins "as is read in the histories," on the word *manseres*, in § *Personae vero*), where the gloss says: *manser* is properly said of one born of a harlot, *spurius* of one born of a prostitute, *nothus* of one born of adultery; and all such illegitimates are repelled from honours (above, *De electione*, [c.] *Cum in cunctis*; and *De filiis presbyterorum*, c. 1, last §). One is called *natural* who is born of a concubine who is kept in the house as if in place of a wife, a single one; and such a one succeeds on intestacy in the goods of the father to two twelfths of the paternal substance if other legitimate sons do not exist, nor a lawful spouse (Cod., *De naturalibus liberis*, auth. *Licet patri*); and in the goods of the mother they succeed with the legitimate sons (Cod., *Ad senatusconsultum Orphitianum*, l. *Si qua*, last §). But others are sons legitimate and not free, as sons of slaves born of lawful matrimony; and these, having obtained freedom, are promoted (D. 54, throughout). But while their parents still remain slaves they succeed in nothing, because [the parents] have nothing. But if the parents had obtained freedom and had something, such sons, legitimate and free, would well succeed in the goods of the parents (above, *Qui filii sint legitimi*, § *Quoniam*, coll. 7; and Cod., *De suis et legitimis heredibus*, l. 1 and throughout). Others are only natural sons, namely born of an unmarried man and an unmarried woman; and these are not promoted without dispensation, as in c. *Cum in cunctis*, above, *De electione*; they ought, however, to be

fed from the goods of the parents, as in l. 1 and the last, Cod., *De naturalibus liberis*. These are also easily legitimated, either by the parents contracting matrimony with each other — and so by subsequent matrimony sons even born before are legitimated, if at the time when they were conceived or born, according to the more favourable opinion, which the moderns mostly follow, matrimony could stand between the parents, as in c. *Tanta* and in c. *Conquestus*, above, *Qui filii sint legitimi* — or legitimation is conferred by the Pope or the Emperor, as is fully noted in c. *Per venerabilem*, above, *Qui filii sint legitimi*. Others are spurious sons, or *nothi*, who are born of adultery or incest; and such are the more detestable the more detestable is the incest, whether legal, carnal or spiritual; whom the Church so abhors that clerical dignity is by no means conferred on such vile persons, as in c. *Inter dilectos*, above, *De excessibus praelatorum*. For *manseres* also, according to the law of the Old Testament, were not permitted even to enter the temple of God (Deuteronomy 23); and in c. *Innotuit*, above, *De electione*, and in c. *Per venerabilem*, at the end, above, *Qui filii sint legitimi*. Such persons by civil law are deprived of every human benefit, as in l. 1 and in the authentic placed there, Cod., *De naturalibus liberis*; and C. 36 q. [1], [c.] *Quid est*; and note C. 34 q. 2, [c.] *Cum per bellicam*, supports this. Sometimes, however, concerning secular dignities, it is dispensed more easily even with such (Dig., *De decurionibus*, l. *Spurii*, and l. *Generaliter*, § *Spurios*). But as to divine and canon law, such spurious persons too, if they have lived honestly and observed the Christian rules, notwithstanding their ignoble or spurious birth, will yet be received into eternal life (D. 56, [c.] *Nunquam*). Their condition is aggravated, however, as to the present life, not from their own fault, which they by no means committed in their conception, but rather in detestation of the parental crime, as in c. *Vergentis*, above, *De haereticis*. Moreover, such a condition is much aggravated as to the spurious themselves, because commonly sons more easily imitate the morals of their parents. For everything which descends from another savours of the nature of him from whom it descends, as is gathered from book 1 *De generatione et corruptione*; therefore the law says that a son is wont to be like his father (Dig., *De aedilicio edicto*, [l.] *Quod si nolit*, § *Qui mancipia*). Note C. 6 q. 1, [c.] *Si quis cum militibus*, and D. 56, [c.] *Gens Anglorum*, which otherwise begins *Divulgatum est nobis*, adds to this, where it is said that from such intermingling of harlots degenerate peoples, ignoble and raging with lust, are to be expected to be procreated. And that such a fault does not stand in the way of salvation and the attainment of eternal felicity Augustine proves well enough, saying: "From wherever men are born, if they do not follow the vices of their parents, they will be honest and saved" (D. 56, c. *Undecunque*), with the two following chapters. 338. For as to eternal life the offence of the father does not prejudice the son, except as to that original sin which was implanted in nature from the beginning of the sin of the first parent, from which the natural gifts were wounded, the gratuitous lost, and free will corrupted, as the Master of the *Sentences* treats, book 2, dist. [2]5. But in actual sin the rule stands: "The soul that sins, the same shall die; and the father shall not bear the iniquity of the son, and the son shall not bear the iniquity of the father" (Ezekiel 18), where it follows: "the justice of the just shall be upon him, and the wickedness of the wicked shall be upon him." Note D. 56, [c.] *Nunquam*, supports this. For it is better to live well and honestly and to have had origin from dishonest parents, than, born of honest parents, to live ill, according to what is noted by the gloss on D. 56, [c.] *Item non est omnino*. Hence Jerome too says in the letter against Rufinus: to be born of adultery is not the fault of him who is born, but of him who begets; and he gives the example of seeds sown in the ground. So also we can say it was better for Enoch, that he was born of Cain, a bad

father, than for Cain, that he was born of Adam, a good father (Genesis 4) — although Adam himself had sinned mortally only once before (Genesis 3).

