CHRISTIAN THEOLOGY

Dogmatic and Moral

in Compendium

by Fr. Daniele Concina, of the Order of Preachers

BOOK IX

On Justice and Right

Books I-III from the first of the four tomes printed at Venice in 1761;
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CHRISTIAN THEOLOGY, DOGMATIC AND MORAL

Dissertation I — On the notion and division of justice

Chapter I — Propositions condemned by Alexander VII and Innocent XI

I. *When litigants have on their side opinions equally probable, the judge may accept money for handing down sentence in favour of the one rather than the other.* This is the 26th of Alexander VII.

II. *It is lawful for a lender to exact something over and above the principal, if he binds himself not to demand back the principal until a certain time.* This is the 41st of Alexander VII.

III. *It is permitted to steal not only in extreme necessity, but also in grave necessity.* This is the 36th of Innocent XI.

IV. *Manservants and maidservants of a household may secretly filch from their masters in order to compensate their own labour, which they judge greater than the wage they receive.* This is the 37th of Innocent.

V. *No one is bound under pain of mortal sin to restore what has been taken away by a number of small thefts, however great the total sum may be.* This is the 38th of Innocent.

VI. *He who moves or induces another to inflict grave loss upon a third party is not bound to the restitution of the loss so inflicted.* This is the 39th of Innocent.

VII. *The Mohatra contract is lawful even in respect of the same person, and with a contract of resale entered upon beforehand with the intention of gain.* This is the 40th of Innocent.

VIII. *Since money counted down is more precious than money to be counted, and since there is no one who does not value present money more highly than future money, a creditor may exact something beyond the principal from the borrower, and on that title be excused from usury.* This is the 42nd of Innocent.

IX. *It is not usury when something beyond the principal is exacted as owed out of benevolence and gratitude, but only if it is exacted as owed out of justice.* This is the 41st of Innocent.

Chapter II — The lax opinions of several Casuists

I. Fr. Thomas Tamburini, *Method of Confession*, Book III, chap. 4, no. 5: "If the confessor foresees that the penitent will not make restitution should the nullity of the title which the penitent supposes himself to possess be disclosed to him, such nullity is not to be made plain to him by the confessor, even though this be to the prejudice of a third party who will thereby go without what is his." How ruinous this principle is to justice, to trade, and to human society, let every man judge.

II. Fr. Dominic Viva, question 1, article 5, no. 2: "If from a probable opinion the penitent judges that here and now he is not bound, the confessor ought to accommodate himself to the penitent's opinion, provided that opinion be truly probable, even though he himself follow the contrary judgment. The reason is that when the penitent is duly disposed, he ought to be absolved. But he is duly disposed if he follows a probable opinion, namely that he is not bound to restore. Therefore he ought then to be absolved."

III. Tamburini, *Method of Confession*, Book III, chap. 4, no. 5: "If you foresee that the penitent will not make restitution, although you likewise observe that this is to the public detriment, why should you be obliged to admonish him, seeing that you foresee that even with your admonition added he will not make restitution, and consequently that the public loss will not be removed? Assuredly such an admonition will be in vain — nay, harmful to the man admonished, and in no way favourable to the public good. … And all this proceeds also on the principles of de Lugo, when the confessor should hope that the penitent would indeed receive the admonition, but nevertheless perceives that the remedy is exceedingly difficult. Whence it is also inferred that the same must be said when the penitent is bound under mortal sin to something so difficult that he is not believed likely to receive it with an even mind at the time, but is judged likely to receive it better on another occasion: for then a prudent confessor will be able to leave him in his own good faith, which excuses him from sin, and to defer the admonition to a more opportune time, lest the penitent, being terrified, abstain from confession and suffer a greater harm. And let this be noted above all for the confessors of merchants and of princes."

IV. Leonard Lessius, *On Justice*, Book II, chap. 14, doubt 8, no. 51: "And although the evil work for which he gave is not appraisable at a price inasmuch as it is evil, nevertheless inasmuch as it is delightful or useful to the one and detrimental, dangerous, or laborious to the other, it is appraised at a price among men: therefore what has been received on this account is not to be restored, unless perhaps someone exceed the valuation; as if a harlot, who is accustomed to grant the use of herself for one gold piece, should extort fifty from some young man as the price. This, however, has no place in her who is reckoned honourable; as if some matron or daughter should accept a hundred gold pieces for the use of her body from one who was able to give them, for he who was able to give could also retain: FOR SHE CAN VALUE HER OWN CHASTITY AT SO MUCH THE MORE. For things which have no fixed price, and are not necessary to life, but are sought for the sake of pleasure, can be appraised at the seller's discretion, and, as Peter Navarra probably teaches, at others' too."

V. The same Lessius, in the place cited, no. 48: "You will say: St. Augustine, Epistle 54 to Macedonius, says that *it is more wicked to accept money for an unjust sentence than for a just one, for false testimony than for true.* But money accepted for a just sentence is to be restored: therefore also for an unjust one. So Soto. — I answer by denying the consequence. For it is not the case that, because a thing is more wicked, it therefore obliges more, or equally, to restitution. For this obligation does not follow the magnitude of the crime, but the loss inflicted by the injury. But he who accepts money *for an unjust sentence inflicts no injury upon the giver,* as does he who accepts for a just one. Now the former is more wicked than the latter: both because it is worse to pass an unjust sentence (to the passing of which he who accepts the money has already set his mind) on account of the injury which is thereby done to the other party, than to accept money for a just sentence to be passed; and because (as Augustine there says) it is more wickedly given for an unjust sentence than for a just one, although it be given voluntarily and willingly. For he is speaking of a sentence to be passed. Add that Augustine in the same place signifies that this money, though more wickedly accepted, is not to be restored once the work has been performed, since he says it was given *by the willing.* For to one who is willing no injury is done. It is otherwise if it be given for a just sentence, which is reckoned to be given under compulsion, from fear of an unjust sentence."

VI. Fr. Lessius, Book II, chap. 19, doubt 3, no. 21: "Thirdly, if an heir *ab intestato* should retain the inheritance and the legacies, those to whom something had been left by such a testament may use occult compensation: for in truth the thing was theirs." So Sylvester, under the word *Inheritance*.

VII. Fr. Dominic Viva, *Course of Theology*, Vol. I, part 3, question 4, article 5, no. 12: "Thirdly, many teach with Lessius, chap. 19, doubt 5, Molina, Granados, and others, that he who ought to have a legacy under a testament less than solemn may retain it for himself, or make compensation, on the ground that it is a probable opinion that by the law of nature such a testament is valid, and that consequently in the forum of conscience the legacies made in it are owed — although the contrary opinion be common enough and probable. Fourthly, Lessius teaches in the same place that an heir *ab intestato* may use occult compensation against him who possesses the goods of the deceased under a testament less than solemn: because it is a probable opinion that the goods are owed to the heir *ab intestato,* to which opinion he may conform himself."

VIII. Fr. Lessius, in the place cited, no. 50: "Thirdly, the heir *ab intestato* may retain it; and if another possesses it, he may sue for it at law. Fourthly, that if he cannot do so because of the power of his adversary, he may use occult compensation."

IX. Fr. Antonino Diana, Vol. VI, tract 3, resolution 149: "He who ought to have a legacy under a testament less than solemn, since it is a probable opinion that those legacies are owed in the forum of conscience — although the contrary be common enough *and probable* — may nevertheless retain the legacy, or receive it anew, or make occult compensation, as Granado and Molina admit. Lessius adds that the heir *ab intestato* may also use occult compensation against him who possesses the goods of the deceased under a testament less than solemn, because the contrary *opinion also is probable, to which he may conform himself."*

X. Fr. Diana, in the place cited: "Whether in occult compensation the debt to be made good must be liquid and certain? Upon this the most eminent Cardinal de Lugo treats this question at large, Vol. I, *On Justice,* disputation 16, section 5, from no. 94 to no. 107, and endeavours to establish the negative opinion, with the distinctions adduced by him, forcibly and learnedly, as he always does. He asserts therefore that when *an equally probable, or a more probable, opinion favours the creditor who wishes to make compensation* — an opinion which turns not upon the *fact* but upon the *right* — it seems probable that the creditor may, before the matter be brought to judgment, the other conditions required above for lawful compensation being posited, secretly compensate himself for his debt. This conclusion seems to be proved by *the arguments made above and the examples adduced above,* in which examples the authors themselves admit compensation, although in them there proceeds only a probable opinion, as in the compensation of money for reputation taken away, and in the legatee, or the heir under a testament less than solemn, and the like. For the reason adduced above seems to prove this: because in the aforesaid case, notwithstanding the debtor's possession, the judge would pronounce sentence, or at any rate could pronounce it, for the creditor, embracing the probable, or the more probable, opinion which favours him. Likewise, when he brings forward on his own side *good and qualified Doctors,* who hold that in such circumstances the law favours him, and that the defendant ought to be condemned, he has already shown that, according to the judgment of those Doctors, his cause is not equal but better than the cause of the defendant. Why then shall not the creditor himself, when without grave inconvenience he cannot have recourse to a judge, be able to embrace the same opinion which the judge ought or could have embraced, and compensate himself for his debt?"

XI. Fr. Diana, in the place cited: "Nor is it an objection that it seems iniquitous to compensate a certain debt with an uncertain one: for he who has only probability that Peter owes him something, to whom he himself owes with certainty just so much, if he uses compensation, seems already to compensate a certain debt with an uncertain one, and thus to extinguish an uncertain debt by a certain payment. It is answered that this same argument, if it proves anything, proves not only against compensation but also against payment, namely, that one who has only a probable right to sue for a thing owed him could neither sue for nor receive it from the debtor: because it would then likewise be iniquitous to sue for a certain and entire payment, and a certain thing, for an uncertain debt. Whence it would never be lawful even in court to plead except with an evident right. As therefore *it is lawful to sue for a probable debt, and to receive it from a debtor who pays; so it will be lawful, in that proximate probability of which we have spoken, to make compensation, and to receive the certain thing.* For the reason in both cases is the same: namely, that those probable reasons, and the authority of the Doctors, and that opinion, although in itself it be probable, nevertheless do not have for their object a probability, but a certain payment or compensation. For it does not say that a probable payment or compensation ought or may be made; but it says *probably* that a certain payment or compensation ought or may be made — which suffices for suing for it, or for making it, as in other matters. For thus a probable opinion concerning fasting, or concerning the recitation of the Office, brings it about that *you may take food* not probable but certain, and *may set down a certain omission* of the divine Office. And the reason arises from the principle laid down above, that for a lawful operation *proximate probability suffices, by which you probably judge that it is lawful to act in such a manner.* Since therefore you have a proximate probability by which you probably judge that you have here and now a right to so great a sum of money, you will be able to take the whole of it: because there cannot be a right to take it, unless there be a right to take it with certainty. — And all these things, and many others, the most eminent Cardinal de Lugo adduces in the place above cited for the confirming of this opinion; although afterwards, at the end of no. 106, he abstains from a final judgment upon it."

XII. The Fathers of Salamanca, tract 13, chap. 1, doubt 13, no. 318: "Whether one who has an opinion that a thing is owed him may use occult compensation?" They answer, no. 319: "It must be said therefore that in general and in the abstract, so to speak — that is, for all cases — it is not lawful to use occult compensation when there is given only a probable opinion for either side, that is, for the debtor and for the creditor; but in particular cases it is lawful. And it is also lawful in all cases, when there is given a greater probability on the creditor's side that such a debt is owed him."

XIII. The Fathers of Salamanca, in the place cited, no. 320: "But behold a difficult objection: for if in this particular case A, and in that other B, such compensation is lawful, therefore in all it will be lawful: because from particulars to the universal the argument holds good by induction. — By this objection (in my judgment) it is rightly proved that, speaking by intrinsic principles, either it must be said that in all cases in which there is given a probability of fact that the thing is owed, compensation is lawful, and thus that a probability of right, and a proximate one, is given; or it must be denied in the particular cases: and thus the most eminent Cardinal de Lugo rightly said that authors proceed inconstantly and inconsequently. … I confess that I do not grasp the disputant. But I do not deny that among men so learned there are some special reasons by which they were moved to assert this in one case and not in another; and that what is hidden from me is plain to them: and therefore I assert that, *by an extrinsic probability drawn from the probability of the Doctors,* it is lawful in those cases in which there

are given classic authors sufficient to produce a probable opinion, to use compensation with a probability of the debt."

XIV. *Whether one who has bound himself under oath to the payment of a debt may use compensation, and not pay the debt.*

Fr. Diana, Vol. VI, tract 3, resolution 151, says: "The case is an everyday one, and I find three opinions concerning it. The first denies. … The second opinion affirms, and therefore asserts that one who has sworn to pay money may compensate without fear of perjury. … The third opinion distinguishes. … What I myself think I will say briefly. I judge all these three opinions probable. But I adhere to the second as the more probable."

XV. Cardinal de Lugo, Vol. *On Justice and Right,* disputation 4, no. 117, embraces the third opinion with this distinction. If you promised not to use compensation, adding an oath to pay the debt, you cannot use compensation; but if you swore absolutely that you would pay the debt, you will be able to use compensation. Because, he says, although an oath added to a promise introduces a new bond of obligation, "nevertheless it does not oblige to another and new object. For it only confirms the promise; therefore it obliges only to that which was the object of the promise. But the promise to pay does not exclude compensation. For he who compensates truly pays."

XVI. *Whether one may use present compensation for a future debt?*

Cardinal de Lugo, in the place cited, section 3, no. 93, answers: "Sometimes, however, it is lawful for a creditor to anticipate, and to compensate himself now for that which Peter does not yet owe but will owe after a month, for example; and if the creditor prudently fears that it will not be paid him, Tanner affirms it, 2-2, disputation 4, question 6, doubt 14, no. 406; Diana, resolution 48. Yet whatever be the case in the external forum, in which the law seems to proceed otherwise, in the internal forum *the opinion of the said Doctors seems probable, that the creditor may compensate himself before the time for a future debt,* upon a twofold warning."

XVII. Fr. Diana, Vol. VI, tract 3, resolution 150, no. 5, confirms the opinion recounted above, which he had earlier taught, and in these words: *This I formerly taught; and most recently, citing me, the most eminent de Lugo teaches it, and also, citing me, Machado.*

XVIII. *Whether one who by occult compensation filches what is owed him may swear that he has received nothing?*

Fr. Thomas Tamburini, Book VIII, tract 2, chap. 4, § 1, no. 1, answers: "That he is not a thief in conscience, nor does he sin, nor does he incur the excommunication which perchance is imposed against thieves; and that he may swear even before a judge that *he has received nothing,* understanding *that which was not owed him* (if it be already certain to him, as today it is among all); even if the thing which he takes had been consigned to him by the debtor on deposit. See Molina, Lessius, de Lugo, and others soon to be cited, to whom add Dicastillo."

XIX. Fr. Diego de la Fuente Hurtado, disputation 25, chap. 1, no. 5: "All these things show how confusedly and indigestedly that proposition (namely the 57th, condemned by Innocent XI) had been handed down, comprehending so many diverse cases under one rule, when they are very unlike; and with how many additions, limitations, and props it needs to be shored up, that it may be safely brought back to practice."

XX. Fr. Dominic Viva, in his *Tract on Theology,* upon this proposition 57, no. 7: "What is proscribed in this thesis is *that servants may secretly compensate themselves for what they judge to be owed them in justice by way of wages*. Therefore for the making of this occult compensation there is required the judgment of a man learned and at the same time expert."

XXI. The Fathers of Salamanca, tract 13, chap. 1, doubt 19, § 2, no. 416: "Likewise, if a master employs a servant either at other hours, or in other services than was agreed, the servant may use compensation, if he cannot obtain it from the master."

XXII. Fr. Patrick Sporer, Vol. II, tract 5, on the 7th precept of the Decalogue, chap. 5, sect. 2, § 4, no. 83: "A servant or official who through error, necessity, or some like cause has hired out his labour for less than the just price, since he was at least in some respect unwilling, and so had not the mind to make a gift, will be able both to exact the deficiency of his wage by right, and, if he cannot obtain it otherwise, to compensate himself secretly. And let the master lay the blame on himself."

XXIII. Lessius, cited in Matthew de Moya, Vol. I, *Select Questions,* tract 6, Miscellany, disputation 4, question 3: "When a servant asks nothing by way of wage — nay, expressly rejects in his heart every intention of asking — and serves in the hope that some office or benefice will be procured for him by his master: when the master has procured it for him, even if he has obtained nothing, he cannot ask for anything, nor compensate himself. But if the master has procured nothing, because for the sake of avoiding the stain of simony he was unwilling to procure it, or for other causes, he will be able to ask for the wage customary after the manner of the country; *and if the master does not give it, he may lawfully provide for himself by compensation.* So Lessius, chap. 24, doubt 4, no. 26, near the end. … The second part is proved: because although he had the internal intention of asking nothing, nevertheless, since that intention is not a vow, by it he did not take away from himself the power of acquiring that to which he has a right."

XXIV. *Whether in debts of justice there can be given compensation by a gift or by gratuitous service?*

Fr. Diana, Vol. VI, tract 3, resolution 152, answers in the affirmative. "When I willed by a gratuitous gift to satisfy obligations of justice which I knew myself to owe — but the difficulty is, whether, when I furnished the gift or the service in ignorance of the debt of justice, I may then make compensation? And he judges the affirmative opinion to be probable, on the authority of Rodriguez and Aegidius Trullench, *On the Decalogue,* Vol. II, Book 7, chap. 4, doubt 5, where he asserts thus: I owe you a hundred gold pieces in justice, and afterwards I gratuitously render a service of the same value, or confer upon you an equivalent under the title of donation: shall I remain exempt from the obligation of justice? I answer: if, when I conferred that gift, I was mindful of the obligation of justice, and did not will by that thing or gift to satisfy the obligation of justice, but to render that thing gratuitously, it is certain that I have not satisfied the obligation of justice, nor can I afterwards use compensation, because that thing was knowingly given gratuitously and liberally. … What if, when he conferred the service, he was ignorant of the debt of justice? Rodriguez, in his *Summa,* part 2, chap. 49, conclusion 2, asserts not improbably that afterwards, when he remembers the debt of justice, he may make compensation by that thing given under such ignorance: because it is presumed that he would not have been so liberal, had he been mindful of the debt. But Sánchez, Book 1 of his *Moral Works,* chap. 13, no. 1, with other probable authors, judges the contrary. … Nevertheless, as I have said, the opinion of Rodriguez is not improbable, and Layman, cited by us, favours it." Thus far Trullench.

XXV. *Whether compensation is valid in the forum of conscience, even though there be prior creditors?*

Fr. Diana answers in the place cited, resolution 153: "This case is much in practice, and it happened in these past days upon the death of a certain banker: then many learned men answered in the negative, because the debtor in such a case receives a thing obligated to another; and so the Doctors commonly teach. But I judge the contrary opinion probable. What if the creditor should possess the debtor's property by right of deposit? I think probably, with Tanner … who cites Navarrus and Lessius, that that law (of deposit) otherwise regards only the external forum, or at any rate is to be understood as holding if the compensation can be obtained otherwise. Whence in our case not only would the creditor justly make compensation, prior creditors existing, as has been said, but also, against Comitolus, he would lawfully possess the thing by right of deposit."