Canon law also deals more gently with such spurious persons than civil law: for by civil law, as was said, they are altogether excluded from every benefit, as in the said auth. *Licet*, Cod., *De naturalibus liberis*. But by canon law it is the bishop's concern so and in such a manner to proceed against the parents that each of the parents supply necessaries to such children, however spurious, according as the means of each suffice, according to what is noted in c. *Cum haberet*, above, *De eo qui duxit in matrimonium quam polluit per adulterium*, at the end. For by natural law parents ought to feed their children (D. 1, [c.] *Ius naturale*); so also children their needy parents (Dig., *De agnoscendis liberis*, l. *Si quis a liberis*, at the beginning, and § *Impubes*; and Cod., *De alendis liberis*, l. 1; and D. 30, c. 1; and C. 22 q. 4, [c.] *Inter ceteras*). If, however, the son had made himself unworthy, as because he accused his father, then the father would not be compelled to bring up such a son, as in the aforesaid l. *Si quis a liberis*, § *Si quis ex his*, at the end. And it is always understood that maintenance ought to be supplied according to means, as in the said § *Si quis ex his*, and Cod., *De alendis liberis*, l. *Si competenti*, and the last law; it supports by analogy above, *De censibus*, c. *Sopite*, and c. *Cum nuper*. But if the father and the son were needy, and the mother and wife wealthy, then she is compelled to support the husband and the sons, as in the said l. *Si quis a liberis*, § *Utrum*, and the penultimate law; and Cod., *De alendis liberis*, auth. *Quemadmodum*; and in the authentic *Ut liceat matri et aviae*, § *Illud*. But if the father abounds and the mother at such a time feeds the son, the mother can reclaim the expenses which she made on a son older than three years, but not on a younger (Cod., *De patria potestate*, l. *Nec filium*; and above, *De conversione infidelium*, c. [text unclear], at the end; and argument in the said l. *Si quis a liberis*, § *Non tantum*). And understand that she can reclaim such expenses, namely if she has protested this; otherwise she is presumed to have spent on the son gratis with the intention of forgiving, according to what is noted in l. *Nesennius*, Dig., *De negotiis gestis*. Understand also the laws, as in auth. *Ex complexu*, Cod., *De incestis nuptiis*, and in the said auth. *Licet patri*, Cod., *De naturalibus liberis*, and in auth. *Quibus modis naturales efficiuntur legitimi*, last §, coll. 6, and in the said c. *Per venerabilem*, at the end, above, *Qui filii sint legitimi*, with similar ones — which laws report the rigour of civil law, which in detestation of the crime renders the spurious themselves unworthy of every benefit. Canonical benignity, however, proceeds more mildly, that they be fed, having respect to natural law, which teaches even brute animals to bring up their young, according to what is noted in the said c. *Ius naturale*, D. 1, with similar ones.

You see, therefore, how commendable, how conformable to divine institution, how seemly and lovable it is that children be begotten from lawful wedlock; so much so that although Jerome says, "Marriages fill the earth, virginity paradise," he yet means not that virgins alone have paradise, but that virginity is the sister of the angels (C. 32 q. 1, [c.] *Nuptiae*). For in that kingdom of beatitude they will neither marry nor be married, but will be as the angels of God in heaven, as the Lord says to the Sadducees (Matthew 22 and Luke 20). Hence one abominating marriages, as though the married could not enter the kingdom of God, is to be reputed anathema (D. 30, [c.] *Si quis nuptias*). And whoever vituperates marriages and detests or thinks culpable a faithful woman sleeping with her husband, as though she could not enter the kingdom of God, let him be anathema, as was decreed in the Council of Gangra, of which it appears in D. 31, [c.] *Si quis vituperat*. The like in effect is concluded in D. 30, c. *Si qua mulier*, and c. *Si quis propter Deum*, and c. *Si quis virginitatem*, and D. 31, [c.] *Quicunque nuptiarum*. For indeed the bond which endures according to chastity is to be honoured; but

we admire virginity with humility, and confess continence with chastity to be most acceptable to God (D. 30, [c.] *Haec autem scripsimus*). For "marriages are honourable," and it is a chaste act to sleep with one's own wife (D. 31, [c.] *Nicaena*). Therefore the coupling of marriage cannot be called a sin, because God instituted marriages from the beginning (D. 26, [c.] *Deinde*). And although virginity of mind and body, which a good will embraces, which is called glorious virginity (C. 32 q. 5, c. *Sicut enim*), by reason of its state and dignity is the only thing that can be urged but cannot be commanded, and so is a matter rather of vow than of precept (C. 32 q. 1, [c.] *Integritas*); and although virginity is preferred to present marriages, if rightly borne, not

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in detestation of matrimony, as in the said c. *Si quis propter Deum*, it is yet made equal to the wedlock of Abraham and the other patriarchs; because, just as now virgins please God in perpetual chastity, so Abraham and the other patriarchs pleased Him in fruitfulness and marital wedlock (*De poenitentia*, dist. 2, [c.] *Ecce ait*, and § *Opponitur*). Let virgins therefore beware, because virginity alone does not save (C. 32 q. 5, [c.] *Tunc salvabitur*), where are reported the words of Jerome, saying: "Then the woman shall be saved, if she bear those sons who are to remain virgins; if what she herself lost she acquire in her children, and compensate the loss of the root and the stock" — that is, from the corruption of her flesh — "with the flower and the fruits" — that is, with the children. And he adds: "I say not this only, that virginity alone without the other works does not save; so all works without virginity" — that is, of mind — "piety" — that is, of faith — "continence and chastity" — that is, kept at least in affection — "are imperfect." For it does not suffice to have a virgin flesh and a harlot mind defiled in the brothel; because many, although they keep virginity in the flesh, yet commit adultery and fornication or incest by will; for virginity perishes in the mind too (C. 32 q. 5, [c.] *Sicut enim*, and c. *Si Paulus*), where are reported the words of Jerome to Eustochium, saying among other things: "I will say it boldly: though God can do all things, He cannot raise up a virgin after her fall. He can indeed free her from punishment, but He cannot crown one corrupted." And the civil law says that virginity cannot be restored (Cod., *De raptu virginum*, l. 1, at the beginning); which is understood from this, that it is not possible for something which has been done not to have been done, because a deed cannot not be a deed, as in Dig., *De captivis*, l. *In bello*, § *Factae*. And understand soundly what Jerome says: it refers not to the restoration of corrupted flesh, but to the reward of the virginal palm. And say: God cannot raise up a virgin after her fall, that is, it does not befit His power that He crown corrupted women with the aureole; for this would be against justice to be able to do, and so that "being able" would be a falling away from just power (argument from *De poenitentia*, dist. 2, § *Charitas*); of which enough is treated on [book] 1 of the *Sentences*, dist. 42, and fully there by the theologians.

And as to what is said of the aureole, understand that the aureole in the blessed is a certain joy over good works done by themselves which have the character of an excellent victory; on account of which there will appear outwardly in the body a certain beauty, which will declare outwardly in the body the aforesaid joy existing inwardly in the soul. And so that beauty in the body declaring that inward joy is an effect of that joy, or something in some way ordered as a sign to the principal thing itself. Therefore the aureole, as it were, will be in the soul, and some sensible sign of it will be in the body, whether it be effected by the inward joy or not; which is said most of all on account of the scars of

the martyrs, which seem to be a sign of the martyrs' aureole existing in the soul, though they are not effected by it. And so is understood the authority of Augustine, *De civitate Dei* 22, c. 20, where he speaks of the scars of the martyrs, saying that the scars in the blessed will not be for deformity but for dignity, and the aureole of the scars will be a certain splendour in the body, not of the body but of virtue.