XXVI. Fr. Dominic Viva, Vol. I, part 3, question 6, no. 9: "It follows in the fourth place that a priest who has celebrated ten Masses for money lent, if he cannot recover this money, may, when ten *carolins* are afterwards offered him for another ten Masses, retain this money and not celebrate the other Masses, as Pejerinus notes in Tamburini, Book 5, *On the Sacrifice of the Mass,* chap. 1, § 3 — provided nevertheless that he avoid the loss of a third party, namely either of a soul in purgatory, or of a sick man, etc."

XXVII. Fr. Diego Hurtado de la Fuente, *Reformed Theology,* dissertation 13, chap. 5, no. 41: "Now what we have said of servants we extend to any other stipendiaries whatsoever, proportion being observed; and they have place in priests who celebrate Masses: for they too labour in the vineyard of the Lord, like other labourers, and are worthy of their hire. Wherefore, if the just hire, fixed by law, custom, or agreement, be not paid them in full, they will by the best right be able to compensate themselves, and secretly to take for themselves what is lacking to the just wage out of other moneys of him who commended the Masses to them, those things being observed which in such compensations ought to be observed by others."

XXVIII. The same Fr. Diego, in the same place, no. 43: "A grave difficulty, however, arises: namely, whether that priest to whom recompense was owed in justice, and the supplement of a scanty stipend, may keep himself indemnified by not offering as many Masses as he promised to the iniquitous contracting party, but fewer — only those which, the diminished stipends being taken together, correspond to a just stipend? … (After many things which for brevity's sake are omitted, he answers:) Just as other labourers unjustly injured in a contract of hire as regards the justice of the wage can provide for themselves in two ways, when other means are lacking — namely, either by exhibiting the whole labour promised, worthy of a greater stipend, and taking to themselves secretly what is lacking to the just stipend, at least up to the lowest degree; or rather by diminishing their labours, and rendering only those to which the stipend that is given corresponds in equality — so likewise it will be lawful for this priest, similarly injured unjustly as regards the stipend of Masses, to provide for himself by either of the aforesaid means: for neither is unjust, etc. … No. 45: The decrees of the Sacred Congregation, however, made by the special authority of Urban VIII, cause trouble … It may nevertheless be answered that the decree does not touch our case." See there many things of the laxest kind.

XXIX. Fr. Leonard Lessius, Book II, chap. 2, doubt 22, no. 135: "If you have unjustly defamed another who had previously defamed you, you are not bound to restitution towards him, if he is

unwilling to make restitution to you; but you may use compensation, equality nevertheless being preserved as far as may be."

XXX. The same Lessius, in the place cited, no. 136, to the question *whether defamation may be compensated by the occult retention or filching of money,* answers: "It is probable that this compensation may be made: because that opinion is probable which asserts that defamation is to be compensated with money, when it is not restored in its own kind."

XXXI. Fr. Luis de Molina, *On Justice and Right,* Vol. IV, disputation 49, no. 5: "When one has unjustly defamed another, and is unwilling, as he was bound, to restore that reputation to him, then the man unjustly defamed, who had not inflicted a loss of reputation upon the other, could compensate in money the loss of reputation in which he stands; and that *not only by not paying an old and occult debt,* so far as would be judged sufficient in equality for a competent compensation of the reputation in which he stands, *but also by secretly taking from what belongs to the other as much as would be enough for the same compensation:* provided that no scandal intervene, and that he could not otherwise conveniently obtain the restitution of his reputation; and lastly provided that all the conditions required intervene, that occult compensation of a debt may lawfully be made in the forum of conscience."

XXXII. Fr. Dominic Viva, Vol. I, part 3, question 7, article 1, no. 2: "He who is assaulted by an open enemy, whether with arms or with insults, and can flee and decline the evil, yet does not flee, but defends himself with due moderation, is not bound to restitution. The reason is: because although he sometimes sins against charity by not fleeing, if indeed he could flee without loss of honour, yet he does not sin against justice. Therefore he is not bound to restitution."

XXXIII. The Fathers of Salamanca, tract 14, chap. 1, point 6, no. 52: "Since therefore both the said opinions are probable, he who should wish to follow the first will be able, if he be instituted heir or legatee of a testament less than solemn, to procure the inheritance or the legacy, and if he obtain it, to retain it; and the same holds of other contracts. And according to our opinion the heir *ab intestato* will be able not to give up the inheritance or legacy of a testament less than solemn: because according to that opinion the testament remains invalid even in the forum of conscience; and therefore the heir *ab intestato* succeeds as if it had not been made. But because we have called this opinion the more probable, the said heir will be able to use occult compensation, if the legatee or the constituted heir shall by any way have entered upon the legacy or the inheritance: because, as we said (tract 13, chap. 1, point 19, § 3), place is given to compensation when there is the more probable opinion that such goods are owed to oneself. But the heir or legatee will not be able to do this, if the heir *ab intestato* be unwilling to render what is rendered in the testament less than solemn, even though he should wish to conform himself to another's opinion, unless he judge it the more probable: because from the fact that it is probable that something is owed, place is not given to compensation, as we proved in the same place, § 5, no. 319. But that it may be done on both sides by following an opinion merely as probable, Villalobos and Lessius hold."

XXXIV. Fr. Dominic Viva, Vol. I, part 4, question 1, article 1: "Wherefore it is lawful to sell dice and knucklebones, although I observe that the buyers will make ill use of them; and it is lawful also to sell a lamb to Jews, and flowers, and to sell paints and ornaments to harlots, and food to those whom I know will violate the fast."

XXXV. *Whether a probable opinion is matter for sale.* Fr. Thomas Tamburini, Book VIII, *On the Decalogue,* chap. 7, § 3, no. 13, proposes this question under this title: *The sale of a probable opinion;* and sets it forth in these words: "There occurs here a difficulty not unlike that concerning a judge. Let us suppose that opinion to be probable of which I have spoken at large in Book I, chap. 3, which, besides those cited there, Dicastillo follows, Book II *On Justice,* no. 5, disputation 5, doubt 7: that it is lawful for a judge to choose one of two equally probable opinions, and to pronounce sentence according to it. Now I ask, will a judge lawfully and justly accept money, that he may rather choose the one which favours me than the one which favours my adversary? (He answers that he disapproves this opinion; but he adds:) Let him nevertheless read it who will, in Lessius, Book II, chap. 14, doubt 9, no. 64; Valentia, 2-2, disputation 5, question 6, article 4, part 4; Salón, 2-2, question 61, article 4, conclusion 2."

XXXVI. Fr. Leonard Lessius, Book II, chap. 14, doubt 9, no. 64: "If he (the judge) accept something, that he may follow this opinion rather than that in judging, he seems not to sin. … Because he is not bound to determine himself to the one or the other; but it is free to him to follow whichever he prefers. Therefore if he accept something that he may follow this rather than that, he does no injury to anyone. The consequence is plain. Because, since the thing is not owed, it is not against justice (if we regard the law of nature alone) to exact a price for it, and otherwise it is appraisable at a price. Thirdly: because he does not accept a price for the justice of the sentence, but because in this cause he prefers this opinion to that, to which he was in no way bound. Now this is appraisable at a price: both because it is most useful to the party, and because by following this opinion he loses the favour of the other party, whom he could have gratified." Thus indeed he teaches, regarding the law of nature alone.

XXXVII. Cardinal de Lugo, Vol. I *On Justice,* disputation 26, section 11, no. 108: "It is inferred thirdly, that neither is this contract (the *Mohatra*) rendered unjust from the nature of the thing by this, that the seller manifests his intention to the buyer, saying: I freely sell you these wares on credit; but if you should wish afterwards to sell them at a lower price in order to have ready money, I am prepared to buy them."

XXXVIII. Fr. Lessius, Book II, chap. 21, doubt 16, no. 131: "Observe nevertheless that this manner of contracting is often not free from fault in a merchant who by arrangement so sells that he may buy back at the lowest price. For first, he can sin against charity: as if he compel some wretched man to buy wares of which he has no need, to that man's great cost, when he could easily and without inconvenience to himself lend him money. Secondly, he can sin by giving bad example. For that contract has the appearance of evil and the suspicion of usury. Thirdly, by defaming himself and his own. He is nevertheless not bound to restitution, as Navarrus says: which understand of not being bound in justice."

XXXIX. The Fathers of Salamanca, tract 14, chap. 2, point 9, § 1, no. 84, ask whether sellers and buyers sin against justice while they deceive one another with lies and perjuries, in order that the price may be increased or diminished within the appointed degrees. They deny it: because these, they say, *are the common lies of sellers and buyers, and men commonly know that these are the stratagems of traders, to whom they give no credence; and if they incautiously give them credence, let them impute it to themselves, since they are easy of belief.*

XL. Caramuel, Book II of his *Moral Theology,* disputation 14, no. 778: "I distinguish the troublesome from danger, or from emerging loss, and from ceasing gain. Is there not truly some recreation in seeing precious things — why not also in possessing them? A price is given for hearing a comedy or seeing a beast, and no one contradicts: why not for seeing or possessing the best pieces of gold? By reason therefore of this trouble, arising from the want of money, every other danger being set aside, Medina affirms that something above the principal may be received; and the interpreters of St. Thomas, question 78, article 1, indicate that it is speculatively probable. But Dicastillo contradicts, and says: to me this opinion is speculatively improbable, and morally pernicious in practice … He nevertheless contradicts himself at no. 154. One thing alone remains, he says, truly difficult, namely the sadness arising from the want of the thing which he loved and in which he delighted when he had it. It is not upon this that we dispute … And he answers: Some more recent authors teach that this sadness is sufficiently recompensed by the recompense of a thing of like condition. … But in very truth that want does not seem to be recompensed by the rendering of a like thing; rather, from the payment of the thing lent there returns again the delight which he would have had, if he had not lent, and thus he would have that of which he was deprived; and so he would not now have it. Therefore it is not enough that past sadness be recompensed by present gladness: because he would have had this also, if he had not lent. Therefore I prove that in this case something beyond the principal may be received, if from the beginning he brought it into the agreement and declared it to the borrower, according to what has been said above. … (Thus far Dicastillo: Caramuel in this fashion resumes the discourse.) *The mountains are in labour, and a ridiculous mouse is born.* Why were those things said before? An opinion which a little while ago was pronounced improbable and pernicious in practice is now at last asserted to be true. *For truth is truth, though, prepossessed with other notions, you condemn it; and while you condemn it, it shines forth, and you will defend its sincerity against your very self."*

XLI. Fr. Claude La Croix, Book III, part 2, *On Usury,* no. 854: "Sylvius, Serra, and others in Mendo, *In the Balance,* disputation 6, article 1, no. 54, have taught that there is *always* a danger to the principal when a loan is given, and that therefore something can always be exacted by reason of the danger."

XLII. Fr. Thomas Tamburini, Book VIII, tract 3, chap. 8, § 4, no. 1: "When there is reasonably feared a danger, or difficulty, or expense in recovering the loan, and these arise by reason of the person of the borrower, something proportionate above the principal may be exacted; if the dangers be feared from mere pusillanimity, most authors deny it. … But de Lugo intimates that it can be done, though he leaves it at last to the judgment of others. The reason is … the anguish and trouble which the lender is to suffer, for a whole year, say, on account of the fear of losing the principal, and which he is not bound to undergo without a price. And these things are already present in that small matter, etc."

XLIII. Cardinal de Lugo, Vol. I *On Justice,* disputation 25, section 6, no. 81: "But since this comes about, that the danger itself is a loss distinct from the principal, and for which something may be exacted by a preceding agreement — for it cannot be denied that, although the debt be afterwards recovered, nevertheless that danger and the fear of losing the principal has brought trouble to the lender. As therefore a loan cannot be given without labour of body or of mind, or trouble, or fear of losing the principal, you will be able to receive something for this trouble to be undergone. … And this is proved *a priori,* because labour and grief of mind, although they be not in the class of goods of fortune, and therefore injuries inflicted concerning them do not of themselves oblige to compensation in money, are nevertheless something which can be brought into an agreement, so as

to be compensated with money. For just as you can exact a price for bodily labour, so also for labour of mind: as you can exact a price that some pain of the head be yours, inasmuch as the trouble of that pain can be appraised; so for trouble and anguish of mind to be undergone you will be able to exact a price, since it torments not less, but sometimes more, than bodily pain. If therefore you could exact beyond the principal when the future loan would be to you a cause of headache, you will be able to exact also when the future loan would be to you a cause of grief and internal fear on account of the danger of losing the principal: because that grief and fear, as contradistinguished from the principal itself, is something which can be brought into an agreement for a price."

XLIV. The same de Lugo, in the place cited, no. 83: "Since the reason for lawfully exacting something on account of danger is that the lender cannot here and now lend without undergoing that trouble and fear, it seems to matter nothing whether the thing itself, or the disposition and character of the lender, bring such trouble. For if I, for example, am lame, and must undergo a peculiar trouble in bringing the money from my house to the place of lending — a trouble which others would not undergo — I can well exact a peculiar price (N.B.) for that trouble to be undergone by me. If therefore likewise, because I am timorous and fearful, I cannot lend to you without great anguish and fear of losing the principal …" "… it seems that I may exact something for this trouble, without which I cannot lend to you. This, however, I leave to another's judgment."

XLV. Fr. Thomas Tamburini, Book VIII, *On the Decalogue,* tract 3, § 5, no. 18: "I have already said that under this title of a promise not to demand back the money lent, it is lawful in this money-getting age of ours to exact five per hundred for any year whatever. So Caramuel."

XLVI. Fr. Leonard Lessius, Book II, chap. 20, doubt 10, no. 74: "Observe nevertheless that if in truth from a loan of a hundred gold pieces you are certainly about to receive a detriment of ten gold pieces, it will not be the sin of usury, even if, without the borrower being warned of this loss, you should bargain for a hundred and ten to be repaid you."

XLVII. The same Lessius, in the place cited, no. 90: "The third mode is this. If I had destined money for trade, and they should ask a loan: concerning which mode there is difficulty. For certain most learned men think that even then something may be exacted by reason of ceasing gain." (After five reasons adduced in support of this opinion, he thus concludes at no. 95:) "For these reasons this opinion once seemed to me probable, and even now seems so, especially considered speculatively, provided that he exact no more than that hope of gain was worth, the estimation of labours and expenses being deducted; and provided that he always retain the intention of trading, if the loan were not sought. In practice, however, on account of the danger of palliating usuries, *it is not easily to be admitted.*" The same opinion is taught by Fr. Tamburini, Book IX, chap. 5, § 4, no. 2; Layman, Book III, tract 4, chap. 16, no. 8; Sporer, tract 6, on the 7th precept, chap. 4, sect. 2, no. 44.

XLVIII. Fr. Thomas Tamburini, Book IX, tract 1, chap. 5, § 4, no. 2: "If you have at home other money lying idle, but this which you lend you had destined for trade, you may still, if you lend this destined money, exact ceasing gain: because in truth by reason of the loan the gain ceases for you — such gain, namely, as would have come from this destined money." The same he defends in Book VIII, chap. 8, § 3, no. 2, where he cites for himself Aragón and Valentia, Vol. III, disputation 5, question 20, part 1. *Because,* he says, *this was the fruitful money for you, and not the other.* These same words of Tamburini are transcribed by Patrick Sporer, tract 6, on the 7th precept, chap. 4, sect. 2, § 3, no. 44, where he cites Molina, Lessius, Layman, and de Lugo.

XLIX. Fr. Claude La Croix, part 2, book 3, no. 861: "If anyone dare not lay out the other money which he has, but even out of excessive solicitude reserves it for his family, he will be able to ask ceasing gain for the money lent, because the borrower was in very fact the cause of the ceasing gain: Molina, Pirhing, de Lugo, disputation 25, no. 90. But if for that precise reason he reserved the other money, unwilling to expose it to trade, that he might always have it at hand for the case in which someone should ask a loan, Molina, Layman, de Lugo, Tamburini, Hannold, Illsung (no. 458) teach that he can equally ask ceasing gain: because the loan, partly past and partly future, seems to have been the cause; and the presumed will even of those who are about to ask a loan moves him not to expose his money to trade, from which fact the gain ceases."

L. De Lugo, disputation 25, section 6, no. 91: "Concerning the same condition it is asked, secondly, whether gain is said to cease by reason of the loan, so that something may be exacted for it from the borrower, when someone keeps some money by him which he was therefore unwilling to apply to trade, that he might have money at hand for those who should ask a loan. … And Lessius, no. 88 and following, divides this case into two others. The first is when I know that you will afterwards ask a loan, and for your sake I withdraw some money from trade, that I may be able afterwards to lend it to you: in which case he says that something may be exacted beyond the principal. The second case is when you do not know of anyone in particular who will ask a loan; but because many will afterwards be in need, you withdraw money from trade, that you may be able to lend to them, whoever they be: in which case he says it seems probable that ceasing gain may afterwards be exacted, especially speaking speculatively, if the intention of trading be retained, if that money were not given on loan, etc."

"For clarity's sake we may subdivide the first case into two others. … After many things he answers at no. 93: Whence, to the ground of doubting, we can say that even then the loan is the cause of the ceasing gain, which can be explained in two ways. First, in the class of final cause: for therefore in your manner you cease from present gain, that you may afterwards be able to lend to me. Nor does it seem to be required that the loan be the efficient cause, and antecedent in priority to that cessation of gain; but it seems to suffice that it be the cause in the class of final cause of ceasing from gain: just as also *our salvation and justification is called the cause of the Passion of Christ,* because it was the end for the sake of which Christ died. Nor ought I to be less grateful to him who suffers loss in order to free me, than if he suffer at my asking; although in the first case my liberation is the final cause, and in the second my prayers are the moral and efficient cause. Secondly, we can add that the foreseen future will of the borrower is the moral and efficient cause of desisting from the gain of trade. For although you be not moved by the loan manifested, it is just as if you were moved by the absolutely foreseen future loan to withdraw the money: for you do not desist from trade because you are about to lend; but you are about to lend because you desist from trade: yet nevertheless you are moved by my foreseen future will of asking a loan. Wherefore truly my will and my asking of the loan is the moral cause of the ceasing gain; and this suffices for exacting it, etc."