For indeed the aureole, which is a certain spiritual joy of the mind coming from an excellent and privileged work, is owed to three kinds of men. This is taken from the words of God to Moses, Exodus 25, saying of the ark: "And you shall overlay it with the purest gold within and without, and you shall make above a golden crown round about"; and below: "and you shall make for it a golden lip round about, and for the lip itself a polished crown four fingers high, and above that a golden crown"; from which the doctors understand that there was signified a certain accidental reward which is called the aureole, as a diminutive from the golden crown; and so the aureole is a certain superaddition to the golden [crown]. Yet not every accidental reward is an aureole, because not all the good works which the blessed did, from which they rejoice, have the character of an excellent victory, but only three principally, in respect of the three powers or faculties of the soul: namely the rational, which is referred to the intelligence; the irascible, which is referred to the memory; and the concupiscible, which is referred to the will.

For indeed the most excellent work of the rational power is the preaching of truth, because it is the most perfect victory against the devil when one not only does not yield to the devil attacking, but also expels him from the kingdom of Christ, that is, from Christian souls. Hence the Lord Jesus by His wisdom conquered the malignant one, who strove to fight not only against Him but also against His own. Hence He said (Matthew 4 and Luke 4): "Begone, Satan," etc.; and Luke 11: "When a strong man armed keeps his court," etc.; and John 12: "Now shall the prince of this world be cast out; and I, if I be lifted up from the earth, will draw all things to myself" — which is understood not only of what belongs to the truth of the essence of human nature in His own body, but also in the mystical, that is, for the whole body of those to be saved. The true and authentic preacher, therefore, expels not only from himself but also from others of Christ['s] the enemy [text unclear]; which appears in Matthew 10, where, when He sent [them] to preach, He gave power among other things to cast out [demons]. Hence to them returning Jesus said: "I saw Satan like lightning falling from heaven. Behold, I have given you power to tread upon serpents and scorpions, and upon all the power of the enemy." Nor on this account does it follow that the aureole is owed only to prelates, as some would have it, saying that to preach and teach belongs by office to prelates, therefore to them only the aureole is owed, as some asserted — and wrongly; because the aureole is not owed to the habit, but to the act of pain and victory against combat, according to that of the Apostle, 2 Timothy 2: "He shall not be crowned unless he has striven lawfully." Therefore, although to preach and teach belongs principally to prelates (D. 43, [c.] *Sit rector*, and c. *Dispensatio*, and c. *Ephesiis*, and c. *In mandatis*; and in c. *Irrefragabili*, above, *De officio ordinarii*, with many similar), yet if they do not preach in act they do not merit the aureole from such office, but only those who justly and faithfully exercise the office of preaching committed to them; and although they be not prelates, it suffices that they be sent to preach, even if they be only deacons (D. [2]5, [c.] *Perlectis*, verse *Ad diaconum*). For since the order of doctors is as it were the chief in the Church of God, no one ought indiscriminately to usurp to himself the office of preaching, as in c. *Cum ex iniuncto* and in c. *Sicut in uno*, above, *De haereticis*. 341. Hence the office of preaching is not to be committed to laymen of whatever order or merit they be, as

the gloss says on the text reported in the said c. *Sicut in uno*; and what is more, one presuming the contrary is bound by the bond of excommunication, says the text in c. *Excommunicamus* [1], § *Quia vero*, above, *De haereticis*. And if a layman says he has been sent by God to preach, unless signs of miracles followed, as for Moses (Exodus, throughout), he is by no means to be believed (*De consecratione*, dist. 2, [c.] *Revera*). Therefore the Apostle says to the Romans 10: "How shall they preach unless they be sent? As it is written: How beautiful are the feet of those who preach the gospel of peace," etc. (Isaiah 52).

Secondly, the most excellent work of the irascible power is the suffering of death: for the most perfect victory of the outward combat is consummated by death. Of which the Lord said, Matthew 10: "Fear not those who kill the body but cannot kill the soul." And the Apostle says to the Hebrews 11: "The saints by faith conquered kingdoms, wrought justice, obtained promises, stopped the mouths of lions, quenched the violence of fire, escaped the edge of the sword, became valiant in battle, put to flight the armies of foreigners"; and below: "they were stoned, they were tempted, they were cut asunder, they died by the slaughter of the sword." And 1 John 5: "This is the victory which overcomes the world, our faith." From which Blessed Maximus in a certain sermon says: "For this blessed martyr, clothed with the virtue of charity, fought the good fight, finished the course, kept the faith; suffering he overcame, slain he triumphed"; and below: "For it is one thing to be slain for the world, and another to be slain for Christ: he who is slain for the world is conquered when he is slain; but he who is slain for Christ is not said to be conquered, because he is not conquered although he is slain; but in truth he dies a victor, because when he is slain he is made victor; and the crown is given to victors." 342. Such perfection of victory, indeed, is regarded principally from two things. First, from the greatness of the suffering, which is considered in three ways: namely, first, inasmuch as the passions are innate, which virgins conquer; secondly, inasmuch as they are inflicted, which martyrs conquer; thirdly, inasmuch as they are participated, which preachers conquer, who root out from the hearts of their neighbours the passions rooted in others' hearts, in which they themselves participate by charity. But among all the passions inflicted from without, death holds especially the highest place, since death is the most terrible thing; from which the Philosopher says that death is the last of terrible things (*Ethics* 3); and therefore the pain of death excels all other pains, on account of which the victory in it is more glorious. Secondly, the perfection of such victory is considered from the cause of the combat, which is Christ Jesus the Son of God: for not the penalty but the cause makes the martyr; for "martyr" in Greek is said "witness" in Latin. Death, therefore, undertaken on account of Christ, that is, in testimony of the truth of Christ, makes a glorious martyr; from which the Lord said, Matthew 10: "Behold, I send you as sheep in the midst of wolves"; and below: "But beware of men; for they will deliver you up in councils, and in their synagogues they will scourge you; and you shall be led before kings and governors for my sake, for a testimony to them and to the Gentiles"; and below: "And the brother shall deliver up the brother to death, and the father the son; and the children shall rise up against their parents and put them to death; and you shall be hated by all men for my name's sake; but he that shall persevere unto the end, he shall be saved." Hence Augustine too, in a certain sermon on the Psalm, from that verse "Precious in the sight of the Lord is the death of His saints," says: "Precious is the death of the saints

of the martyrs, because their price is the blood of their Lord"; and below: "And the martyrs were truthful, because they died for the truth. For they are martyrs because they suffered for the truth. For 'martyr' is a Greek word; in Latin it is called 'witness.' If therefore they were witnesses, they spoke