LI. The same de Lugo, in the place cited, no. 94: "These things being supposed concerning both parts of the former case, it seems that it must consequently be said that in the latter also ceasing gain may be exacted, when no one in particular is foreseen as about to ask, but some men in general, for whose sake you withdrew money from trade; as Malderus concedes absolutely and without scruple. … The reason can be gathered from what has been said: because between this second case and the first there

seems to be only this difference, that in the first I in particular was foreseen as about to ask a loan; but in the second I was not foreseen in particular, but nevertheless in the aggregate, indeterminately. But this seems to matter little to the purpose. … Which can be explained by the example adduced above of the PASSION OF CHRIST. For although Christ, before his will of suffering, did not determinately foresee the future sin of this man, or that some men would sin mortally, yet he willed to pay the price of his blood for their justification, and still it is truly said that the sin of this man is the cause. … Because under that distinction all future things are known disjunctively, so that in willing to die for the freeing of those who were about to sin, he willed to die for this man, if this man should in fact have sinned. If therefore you wish to reserve money for him who will ask it, whoever he be, foreseeing that someone will ask, you willed in fact to reserve it for him, although known indeterminately."

LII. Fr. John Azor, part 3, book 4, chap. 4, question 3: "Whether ceasing gain may be paid by an anticipated payment? It is answered by common consent that it may not. But it must be noted that this is to be understood thus. For example, Titius lends to Caius, and because it is agreed between them that by reason of ceasing gain Caius shall pay Titius five, it is called an anticipated payment if Titius give Caius ninety-five. This is altogether unlawful, because manifest usury. For it is just as if he should lend ninety-five, that afterwards a hundred should be repaid him." *But it is not unlawful if the anticipated payment be understood thus: Titius lends a hundred to Caius, and it is agreed between them that by reason of ceasing gain Caius shall pay Titius five — for example, a certain portion of oil, wine, or corn, or a pair of hens, which Caius gives by reason of those five which it was agreed between them should be paid by reason of ceasing gain.*

LIII. Fr. Thomas Tamburini, Book IX, chap. 5, § 4: "We have handed down certain remedies or just artifices, Book VIII, *On the Decalogue,* tract 3, chap. 8, no. 16, by whose help something may be taken in anticipation." (The just artifices handed down in the place cited are these.) "Caramuel, Book II of his *Moral Theology,* no. 755, removes the difficulty thus: *Let there be two contracts, one of lending, the other of sale; and so the lender will be able to take now ten, or at least eight or six*. I explain (says Tamburini): The lender now lends a hundred gold pieces for a year, with the hope of receiving thence a lawful gain of another ten beyond the principal. Let him now sell this hope of ten of gain in anticipation to the borrower himself, which hope will be worth, all things being expended by an expert man, six or eight gold pieces: for at once, now, he will be able without the stain of usury to take these six or eight gold pieces, not indeed by force of the loan, but by force of the sale of the gain hoped for and sold to the borrower."

LIV. The same Tamburini, in the same place, no. 18: "Lessius, Book II, chap. 20, no. 100, frees himself from the same difficulty thus. Let someone lend you a hundred, and let him lend with interest, or without interest. For presently these may be returned to the lender without any injustice of his own, for the interest owed to them. For then you, the borrower, will not pay the gain out of the whole sum lent with interest, but out of another. — You will say: I shall be burdened by this, that I pay in anticipation what I do not yet owe. I answer thus for Lessius: But you will certainly owe it; and on the other side the trouble of giving now what you will owe afterwards seems sufficiently compensated by this, that the lender lends you gratis, without interest, those nine."

LV. Fr. Antonino Diana, Vol. VI, tract 5, resolution 47, no. 5: "I shall show to confessors two modes by which penitents in lending may bargain that the gain be at once returned to them out of that loan.

The first is that of Leonard Lessius, etc. The second mode is that of John de Salas and John Azor, namely, by not receiving that ceasing gain out of the sum of money itself, or out of some fruit-bearing thing, but, for example, in such a quantity of oil, of corn, of wine, etc. Confessors will note this: in practice they will extricate themselves. FOR THE REMOVING OF OCCASIONS OF SINS LET THEM USE THESE COUNSELS."

LVI. *Whether it be usury that the borrower at the beginning of the loan should pay the gain on occasion of the loan.* Baunius, in his *Moral Theology,* Vol. III, book 2, question 12 (cited in Diana, in the place cited, resolution 45), answers in the negative, scandal being set aside: "First, because time is something extrinsic to usury: therefore from it the payment of ceasing gain does not contract the stain and vice of usury. Secondly, as soon as anything is owed, to pay it is not evil; but ceasing gain is owed to the lender as soon as the loan is made: therefore he will then be able to pay it."

LVII. Fr. Paul Layman, Book III, tract 4, chap. 18, no. 2: "A citizen for the greater part of the year has money ready, out of which he may give a loan to needy craftsmen, especially weavers, a pledge being left him for the security of payment, for example a web. But when the pledge has been received, and payment is to be made after half a year, an increment is to be added upon each florin given on loan — for example, one *batzen.* For it must be considered that that increment is not received by reason of the loan, but by reason of the obligation, burden, and care which that citizen takes upon himself for the sake of the weavers, that for nearly the whole year he may have money in readiness for them, that at whatever time they come to his house he may admit them, count out the money, etc.; which obligation is appraisable at a price."

LVIII. Fr. Leonard Lessius, Book II, chap. 21, doubt 16, no. 130: "Certain Doctors judge that it is unjust and palliated usury when the same man buys back who sold. But it is not unjust, even though the seller himself buy back, provided it stand within the limits of a just price. … The reason is that the first sale is just; because the same wares are resold. Nor does it matter that this resale is made at the lowest price: both because wares which are pressed upon one by a seller become cheap. Nor does it matter either that the buyer is the same who before was the seller. BECAUSE IF ANYONE ELSE COULD BUY AT THAT PRICE, WHY NOT ALSO HE WHO SOLD?"

LIX. Fr. Thomas Tamburini, Book IX, tract 1, chap. 4, § 1, no. 6: "The first title is, because the buyer will be without the money which he himself hands over, for three or more months, whence he will be deprived — even if he be not a merchant — of the opportunity and freedom of gaining something with that money that is to be repaid, through other trades perhaps offering themselves."

LX. Fr. Lessius, Book II, chap. 23, doubt 9, no. 85: "You will ask whether that which is owed to exchangers by reason of provisions and interest may be continuously added by them to the principal, so as to increase the exchange." He answers: "This cannot be done, unless they be morally certain that they could have given it at once to others for re-exchange, and have gained by it. For then, by reason of ceasing gain, they can unite it to the principal for the increase of the exchange."

LXI. The Fathers of Salamanca, tract 14, chap. 4, point 2, § 4: "Things are not pledged in order that of necessity the rent-charges be paid out of them; but that the payment itself may be the more secure: and therefore they are pledged as a pawn and hypothec, not as the foundation of the rent-charge. But so it is that even if the pledges or the hypothec perish, the obligation does not cease (law *Adversus,*

Code, *On Actions and Obligations*). Therefore neither, when the things pledged to the rent-charge perish, does the rent-charge vanish."

LXII. Fr. Thomas Sánchez, Book I of his *Moral Counsels,* chap. 7, doubt 2: "Whether one who has a licence from the Pope or the Bishop to ask alms for one year, by himself or by another, that he may provide for his own necessity, may let out this right to another for some price. … The second and more probable opinion says that he may, and that no obligation of restitution is caused: because by no express law is he forbidden to let it out; nor is he made incapable of receiving the price of the letting; and he lets out that right which he has, and it is a contract of fortune, by which each party is exposed to the danger of gain and of loss. So Henríquez, Book 7, *On Indulgences."*

Chapter III — The various acceptations of right: the notions and divisions of justice

I. There are three acceptations of *right*. First, for the law defining what is to be attributed to each man out of justice: in which acceptation the law itself is called right, or the rule of right. Second, *right* signifies a power of doing, exacting, or receiving something. Third, *right* is taken for the equality between thing and thing. One right is *in the thing,* which gives an action both against the thing and against the person. By this right men possess the things which they hold, and are able to sell, alienate, let them out, and so forth. Another is a right *to the thing,* which gives an action against the person, not against the thing — that is, it gives a personal, not a real action. You sell your thing to another, which by the delivery of it becomes his. The buyer has a right *in* this thing bought; you retain a right *to* the thing, that is, you have an action against the person for exacting the price.

II. That potestative right is of two kinds: one of *jurisdiction,* which princes, prelates, and superiors possess over their own subjects; another of *ownership,* by which a man possesses his own thing. The remote matter of justice is things — money, wares, fields, houses, animals, and the like. The proximate matter is exterior human actions.

III. QUESTION I. *What is justice, and of how many kinds is it?* ANSWER. It is the perpetual and constant will of rendering to each his right. It is threefold: commutative, distributive, and legal. Commutative justice is between two equal men buying, selling, letting, and so forth. For in these contracts they are equals, even though on other grounds the one were a prince and the other a subject. Distributive justice is of the whole toward the parts, namely of the prince toward his subjects in distributing ranks, dignities, rewards, and the like. Legal justice is of the part toward the whole, that is, of subjects toward the prince, inasmuch as all render those things which are fitting to the community by the prescript of the laws. That this legal justice is not justice in the whole rigour of the term the Salmanticenses and others contend; but the opposite opinion is to me the more probable.

IV. *Distributive* justice distributes the goods of the community among the parts of the same community according to the proportion of merits. This virtue of justice resides in the superior, whose office it is to distribute the common goods; it is found also in subjects, inasmuch as they acquiesce in this justice. The mean of the thing which this justice regards is not one of arithmetical equality, but of geometrical proportion: which proportion holds between the goods to be distributed and the merits of the subjects.

V. QUESTION II. *Whether commutative justice is distinguished from vindicative justice?* ANSWER. Commutative justice, as has been said, renders to each his own thing according to the right which he has of exacting it; for it establishes an equality between debt and credit, which arises out of buyings, sellings, loans, and the remaining contracts; likewise out of thefts, homicides, and other injuries, whose damage is to be compensated. The principal act of commutative justice is restitution.

VI. Vindicative justice can be regarded either in the judge or prince, or in the private persons injured, who demand vengeance. Under the former consideration it is an act of true commutative justice; but in the persons injured it is not true justice, but a potential part of the same, as St. Thomas teaches, II-II, q. 80, art. 1, reply 1. The reason of the first part is evident. For the judge is bound by force of commutative justice not only to provide for the common good, but also to defend his subjects from injuries and oppressions. There is present besides a mean of the thing. For the judge is bound to inflict a penalty equalling the right of the offended person that has been injured. The second part is plain of itself.

VII. QUESTION III. *Is commutative justice distinguished in species from distributive justice?* ANSWER. The common opinion affirms it. Since indeed the specific diversity of virtues is taken from the formal diversity of objects. But each of these virtues regards a formally diverse object. Therefore a specific diversity resides between them. For the object of the virtue of justice is a right and an equality to be constituted between the right of one and the debt of another. Commutative justice regards arithmetical equality, distributive geometrical. The right of commutative justice is a rigorous right; the right of distributive justice is imperfect, founded not in the thing or to the thing, as the former, but in fitness and personal capacity. The first justice regards the price of the thing; the other the prerogatives of the person, as St. Thomas teaches, II-II, q. 61, art. 1.

VIII. It is to be observed nevertheless that distributive justice almost always has commutative justice inseparable from it. On which matter read Vol. VII, book 2, dissertation 1, chapter 4, no. 10.

IX. QUESTION IV. *What are the vices opposed to justice?* ANSWER. Justice is here taken, not for sanctifying grace, by which a man is called just, nor for the general justice set in the complex of all the virtues; but for that peculiar moral virtue which inclines the will to render to each what is his, as we have already said. Now the other virtues are wont to have two contrary vices: the one by excess, the other by defect. To justice there is opposed defect only, inasmuch as a man does not render what he owes. Excess in rendering more than is owed conflicts with the other virtues, but not with justice, unless harm be inflicted upon another.

X. The vice opposed to justice is injustice, which, like justice, is divided into various species. For one is legal injustice, which relaxes the laws; another is opposed to distributive justice, namely respect of persons; and to commutative justice are opposed thefts, homicides, rapines, contumelies, calumnies, false accusations, the impostures of advocates, the unjust judgments of judges, and the like. Injustice is in its own kind a mortal sin; from smallness of matter, or by reason of indeliberation, it is a venial fault.

Chapter IV — On dominion, and its division, and the partition of goods

I. QUESTION I. *What is dominion, and of how many kinds is it?* ANSWER. Dominion admits of very many significations. Here it is taken for the dominion of ownership, which is properly dominion, and is defined as *the faculty of using a thing as one's own in all the uses permitted by law, to one's own advantage.* That dominion is of two kinds: one *perfect* and full, the other *imperfect* and half-full. The former was once called *mancipium,* because it was taken with the hand; and it is dominion over the substance of the thing and its advantages, and therefore it is also called dominion *in solidum;* because it has not only the ownership, by force of which it is called *direct* dominion, but also the advantages and uses of the thing, on which account it is called *useful* dominion. Imperfect dominion separates these two, namely the ownership of the thing from the use of the thing. For Titius often has the ownership of the thing without the use, and is called the proprietary or direct lord. Sempronius often has the use of the thing, or the usufruct, without the ownership; and is called usufructuary, emphyteuta, vassal, or feudatory.

II. From this, however, it by no means follows that direct dominion lacks all utility. It lacks indeed directly the fruits which are wont to be produced by the thing, and therefore it is distinguished from the useful; but it has many other advantages. For the proprietary lord is able to alienate the thing; besides which he receives the *canones,* or pension, from the usufructuary or emphyteuta; and finally the useful dominion often returns to the proprietor. And when with the proprietor's licence an alienation is made by means of a new contract, a *laudemium* is to be paid to him. Lastly, one dominion is *high,* which belongs to princes; another *low,* which subjects possess over their own goods.

III. Dominion is transferred either by title or by delivery of the thing. For he who furnishes another with the title or right of a thing intends to transfer dominion. Here the transfer of dominion is wont to be described as *the transmission of a thing from him who lawfully possesses it to another who begins to be its lord.* The principle of such transfer is threefold: God, man, the prince. The root of the transfer of dominion proceeds from the division of things. The division of things was introduced by the law of nations. Not all things, however, are divided by the law of nations: for many remain common, such as roads, squares, cities, rivers, the sea, wild beasts, and the like.

IV. Useful dominion is *the right of using and enjoying another's thing, the substance of the same being preserved.* One right is called the *use of right,* another the *use of fact.* But the use of fact is not a right, but the execution of a right. The proper right is the right of using, which is distinguished from other rights which afford no use, such as is the right of a depositary in the thing deposited, or of a creditor in a pledge. There is added *and enjoying,* which particle distinguishes usufruct from bare use: for a user is able only to use the thing to his own advantage; whereas a usufructuary can both use the thing and sell, alienate, or let out the fruits of the same, the substance of that thing being preserved. But the proprietary lord is able to alienate the thing itself. Usufruct is of two kinds, legal and conventional: the former is effected by law, the latter by agreement.

V. QUESTION II. *What are the fruits which a usufructuary may enjoy, and what ought he to furnish?* ANSWER. Whatever bears fruit, and can be perceived from it, is comprehended under the name of fruit. The usufructuary does not acquire dominion of the fruits unless they be gathered: wherefore if he die before the gathering, they belong to the lord. The usufructuary, as a good father of a family, ought to preserve the substance of the thing. If any head of the flock die or be rendered useless, if the

plants of the vineyards wither, he is bound to substitute other fruitful head or plants. If without his negligence the things, or parts of the things, perish, whether by frost, hail, or invasion, he is held to nothing. The usufructuary may, with the proprietary lord consenting, but not if he refuse, cede his right to another.

VI. QUESTION III. *What is the contract of emphyteusis, and of fief?* ANSWER. Emphyteusis is a contract by which in perpetuity, or for a time not shorter than ten years, an estate is handed over to someone to be enjoyed, with the burden of a pension to be paid to the direct lord in recognition of the dominion. The emphyteuta may, without the lord's knowledge, let out the emphyteusis to another for ten years. A *fief* is defined as *a grant of an immovable thing, the useful dominion being transferred, the direct remaining with the proprietor, with the burden of fidelity and of personal service to be exhibited.* A fief differs from emphyteusis in this, that the emphyteuta pays a real pension to the direct lord; whereas the feudatory or vassal is bound to render personal service at a fixed time to the infeudator, whether at court or in war.

VII. QUESTION IV. *What is possession, and the manner of acquiring or losing it?* ANSWER. It is the detention of a thing by the support of body, of mind, and of right. For true possession it is required that a man take possession of the thing in mind and in body, in the manner prescribed by law, namely with hands, with feet, or by another formula defined in the law. Possession is twofold. One is *just,* that is, of right together with fact. The other is *unjust,* and of fact alone. The former is called the detention of one's own thing with the right of detaining. The latter, on the contrary, is the detention of a thing as one's own without the right of detaining.

VIII. There are four prerogatives, or privileges, of possession. First, there is good faith. Second, if a doubt arise upon the right, the condition of the possessor is the better. Third, in court the burden of proof lies upon the plaintiff, not upon the possessor. Fourth, it is granted to the possessor to defend his possession in a manner lawful and honourable. Certain moderns have asserted that not only may those things which we actually possess be lawfully defended by a defence that kills, but also those to which one has an inchoate right. Which doctrine Innocent XI condemned in two theses. The thirty-first: *It is lawful not only to defend by a defence that kills the things which we actually possess, but also those to which we have an inchoate right, and which we hope we shall possess.* The other, the thirty-second: *It is lawful both for an heir and for a legatee so to defend himself against one who unjustly hinders either the entering upon the inheritance or the payment of the legacies; as also for one having a right to a chair or a prebend against one who unjustly hinders the possession of them.*

IX. Possession is obtained in three ways. First, by *true* apprehension, when with the hands you obtain a movable thing, money, wares, and the like; with the feet an immovable thing, a house, a field. Second, by *fictive* apprehension, when a man receives the keys of a house, or a writing or instrument in which the right to an estate, a house, and so forth is contained. Third, the *most civil,* which is committed to execution by the sole disposition of law.

X. Movable things possessed are lost: first, by the will of a possessor who is master of himself and an absolute lord. Wherefore wards and madmen can alienate nothing without the consent of a guardian. Second, by theft and rapine. Third, by fortuitous loss, as of a coin, a ring, a gem, and the like. Animals are lost by flight, unless they be of that kind which are wont to return. But a slave is not lost by flight. Immovable things are lost: first, by the long absence of a possessor who neither by himself nor by another protests that he is unwilling to give up the thing. This absence some limit to ten

years, others extend beyond. Second, when a lord knows his thing to be possessed by another, and neglects to recover it when he could. Third, when the thing is so occupied by another that there is no probable hope of recovering it. Fourth, by long forgetfulness.

XI. QUESTION V. *Who are capable of dominion?* ANSWER. All men — sinners, unbelievers, heretics, and the rest. Children before the use of reason are not capable of perfect dominion. Curators and guardians appointed by the commonwealth can supply the consent of children.