true things, and by speaking true things they received crowns." Hence also Luke relates in the Acts of the Apostles, Acts 1, that the Lord said to His Apostles: "You shall be witnesses to me in Jerusalem and in all Judea and Samaria, and even to the uttermost part of the earth"; and Acts 4: "With great power the Apostles gave testimony of the resurrection of Jesus Christ our Lord"; and Acts 5: "And they indeed went rejoicing from the presence of the council, because they were accounted worthy to suffer reproach for the name of Jesus." From which it is to be known that the reward is owed to the martyr not according as [suffering] is inflicted by outward things, but according as it is voluntarily borne in the name of Christ; because we neither merit nor demerit by those things which are outside us, but by those which are within us. Hence the more difficult for the will to bear is that which one bears voluntarily, the firmer in Christ the will by which one bears it for Christ shows itself to be made; and therefore a more excellent reward is owed to it, which is called the aureole. Where it is also to be known that the beauty of the scars which will appear in the bodies of the martyrs is not principally the aureole, because many martyrs will not have scars — such as those who were drowned, or tortured by want of hunger, or killed by the squalor of prison — and yet they will have the aureole, if they suffered for the truth. From which it appears that such an aureole will be a spiritual joy in the soul, which will appear outwardly in the glorified body through a certain beauty or special splendour, as we believe appeared and appears in the most holy stigmata and the whole body of the Lord Jesus Christ, who was the most perfect martyr. Hence He said to Pilate (John 18): "For this I was sent, and for this I came into the world, that I should give testimony to the truth. Everyone that is of the truth hears my voice." Such testimony indeed He bore to the truth not only by word but also by undergoing death; and so He conquered tyrannical violences. Hence He said to His disciples after the resurrection (John 20): "As the Father has sent me, I also send you." And John 17: "Your word is truth. As you have sent me into the world, I also have sent them into the world; and for them do I sanctify myself, that they also may be sanctified in truth. And not for them only do I pray, but for them also who through their word shall believe in me." And John 15: "If the world hate you, know that it has hated me before you"; and below: "The servant is not greater than his lord: if they have persecuted me, they will also persecute you." And John 16: "These things I have spoken to you, that in me you may have peace. In the world you shall have distress; but have confidence, I have overcome the world." Hence to the Lord Jesus Christ Himself, as prince and arch-martyr, the aureole is owed on account of the victory of death, on account of the surpassing truth of His doctrine, and on account of His most entire virginity.

Thirdly and lastly, as to the aureoles, it is to be known that the most excellent work of the concupiscible power is the entire observance of virginal chastity: for the most perfect victory against the flesh, which daily lusts against the spirit, as the Apostle says to the Galatians 5, consists in entire virginity of mind and body. For although widows and other continent persons intending to keep chastity fight daily against the flesh, yet virgins triumph more perfectly over the flesh, because the noblest kind of victory is never to have yielded to the enemy. And therefore the aureole is owed only to those virgins who have had the purpose of observing perpetual virginity; and although this purpose may sometimes have been interrupted, the virginity of the flesh yet remaining, provided that at the end of life they be found to have returned to the first purpose — because virginity of mind can be repaired, but not virginity of the flesh, as Thomas says, II-II q. 152, and it is touched on [book] 4 of the *Sentences*, dist. 33, and touched in C. 32 q. 5, [c.] *Si Paulus*. If, therefore, someone be a virgin in the flesh even if she did not have the purpose of preserving virginity perpetually, yet there ought to

be no doubt that she will have a special joy, as the innocent also will rejoice in this, that they were free from sin, although they did not have the opportunity of sinning. It is to be noted, therefore, that although some virgin may have been violently oppressed and consequently her virginity deflowered, if she has died with the purpose of keeping it never interrupted by a contrary act of the will, she will indeed have the aureole of virginity, and will be more nobly glorified than if she had not been violently oppressed. Hence Blessed Lucy also said to Paschasius, a most cruel executioner and savage tyrant, threatening her that he would have her carried off to the brothel: "If you cause me to be violated against my will, my chastity will be doubled for my crown" — not meaning that through this she would have two crowns of virginity, but that a double reward would be assigned: one for virginity kept in mind and guarded in desire, and the other for the injury which she would have suffered for love of the Lord. Hence Augustine, *De civitate Dei* 1, c. 19 [18], says: "Who of sound mind would think he loses chastity if perchance, his flesh being seized and oppressed, a lust not his own be exercised and fulfilled upon it? For if chastity perishes in this way, surely chastity will not be a virtue of the soul"; and below: "Wherefore, the purpose of the soul remaining, through which the body too merited to be sanctified, the violence of another's lust does not take away sanctity from the body itself, which the perseverance of its own continence preserves"; and below he says that the sanctity of the body is not lost while the sanctity of the soul remains, in a body untouched [in will]. For just as God can restore the integrity of the mind by means of the penance of the corrupted mind, although He cannot bring it about that it was not corrupted, so God can restore the integrity of the flesh, although it cannot be brought about that it was not corrupted — although the integrity of the flesh is not so necessary to that which is of the essence of the aureole, as Richard says on [book] 4 of the *Sentences*, dist. 49, art. 5, q. 4. And that chastity cannot be violently snatched away appears well enough in C. 32 q. 5, in the summary, and through almost that whole question; and there in the summary the example of Blessed Lucy is reported, where the gloss says: 343. Say that chastity is twofold, namely of the soul and of the body. Chastity of the body, which is called integrity, is indeed lost through violence (C. 32 q. 5, [c.] *Illae autem famulae Dei*, and C. 27 q. 1, [c.] *Nuper*); but chastity of the soul, since it is a virtue, namely of the mind, is not taken away by force, because force is not brought upon the soul (C. 32 q. 5, [c.] *Ita ne*). And understand the aforesaid gloss in that it alleges c. *Illae famulae*: 344. because a virgin in mind, though corrupted by violence, since she has already lost the virginal flower as to the flesh, although she does not lose the aureole of virginity according to the theologians — and rightly, who understand better than the canonists — yet such women, corrupted in the flesh although by violence, ought not to be consecrated with other intact virgins, as in the aforesaid laws and D. 26, [c.] *Acutius*. And the reason, according to Thomas and Albert on [book] 4 of the *Sentences*, dist. 33, and II-II q. 152, is because in that lustful act it is difficult so to resist that the will is not drawn to some consent. Hence, since full consent cannot be ascertained by the Church, therefore it has been decreed that such handmaids of Christ humbly abstain from consecration, as in the said c. *Illae famulae*, and C. 15 q. 1, [c.] *Si quis non iratus*. Thomas says more on [book] 4, dist. 33: namely that those also secretly corrupted, whether by men or in any other way whatever, are by no means to be veiled; although, to avoid scandal, those things which are not of the substance of virginal consecration or veiling may be done, such as the lighting of candles and the like, changing the name of virginity into the name of chastity. And this is the common opinion of the doctors, although Ulric said otherwise, and not well, because sacramentals ought not to be varied on account of the scandal of anyone whatever. For, as Gregory says on Ezekiel, if scandal arises from the truth, it is more easily

permitted that scandal be born than that the truth be abandoned; of which in c. *Qui scandalizaverit*, below, *De regulis iuris*; and I spoke above, same chapter 1, in the treatise on scandal.