XII. QUESTION VI. *Is it lawful for anyone to take animals tame by their own nature?* ANSWER. Tame animals, such as oxen, sheep, dogs, hens, swine, and the like, if they go forth from the custody of the house and depart to a distance, always remain the lord's, and it is lawful for no one to usurp them to himself: and he who should take them would, besides a grave sin, be liable to restitution. Animals wild by their own nature, but made tame by the industry of men — such as hawks, stags, bees stored in hives, fish enclosed in the ponds of their lords — remain under the dominion of the possessor, and cannot be usurped by others. But when they flee from custody, and there is no hope of recovering them, then they acquire their pristine liberty and become common, and he becomes their lord who first takes them. Wild animals belong to the first occupant, as all teach: for these are by their own nature common. And when they are found on another's land, they belong to the taker, not to the lord; although lords may forbid anyone to enter upon their own lands. In which case those who enter are bound to compensate the damage inflicted, but the beasts taken become the man's. A wild beast mortally wounded belongs to him who wounded it; otherwise if the wound be not mortal, and there be no hope for the wounder of taking it. For then the beast belongs to the first taker.

XIII. QUESTION VII. *What is to be said of fishing, fowling, and hunting?* ANSWER. All these are common by the law of nature; by positive law they are in some places, and at some times, forbidden. Those who have estates and lands in which there are lakes, woods, and the like, can by right forbid that anyone hunt or fish in these places. Princes can prohibit fishing, hunting, and fowling on the lands of any city; yet cities which have the dominion of the lands are bound to compensate the princes. Similarly princes are bound to compensate the lords of lands which they lay waste by their sporting, or to whom they inflict damage. Those who hunt in forbidden places against the edict of the prince do not sin mortally, as many authors teach, because such edicts are penal, and because edicts of this kind have ceased by desuetude. The circumstances, however, are to be regarded. Clamorous hunting is forbidden to clerics and monks.

XIV. QUESTION VIII. *Whose are the woods, mountains, and pastures?* ANSWER. The dominion of these belongs by the law of nations to the nearer peoples; and all these are common among neighbouring and conterminous peoples, unless by some peculiar title some people has claimed them for itself. Princes and communities can by right forbid that at fixed times anyone cut wood or send animals to pasture, for the sake of the common good. This end being removed, prohibitions ought not to be made, because individual townsmen have a right to the fruits of common places of this kind.

Chapter V — On the dominion of things found, and of those things which accrue by force of alluvion or in another manner; and on prescription

I. Three kinds of goods are to be distinguished. Some are those which no one has ever possessed, such as gems and pearls. Others are treasures, which by the law of nature belong to the finder. Of the third kind are lost goods, which have a lord near at hand; and the finder who retains them commits theft, if he have knowledge of the lord, or could have it. If nevertheless they have long lacked a lord, they are held as derelict, and belong to the first finder.

II. The goods of the shipwrecked are held by no one as derelict; those who usurp them when found sin, and are bound to restitution, and very often incur the excommunication of the Bull *In Coena Domini*. Vacant goods are those which a man dying without a testament leaves, and who has no necessary heirs. These are wont to be applied to the treasury. The goods of pilgrims dying without a testament the bishop ought to lay out on pious works.

III. Those who find lost goods are bound to restore them to the lord. If they be ignorant of the lord, they are bound to use diligence to discover him. The thing found is to be announced from the public pulpits, and notices are to be posted in public places, in which, with due caution, it may be made known. The finder can by right demand nothing for the finding. If the lord offer a gift, he may accept it. If after diligence used the lord be not found, many teach that the finder can retain those goods for himself; but to me it is more probable that they are to be distributed to the poor, or applied to pious works. They are nevertheless to be kept so long as there is hope of the lord being found. If the thing does not suffer long keeping, it is to be sold, and the price kept for a fitting time for the finding of the lord. If the finders be poor, let them consult prudent men whether they may retain part, or the whole, of the goods found.

IV. A *treasure* is properly called an ancient deposit of money, of which no memory survives. This treasure belongs to the finder by the law of nature and by the common civil law. For the rest, many peculiar positive laws have decreed to whom treasures found are to be applied. Money, or other precious things, hidden for fear's sake — say of war, plague, or marauders — do not come under the name of treasure. He who finds them and does not restore them is guilty of theft. If by chance a true treasure be found in another's house or land, half the part belongs to the finder, and half to the lord. If it has been sought by industry on another's land, the whole is owed to the lord, as all commonly teach; who nevertheless add that the finder of a treasure is not bound to restitution before the judge's sentence, because the law forbidding to dig on another's land is penal. That laws of this kind oblige in conscience is to me the more probable, and consequently that the finder is bound in conscience to restitution. The lord of the ownership only is likewise lord of the land in which the treasure is found. Wherefore if a treasure be found in a road, in a square, or in any other public place whatsoever … … whether by chance or by industry, the whole belongs to the finder, unless some peculiar law stand in the way. A treasure found in a field bought belongs to the finder.

V. QUESTION I. *What is to be said of dominion by force of alluvion, and the like?* ANSWER. Rivers induce alluvion when they pluck away a part from one estate and join it to another; which can happen little by little imperceptibly, or in an instantaneous and manifest manner. The lord of an imperceptible alluvion is he whose estate is increased; but on the contrary the lord of a perceptible and manifest

one is the possessor of the estate from which the earth was taken, unless he hold the earth torn away as derelict. But concerning this alluvion the laws are to be consulted.

VI. *Accession* is that which adds something to your thing. It is twofold. The one is natural, such as are the offspring of a handmaid, of flocks, of plants which are born on one's own land. The other is artificial, or industrial, such as is that which is made by painting, by building, by writing, by weaving in, by grafting, and the like. The lord of the handmaid, of the land, and so forth, is the lord of the fruits.

VII. Another mode of acquiring dominion is *specification,* which occurs when out of the material of another lord a new species of thing coalesces: as wine out of grapes, oil out of olives, a vessel out of silver. Concerning these there is fuller discourse in Book 2, *On Justice,* title 1, § 25. When out of two a third one thing is made, it is called *confusion,* and the dominion becomes common; but it is *commixture* when things are so mingled that, the same parts remaining, they constitute one third thing, as when moneys, grains, and the like are mingled. When mixed bodies can be discerned and separated, then they pertain to their respective lords. When on the contrary the aforesaid bodies are so mingled that they can neither be discerned nor separated, you become their lord; you are nevertheless bound to pay the price of the other's thing mingled with your own.

VIII. QUESTION II. *How is dominion acquired by force of prescription, or usucapion?* ANSWER. Prescription is twofold. One draws its origin from the natural law itself; the other has been introduced by positive law. Of the first now, of the other afterwards. From the same fount whence the dominions of things flowed forth, thence usucapion, or prescription, also proceeds. By natural and permissive law all things were common, and nature itself inclines to this community, if it be considered apart from its innate appetitions. For the rest, nature being considered as it now is, division was necessary. Prescription therefore takes its origin from the law of nature itself, and its execution was committed to the law of nations. For this prescription is the basis and safeguard of peace and of mutual tranquillity among men. For the division of goods could not serve reciprocal concord, unless long-lasting possession rendered possessors secure and safe. For this security acquired by usucapion being taken away, dominions would always remain uncertain and in suspense.

IX. That this prescription is confirmed by divine law is clearly gathered from divine Scripture itself. For these words are had in Judges, chapter 11: *Why in all this time hast thou attempted nothing about this recovery?* Jephte therefore alleged against the Ammonites, besides the title of war, a possession of three hundred years; and objected to the Ammonites that in so long an interval they had never attempted anything to recover the land as their own. This prescription introduced by the law of nations has no other conditions save long-lasting possession and good faith.

X. QUESTION III. *What is prescription undoubted by the civil law?* ANSWER. It is *the acquisition of dominion and the extinction of another's right, with the continuation of possession in good faith for the time prescribed by law.* This definition all admit. That prescription, or usucapion (for although some say that prescription transfers movable things and usucapion immovable things belonging to another to a second party, yet more commonly this distinction is rejected, and the one is used for the other), may adjudge dominion to you and extinguish another's right, it must bring with it a continued possession begun in good faith, with a title either real or presumed, and for the time predetermined by law.

XI. Hence it is that authors commonly assign four conditions necessary to prescription. First is possession, of which it has been spoken. Second is a title probably presumed. For if a true and certain one be present, there is no need of prescription. A title therefore is necessary, either presumed, which cannot be proved but must be presumed; or coloured, which can be proved. That is called coloured which is reckoned true, although in the thing itself it be false. Within the space of twenty or thirty years a coloured title must be proved, and unless it be proved, prescription is not admitted. After forty, or fifty, or a hundred years a title is not proved, but presumed. Third is the condition of the amount of time, concerning which authors go off into various parts. The more common opinion is this. For the usucapion of movable things three years among those present and four among those absent are required. The Roman Church alone is excepted, against which, whether in movable or in immovable things, no prescription is admitted, except after the very longest time of a hundred years. Against wards, so long as they are wards, no prescription prevails, whether of movable or of immovable things. The time necessary for prescription must be continuous. Here the continuation of time can fail in two ways: first, while it is interrupted by opposed acts; second, while the prescription sleeps. And it is said by the jurisconsults to sleep when on account of impediments it cannot run, as in time of war, of plague, and the like.

XII. The last and chief condition is that which they call *good faith,* by which a man is persuaded that the thing he possesses belongs to him, or at least is ignorant that the thing is another's. Authors distinguish a twofold ignorance: one of right, the other of fact. If you believed that Sempronius could sell you his own thing, you would labour under an ignorance of right. If you believed the thing to be his, which in truth it is not, there would then be an ignorance of fact. All confess that ignorance of fact does not impede prescription.