It is also to be known that the hundredfold fruit is owed to virgins, and this because they lead a heavenly life, which is signified by a hundred, because that number passes from the left to the right [hand in finger-reckoning]. The sixtyfold fruit is owed to widows, because such ought to exercise themselves in works of piety and mercy, which are signified by sixty. But the thirtyfold fruit is owed to the married, because it suffices for such to fulfil the decalogue in faith of the Trinity; for from leading three into ten thirty is constituted. The aforesaid are gathered from the words of the Lord, saying in Matthew 13, when He speaks of the seeds: "But others fell upon good ground, and they brought forth fruit, some a hundredfold, some sixtyfold, some thirtyfold. He that has ears to hear, let him hear"; and below He repeats the same words about the aforesaid number. From which words it appears that although all goods are gifts of God, yet between gift and gift a great diversity is unfolded. Hence when the Apostle had said, 1 Corinthians 7: "For I would that all men were even as myself; but every one has his proper gift from God, one after this manner and another after that. But I say to the unmarried and to the widows: it is good for them if they so continue, even as I. But if they do not contain themselves, let them marry; for it is better to marry than to burn." Hence also Jerome to Pammachius says: "I do not deny that widows are blessed who have so remained after baptism, nor do I detract from the merit of those who persevere with their husbands in chastity; but just as these are of greater reward with God than wives serving the conjugal office, so let them too bear with equal mind that virginity be preferred to them"; and below in the same letter, reporting the words of Ambrose in the book *De viduis*, since Jerome himself had compared virginity to gold and marriages to silver, he alleges that Ambrose compared wedlock to barley, virginity to wheat, and [martyrdom?] to the body of Christ. He also discourses much on such difference in the letter to Eustochium on keeping virginity, and inserts much also in the letter against Helvidius on the perpetual virginity of holy Mary, and very much in the treatise against Jovinian, where he treats and disputes quite at length on such difference, namely between virgins, widows and married women. Augustine also, in the book to holy virgins, says: "Conjugal chastity is good, but widowly continence is better; therefore virginal integrity is best." The same says

in the book *De sancta viduitate*. And Ambrose, *De officiis*, says: "How great is the grace of virginity, which merited to be chosen by Christ to be the bodily temple of God, in which dwelt bodily the fullness of the Godhead! A virgin begot the salvation of the world; a virgin brought forth the life of all." And in the book *De viduis* the same Ambrose says: "Virginity surpasses the condition of human nature, through which men are likened to the angels. The victory of virgins seems greater than that of angels: angels live without flesh, but virgins triumph in the flesh." And Cyprian, in the book *De virginitate*, said: "Now our discourse is to virgins, whose care is the greater as their glory is more sublime. For they are the flower of the Church's seed, the beauty and adornment of spiritual grace, the more illustrious portion of Christ's flock." And in the same place he says: "Virginity is the sister of the angels, the victory over lusts, the rule of virtues, the possession of all goods."

But you will say: since you promised to commend matrimony, have you put the praises of matrimony behind you and flown to the heralding of virginity? I will say what Augustine says in *De bono coniugali*:

"As what Martha did, busied about the ministry of the saints, was good, but what Mary did, hearing the word of God, was better; so also we praise the good of Susanna in conjugal chastity, but we set before it the good of the widow Anna, and still more of the Virgin Mary." For although marriages and conjugal chastity are to be praised, widowly continence is more praiseworthy, and much more virginal integrity. Hence Bernard in a certain letter says: "A chaste man and an angel differ indeed between themselves, but in felicity, not in virtue: for although the chastity of the one is happier, that of the other is known to be stronger." 346. And Cyprian, *De duodecim abusionibus*, says: "Chastity is the ornament of the noble, the exaltation of the humble, the nobility of the ignoble, the beauty of the lowly, the solace of those who burn, the increase of all fullness, the beauty of religion, the lessening of crimes, the multiplication of merits, and the friend of God, Creator of all." Since, therefore, there is so great a difference between virginity and wedlock, I counsel virgins to preserve so great a treasure in such earthen vessels with most diligent bolts and bars and watchful guard. 347. For virginity is a mountain high enough, to which the angel exhorts Lot to raise his virgin daughters; but she who sees she cannot ascend, let her remain in Segor, that is, in lawful matrimony. For Segor is interpreted "lesser" or "little one," or "dwelling," or "southern." Therefore she who is lesser in the house and is warmer in the flesh, let her seek the southern, as it were the middle, state, in which she may be saved. For it is better to be saved in the lowest grade than to be thrown headlong from the summit of a lofty mountain to the depths of the earth. Hence the Apostle said: "It is better to marry than to burn" (1 Corinthians 7). And Gregory in the gloss on Genesis, on that word "Save yourself in the mountain" (Genesis 19), says: it is better to use a moderate good than to be thrown headlong down the precipices of lusts.

But still I will press: does not the praise of virginity, since virginity is derived from matrimony, further heap praise upon matrimony? Certainly, if you look rightly, you will answer [yes]. For as the glory of the father is a wise son — elsewhere it is said: "A wise son makes his father glad, but a foolish son is the sorrow of his mother" (Proverbs 10 and 15) — so consequently the virginity of children and the praise of their integrity redounds to the joy of their parents; just as, conversely, the foulness and lust of children, and their infamous and shameful life, is deservedly judged the sorrow and confusion of the parents. Proverbs 17: "A fool is born to his own disgrace; and even his father shall not rejoice in a fool"; and below: "A foolish son is the anger of the father and the sorrow of the mother that bore him." And Proverbs 19: "A foolish son is the grief of the father, and a wrangling wife is like a roof continually dropping through"; and below: "Instruct your son, and despair not" — namely from his infamous conduct. Hence Ecclesiasticus 7: "Have you daughters? Keep their body, and show not your countenance gay toward them. Marry your daughter, and you shall do a great work, and give her to a wise man." And Ecclesiasticus 26: "On a daughter that turns not herself away, set a strict watch, lest finding an occasion she abuse herself." And Ecclesiasticus 42: "The father waketh for the daughter when no man knoweth, and the care for her taketh away his sleep, lest perhaps in her youth she become an adulteress, and when she is married she should be hateful; lest at any time she be defiled in her virginity and be found with child in her father's house; lest having a husband she should transgress, or at least become barren. Keep a sure watch over a shameless daughter, lest at any time she make you become a laughing-stock to your enemies and a byword in the city and a reproach among the people, and she make you ashamed before all the multitude." You see, therefore, how much better it would be in such a case for the virgin to have been given in marriage in her due time, and to have celebrated honourable marriages and kept the chastity of

wedlock with her husband, than to have brought such disgrace and torment and mental anguish upon her afflicted parents. But if virgins be entire, holy and chaste — not like the foolish ones having no oil in their vessels, to whom the Lord says, "I know you not," but prudent, humble and discreet, bearing in their hands adorned lamps to meet the bridegroom, that they may enter with Him into the marriage of eternal beatitude and the joy of the elect, according to the saying of the Saviour (Matthew 25) — then let the parents also rejoice, because from their conjugal root such glorious shoots have sprung up and have brought forth fruits worthy of royal sight, and they have sent them ahead so happily into the hall of the divine majesty. And so I praise wedlock, because it begets virgins: I praise the root of the tree for the sake of the precious fruit which it produces for use; I praise the thorn from which I gather the rose; I praise the plant from which I gather the flower; I praise the vine from which I taste the savour of wine; I praise the shell from which I draw precious pearls; I praise the earth from which I receive gold and the other precious metals, or carbuncles and sapphires and gems, with other various and diverse precious stones. But more precious beyond measure than all these is the fruit of wedlock, from which all who are born, both males and females, are brought forth virgins. But woe to the base and shameless wretched harlots and fornicators, who, intent on carnal works, cease not to sow in turn, yet never care to gather the fruit of the seed; because, defiling themselves with many by the commerce of the brothel, by the just judgment of God they are made barren and deservedly do not receive the fruit of offspring. To these that of Wisdom 3 well applies: "But the wicked shall be punished according to their own devices, who have neglected the just and have revolted from the Lord. For he that rejects wisdom and discipline is unhappy; and their hope is vain, and their labours without fruit, and their works unprofitable. Their women are foolish." It is to be noted that it does not say "wives" but "women," under the general term; for *mulier* is said from *mollitie*, softness. The woman, therefore, who follows softness, because she dishonours the vigour of the body, is called the confusion of man, an insatiable beast, a daily anxiety, an unceasing fight, a daily loss, the tempest of the house, the vessel of adultery, a pernicious battle, the worst animal, an incurable sickness, as Papias says. Hence Solomon says in Proverbs 7: "I see a foolish young man who passes through the streets by the corner and near the way of her house" — namely of the harlot, because above he says, "that she may keep you from the strange woman and from the stranger who sweetens her words." "Therefore he goes near the way of her house in the dark, when it grows late in the evening, in the darkness and the gloom of the night. And behold a woman meets him in harlot's attire, prepared to deceive souls, talkative and wandering, not bearing to be quiet, not able to abide still at home, now abroad, now in the streets, now lying in wait near the corners; and catching the young man, she kisses him and with an impudent face flatters"; and below: "Immediately he follows her as an ox led to be a victim"; and below: "and he knows not that he is drawn into danger of his life." Hence also Ambrose says in *De officiis* book 1: the joined familiarity of women with clerics is by no means permitted. 349. "The gate of the devil, the way of iniquity, the sting of the scorpion — a harmful kind is woman: when she draws near she kindles the fire; with flaming fire she strikes; she burns at once the conscience of the one dwelling with her and the foundations of the mountains. If women dwell with men, the devil's birdlime is not lacking." Deservedly, therefore, if from such harlots, and from parents not joined in matrimony in the lawful manner instituted by the Church, children are procreated, they will naturally be wicked, and for the most part cursed by the Lord. Hence it is added in Wisdom 3: "Their women are foolish, and their children most wicked; their offspring is cursed." And for the commendation of the good it is added: "For happy is the barren and

the undefiled, that has not known the bed in sin; she shall have fruit in the visitation of holy souls"; and below: "For the fruit of good labours is glorious, and the root of wisdom never fails." Hence, to conclude, he convicts the disgrace of the wicked by a twofold division: namely, either such children born illegitimately will be damned for their iniquity by the just judgment of God, because they have followed the impulse of corrupt nature; or also by the just judgment of God intercourse with such will be barren. Hence he adds: "But the children of adulterers shall not come to perfection, and the seed of the unlawful bed shall be rooted out. And if they live long, they shall be nothing regarded, and their last old age shall be without honour. And if they die quickly, they shall have no hope, nor speech of comfort in the day of trial. For dreadful are the ends of a wicked race" — as if to say: he who lives ill ends ill. For, as John Chrysostom and Augustine say: "With this punishment the sinner is punished, that dying he forgets himself, who while he lived forgot God." 350. For such illegitimately born have a certain repugnance not only to the heap of the theological and moral virtues, but also to the saving last end, from that inordinate and corrupt procession of nature, according to what is noted in D. 56, [c.] *Divulgatum*

(which otherwise begins *Si gens Anglorum*), where it is concluded that from such intermingling of harlots degenerate peoples raging with lust are to be expected to be procreated, and at last the whole people verging toward worse and more ignoble things, and finally coming to be neither strong in secular war, nor stable in faith, nor honourable to men, nor lovable to God. Note the word and mark the mystery: "nor coming to be lovable to God." For such words sound a certain repugnance even to salvation; of which I also spoke above in this part, § *Ultra praedicta*, verse "the sixth consideration." Of the aforesaid it is also written in Wisdom 4: "For the children that are born of unlawful beds are witnesses of wickedness against their parents in their trial." 351. From which words it appears that such wretched harlots and vile women are like lictors hired for a penny and wage to slaughter men, to labour at the vineyard of Lucifer and the infernal princes; whereas in this world hardly the vilest robber condemned to execution, if life were promised him, would be willing to exercise such an office, but they repute it a disgrace to be occupied in such exercises, even when they would be punished with justice and wholesome merit, [text unclear] to be put to death with the last punishment. How much more, therefore, ought putrid harlots to withdraw themselves from the commerce of the brothel, since their shameful solaces are turned into eternal punishments, according to that of Proverbs 5: "The lips of a harlot are like a honeycomb dropping, and her throat is smoother than oil; but her end is bitter as wormwood, and sharp as a two-edged sword. Her feet go down into death, and her steps go in as far as hell." And Proverbs 6 says: "For the price of a harlot is scarcely one loaf, but the woman catches the precious soul of a man"; and below: "But he that is an adulterer, for the folly of his heart shall destroy his own soul; he gathers to himself shame and dishonour, and his reproach shall not be blotted out, because the jealousy and rage of the husband will not spare in the day of revenge, nor will he yield to anyone's prayers, nor will he accept for satisfaction ever so many gifts." What, therefore, will the wretched, confounded, putrid and detested women answer on the day of judgment, in that strict examination, presented before the supreme Judge with their shameless fornicators, when it will be required of them in turn where is the fruit of the seed scattered, and of venal foulness and concubinous coition? Of the aforesaid enough is treated in C. 32 q. 4, [c.] *Meretrices*; and D. 34, [c.] *Si quis de laicis*, § *Quod ergo de pellice aut meretrice*; and c. *Cognoscamus*, § *Similiter*; and c. *Si quis viduam*; and c. *Vidua*; and C. 3 q. 2, c. *Aliquando*. And Isidore, *Etymologies*, book 10, says much about harlots. See almost what I wrote above, *De cohabitatione clericorum et mulierum*, c.

Si autem, on the word *fornicarias*; and there I wrote enough on the deceits of women and on those endangered by them in many histories of the Old Testament.

But still pressing on, I will add to the preceding commendations of matrimony five other considerations. Namely, the first consideration is that it is a sacrament. For since there are seven ecclesiastical sacraments, the first of them in the natural order was the sacrament of matrimony, as was said above. For, as the Master says in [book] 4 of the *Sentences*, dist. 26, c. 5 [6]: "Since, then, wedlock is a sacrament, it is both a sacred sign and the sign of a sacred thing, namely of the union of Christ and the Church"; and he alleges the Apostle, saying to the Ephesians 5: "This is a great sacrament; but I speak in Christ and in the Church. Nevertheless let every one of you in particular love his wife as himself, and let the wife fear her husband." For it is expressly clear that he speaks of matrimony from that part of that chapter where he says: "Let women be subject to their husbands as to the Lord." And a sacrament is the sign of a sacred thing (*De consecratione*, dist. 2, [c.] *Sacrificium*). A sign is a thing which, beyond the appearance which it presents to the senses, makes something else from itself come into knowledge (*De consecratione*, dist. 2, [c.] *Signum*). And the Master in [book] 4 of the *Sentences*, dist. 1, c. 2, says: a sacrament is the visible form of invisible grace. Augustine says: a sacrament is that in which, under the covering of visible things, the divine power more secretly works our salvation. And Hugh of St Victor says: a sacrament is a material element set outwardly before the eyes, signifying by institution, representing by likeness, and containing invisible grace. But according to the etymology of the word, *sacramentum* is said as it were *sacrans mentem*, "hallowing the mind." Concerning which, although above in this part of the same treatise, § *Ad secundam quaestionem*, verse "And notice what Richard says," 353. I said much to answer the argument and exclude the error of the canonist doctors saying that grace is not conferred from the sacrament of matrimony, yet the theologians, judging better, say that in the receiving of matrimony grace making pleasing (*gratia gratum faciens*) is conferred on those contracting it, but not grace freely given (*gratia gratis data*). For as nature confers a power on no one without also, if it can, conferring the disposition necessary for the fit execution of the act of that power, so God Himself, in conferring on someone some power through the receiving of a sacrament, confers at the same time the disposition necessary for the fit execution of the act of that power. But through the sacrament of matrimony, by divine institution, power is given to those contracting matrimony that one may use the other also for the remedy of concupiscence; the act of which power cannot be exercised fitly and worthily without grace making pleasing. For matrimony as a sacrament ought, from its signification, to contain some invisible and spiritual grace; because, as I said above, Hugh, book 1 *De sacramentis*, part 9, c. 2, says that a sacrament is a bodily or material element, etc., up to "and spiritual grace." But every part of a definition belongs to every subjective part contained under the thing defined: for every part is base which does not agree with its whole, as Augustine says, of which D. 8, [c.] *Quae contra mores*. Since, therefore, matrimony is a sacrament not only of the old but also of the new law — of the old, because instituted by God; of the new, because authenticated by Christ, as was said above of both — therefore in the receiving of the sacrament of matrimony, since the sacraments of the new law effect what they figure, grace making pleasing is conferred, since the sacraments prefigure grace. By which grace conferred in matrimony concupiscence is repressed at its root, and the foulness which is detested in carnal coupling without matrimony is excluded; and by that matrimonial act the married are drawn back from other corruptions; on account of which the Apostle says, 1 Corinthians 7: "It is better to marry than to burn." And although the Philosopher says in *Ethics* 3 that the operation of

concupiscence increases its striving, and the Apostle says of the married, 1 Corinthians 7, "Such shall have tribulation of the flesh," yet it is to be said that when the operation of concupiscence is ordered by reason, it does not increase but represses its excess, because acts dispose to like habits; and therefore the use of matrimony curbs the excess of concupiscence, in which the ordered act and operation curbs the inordinate striving of carnal concupiscence. Hence in this, that matrimony is a sacrament, matrimony is also commendable; and so, as one who inflicted contumely on the other sacraments would be not a little culpable, but would be judged sacrilegious — for, as Thomas says, II-II q. 99, he who violates and offends the articles of faith and the precepts or prohibitions of God by neglecting or not knowing them is judged sacrilegious; of which also enough is had in C. 17 q. 4, [c.] *Quisquis*, and c. *Nemini*, and c. *Constituit*, and c. *Qui autem*; and D. 1, [c.] *Ius publicum*; and C. 12 q. [2], [c.] *Nulli liceat ignorare* — so he is not a little culpable who does contumely to the sacrament of matrimony through adultery or other graver offences, as through incest or sodomy (C. 32 q. 7, [c.] *Adulterii malum*). For he who sins against matrimony sins against God, the author of matrimony (C. 32 q. 4, [c.] *Nemo sibi blandiatur*). And therefore adultery is detestable in both Testaments (C. 32 q. 7, [c.] *Quid in omnibus*), where it says: "What among all sins is graver than adultery? For it holds the second place in punishments, of which indeed those hold the first place who stray from God, even if they have lived soberly." Where the gloss says: he says this in detestation of the crime, for there are many crimes graver than adultery — of which I spoke enough in the treatise on blasphemy, and touched above, same title, c. 1, § "Which are grave sins." And as to what that text says, namely that it holds the second place in punishments, the gloss says: because in the first table are contained these three precepts: "You shall not have strange gods"; "You shall not take the name of the Lord your God in vain"; "Remember that you keep holy the sabbath day." In the second are contained seven. And at the end it says: therefore error of faith is forbidden in the very first prohibition of the first table; adultery in the third commandment of the second, and so in the second prohibition: for the first prohibition of the second table is "You shall not kill," the second "You shall not commit adultery"; and therefore it says, "for it holds the second place in punishments." For the aggravation of adultery also the text says (C. 32 q. 7, [c.] *Inter cetera*): among the seven vices the vice of fornication is of the greatest wickedness, because through uncleanness of the flesh the temple of God is violated. In this respect also it is said that the children of adulterers are an abomination to the Lord; which is to be understood when the paternal crimes descend to them by hereditary succession (D. 56, [c.] *Cum ergo*).

The second added consideration is the great power of matrimony, which is so great that not only does carnal coition, reasonably conducted in the order of matrimony, excuse from mortal and even from venial [sin], but, what is more, in some cases it is meritorious. For when the married intend to be coupled only to procreate offspring and to bring it up for divine worship, it is the act and office principally enjoined by the Lord in the first institution of matrimony, when He said, "Increase and multiply" (Genesis 1 and 2). So also, if the debt is rendered to the one asking, it is an act of the virtue of justice, which renders to each what is his. Hence the Apostle says, 1 Corinthians 7: "Let the husband render the debt to his wife, and likewise the wife to the husband." And to the Romans he says: "Render to all their dues." And

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Matthew 22: the Lord says, "Render therefore to Caesar the things that are Caesar's, and to God the things that are God's." Some also excuse matrimonial coition [undertaken] as a precaution: for instance, because the husband, weighing the mind of his wife inclined to coition, suspecting lest she slip into fornication, uses matrimony to avoid fornication — not his own, but his wife's; or conversely, if the woman weighs this concerning the husband. But certainly in such a case between spouses it is the same as with the rendering of the debt, which, standing simply in itself, not only excuses from sin but also acquires merit, as was said above, because it is an act of virtue referred to justice, as the theologians treat on [book] 4 of the *Sentences*, dist. 26. But virtue is meritorious through the act of the virtue, as Richard proves there, art. 2, q. 2. Therefore consequently such an act of matrimony is also meritorious. For every act proceeding from deliberative will is either according to reason or beside reason. If according to reason, it is virtuous; if beside reason, it is vicious. Hence Damascene, book 2, last chapter, says: "Remaining in that which is according to nature, we are in virtue; but coming to that which is beside nature, we are also evil"; and he calls nature there the natural judgment of reason inclining to virtue. Since, therefore, conjugal intercourse can be granted from deliberative will without its being vicious, as was said above, both for the cause of offspring and for the cause of rendering the debt — because God, who instituted matrimony, introduced nothing binding to what is unlawful — therefore such a conjugal act is virtuous and consequently meritorious, although in such an act there be annexed delight, at least on the part of the agent; and it is difficult also for the patient to keep the mean of delight. For, as the Philosopher says in *Ethics* 2, art and virtue are about what is more difficult; therefore those who keep such a mean merit by such virtue. But if one is moved to such an act on account of carnal delight, or on account of the remedy of carnal concupiscence in itself, how it is a mortal or venial sin I will declare below in the last part of this second part.

The third added consideration is the remedy which the sacrament of matrimony, duly observed, brings against many evils, 355. which come from the venereal act if it be not bridled within the limits of matrimony. Hence the son of Sirach says, Ecclesiasticus 9: "Turn away your face from a woman dressed up, and gaze not about upon another's beauty. For many have perished by the beauty of a woman, and hereby lust is enkindled as a fire. Every woman that is a harlot shall be trodden upon as dung in the way by all that go by. Many by admiring the beauty of another man's wife have become reprobate; for her conversation burns as fire. Sit not at all with another man's wife, nor repose upon the bed with her, and strive not with her over wine, lest perhaps your heart decline toward her, and by your blood you fall into destruction." You see, therefore, how great a detestation against such a vice is evidently expressed by so great a prophet. And that we may recollect in order how many persons have perished through such a vice, let us begin from the head, namely from the beginning of the world.

For first Adam, seduced by Eve — who had first withdrawn from her husband and, deceived by the serpent, tasted the forbidden apple and led her husband to the crime — was expelled with her from the earthly paradise (Genesis 3); for which cause he bound the whole human race to death, because the whole was contained in his loins seminally according to the body, inclusively even up to the Son of God who was to be incarnate, according to what is noted by the Master of the *Sentences* in [book] 2, dist. 30. For even if Adam had not sinned, nor any man, the Son of God would have been made man,

as the theologians say on [book] 3 of the *Sentences*, dist. 2. But the Son of God was incarnate not by human seed but by divine breath, conceived of the Holy Spirit, born of the Virgin Mary; and so He is true God from the Father and true man from the mother — which mother, however, drew her origin from Adam — whose Son is Jesus Christ, God and man, one person, one Son, one Jesus, one Lord, Creator of all things that are, and Author, Lord and Ruler, with the Father and the Holy Spirit, of all creatures; who suffered for our salvation and rose again in true flesh and soul; who will come to judge the living and the dead; as in the Creed of the faith, both of the Apostles and of Athanasius, and D. 23, [c.] *Qui episcopus ordinandus est*, and in c. *Firmiter*, above, *De summa Trinitate et fide catholica*, and in c. *Unico*, same title, in the Sixth Book, and in c. *Unico*, same title, in the Clementines.

Secondly, Lot, with his virgin daughters, having been made drunk by them, committed both fornication and incest (Genesis 19); from which daughters arose two most wicked nations, namely the Moabites and the Ammonites, as appears there. And so it came about that Lot, whom Sodom could not conquer, was conquered by wine (D. 35, § 1). Hence Gregory on Ezekiel says: "For Lot was just in that perverse city itself; on the mountain he sinned" (D. 40, [c.] *Quaelibet*); of which C. 15 q. 1, [c.] *Inebriaverunt*, where are reported the words of Augustine against Faustus, book 22, saying: "His daughters made Lot drunk and lay with him unknowing."

The rest, which is lacking here, has so far been unknown to us; for only these parts are held in the Capistran library and in the Vatican.

[Printer's register of signatures A–Z, Aa–Zz, Aaa–Bbb; all are quaternions except Dd, which is a ternion. Venice, at the Giunta press, 1588.]