XIII. Theologians dispute whether an invincible ignorance of clear right (of vincible ignorance, since it cannot stand with good faith, there is no dispute) is an obstacle to prescription. De Lugo, Castropalao, and others deny it. But the more probable opinion affirms it, and the text proves it which is had in the *Digest,* title 6, law 4, and is of this kind: *ignorance of right is denied to profit in usucapion; but that ignorance of fact profits is established.* That law, like also the other which is had in the law *Sumatur, Digest, On Usucapions,* has place not only in the external forum, but also in the internal. Wherefore altogether vain and inept is the distinction of adversaries, by which they say that the laws cited have place in the external forum but not in the internal. For those laws, which set forth the law of nature and of nations, oblige no less in the one forum than in the other.

XIV. An heir who receives an inheritance from an author of bad faith cannot prescribe, as all teach, because an heir bears the person of the deceased, and constitutes one person with him. But he who in good faith receives a thing from an author of bad faith by another title besides inheritance — say of purchase, of legacy, of donation — is able to prescribe, as the common opinion teaches.

XV. Prescription endowed with all its conditions acquires dominion for the one prescribing, not only in the external forum but also in the internal, as the more common and true opinion teaches: since indeed prescription takes its rise from the law of nature itself, and is confirmed by the law of nations and by divine law, as consonant with the public good, with peace, and with tranquillity. It is coeval with the very division of things, as it were the safeguard and supplement of the same.

XVI. QUESTION IV. *What of the dominion of children subject to the paternal power?* ANSWER. There are four kinds of goods which can pertain to such sons. *Castrensia, quasi-castrensia, adventitia,* and

profectitia. Castrensian goods take their name from war, or the camp, and are conferred under the title of military service. Quasi-castrensian are those which sons of a family obtain by exercising public offices — say the offices of physician, advocate, procurator. Those which sons of a family obtain by title of inheritance, of a legacy left not out of regard for the father, of trade, or of succession to maternal grandparents, are called adventitious. But those which sons obtain out of regard for their parents are called *profectitia*.

XVII. Sons constituted under the paternal power possess full dominion, both direct and useful, in goods both castrensian and quasi-castrensian, and are able to alienate, distract, and give them, without consulting their parents, after puberty attained. But before puberty the administration lies with guardians or parents, without whose knowledge they cannot alienate them. In adventitious goods sons of a family possess direct, but not useful, dominion. In *profectitia* goods parents have dominion both direct and useful. Let it suffice here to have touched briefly upon justice and dominion taken in general.

Dissertation II — On restitution, both in general and in particular

Chapter I — The notion of restitution, and the principles from which it proceeds. Tardy debtors and their confessors are admonished

I. QUESTION I. *What is restitution, and whence is it born?* ANSWER. It is an act of commutative justice by which the loss inflicted upon another is taken away, or what has been received is rendered back, and justice, or equality, is constituted between the parties. Hence it is that restitution arises from a twofold principle: namely, either from unjust acceptance, or from the thing received. Under the name of unjust acceptance is understood whatsoever … … is understood, not only what has been taken away by theft or rapine, but also any injury whatsoever inflicted upon reputation or honour, by adultery, calumny, or defamation. Wherefore every loss opposed to commutative justice, whose right is violated, ought to be repaired by restitution up to equality. Restitution is said to be *from the thing received* when another's thing is with you, whether justly or unjustly. Here the two principles are sometimes conjoined, as in a thief, who is liable to restitution both from the thing received and from the unjust acceptance; sometimes separated, as in him who possesses another's thing in good faith, thinking it to be his own.

II. QUESTION II. *Whether restitution is to be made at once?* ANSWER. Restitution from unjust acceptance is to be made forthwith. Restitution from the thing received is to be made within the time predetermined between the parties, as happens in a loan, in selling and buying, in a deposit, and the like. *If another's thing* (says St. Augustine, Epistle 54) *can be rendered back and is not rendered back, penance is not done, but feigned.* Reason shows the same. For it is no less against justice to retain against the lord's will than to filch, as St. Thomas teaches, II-II, q. 62, art. 8. *As to take another's thing is a sin against justice, so also is it to detain it.*

III. Hence you may infer that those sin who put off the wages of workmen from day to day, against whom holy Scripture cries out: *The wages of him that hath been hired by thee shall not abide with thee until the morning* (Leviticus 19). And again, Tobias 4: *If any man hath done any work for thee, immediately pay him his hire, and let not the wages of thy hired servant stay with thee at all.* More vehemently does St. James the Apostle cry out against the oppressors of hirelings, chapter 5: *Behold the hire of the labourers, who have reaped down your fields, which by fraud has been kept back by you, crieth: and the cry of them hath entered into the ears of the Lord of Sabaoth.* In three ways is a wage defrauded: first, when it is not rendered; second, when it is diminished; third, when the rendering of it is deferred. And it is the wage that cries out at the tribunal of divine justice, not the poor man; because the poor man often, for fear of the rich, dares not cry out. But the wage fears nothing, and therefore implores vengeance upon the head of the rich man. Solomon, Ecclesiasticus 34, compares that crime to the shedding of blood: *He that sheddeth blood, and he that defraudeth the hireling, are brothers.* Nor does the excuse avail of those who say that they do not pay because they lack money. If they lack money, why do they call hirelings to work? These are thieves and robbers, since they know that they are not able to pay, and yet they flay their very skin.

IV. What is to be said of tardy debtors, who buy from merchants and do not pay promptly? *We will pay,* they are wont to say, *as soon as may be. At present it is needful that we provide for our own affairs.* Nobles

set against it the splendour of their own estate, and the sustenance of sons, wives, and servants. *The payment of debts would thrust me down from my proper estate:* and therefore you bring it about that others go begging! You know not how to bear hunger, and therefore you cast others into famine? These men ought to diminish their estate, to restrict the number of their servants and horses, and to cut back the pomps of their wives and sons to the quick. Those who abound in goods are commonly debtors: for no one entrusts his wares to the poor. Those who are able to restore and to pay, even with inconvenience (never is restitution convenient), and who neglect it, are in a state of damnation, and multiply their sins day by day. *The retention of another's thing* (says St. Thomas, Suppl., q. 6, art. 5) *against the lord's will runs contrary to a negative precept, which obliges always and for always: therefore a man is always bound to render it at once*. Therefore those who omit restitution, unless they be truly powerless, are in continual mortal sin.

V. QUESTION III. *What is to be said of confessors who absolve tardy debtors?* ANSWER. These sin, and multiply sacrileges. Nor is it lawful to pay a debt by parts. This truncated payment inflicts a grave detriment upon creditors. They ought to pay the whole debt at once, when in truth they can, even with inconvenience. The debtor is guilty, the creditor innocent. Therefore the guilty debtor, not the innocent creditor, is bound to sustain the inconvenience.

VI. The general rule therefore is this. As often as restitution is morally possible, it is to be carried out before such debtors are absolved. Let the confessor bear himself toward a tardy debtor as toward a concubinary, whom he is not to absolve unless he first cast out the concubine. Let the debts of the poor therefore, and the labours of hirelings, first be paid, and afterwards let them be absolved. Let the confessor beware of the opinion of certain casuists, and chiefly of Tamburini, Book III, *Method,* chapter 4, no. 5, who says: "If the confessor should foresee that the penitent will not make restitution, should the nullity of the title which the penitent thinks he possesses be disclosed to him, such nullity is not, according to Sánchez, to be made plain to him by the confessor, when he has not been questioned … to the prejudice of a third party who will go without what is his." The confessor is bound by his office not only to judge, but also to teach. Many other laxer things Fr. Tamburini teaches there. See Vol. VII, book 2, dissertation 2, chapter 3; and the *History of Probabilism and Rigorism,* dissertation 1, chapter 5.

VII. QUESTION IV. *What kind of fault of injustice brings in the debt of restitution?* ANSWER. One fault of injustice is theological, another juridical. A theological fault is a sin either mortal or venial. A juridical, or civil, fault is the omission of the due diligence by which a man is bound to know, to beware, to provide, or to do something, whence a loss follows. Whether this fault contain malice or not is not attended to. It is threefold: grave, slight, and very slight. *Grave* is the omission of that diligence which prudent men of the same profession are commonly wont to use. This fault is called also *most grave,* as is manifest fraud — say, when the keeper of another's thing sleeps, or feigns to sleep; and *graver,* which is presumed fraud, as when a man knowing and able to hinder does not hinder. *Slight* fault is the omission of that diligence which the more prudent are wont to use. *Very slight* fault is the omission of that diligence which the most careful men use. This juridical fault is sometimes conjoined with, sometimes separated from, the theological fault.

VIII. When none of these faults is committed, no debt of restitution arises, three cases being excepted. The first is, if your animal kill another's animal or trample down his crops, you are bound to compensate the loss. Second, if your slave injure another without his own fault, you are likewise

bound to make good the loss, as is had in the *Institutes, § Domino*. Third, if something be thrown into the road out of your house, and it has not been proclaimed, and if loss befall passers-by without your fault, you are bound to compensate the loss. These laws, however, do not oblige before the judge's sentence, because they have been so received by use.

IX. QUESTION V. *Does theological fault alone bring in the debt of restitution?* ANSWER. Outside an office or a contract, theological fault alone, not interior but exterior, brings in the debt of restitution, because theological fault alone injures another's right. And so if the juridical fault be separated from the theological fault, it does not bring in the debt of restitution, unless a peculiar contract intervene. From a slight theological fault a slight, from a grave a grave obligation of restitution arises; sometimes nevertheless a slight exterior fault conjoined with an interior will of harming can bring in a grave obligation of restoring. An advocate uses all the diligence to which by force of his office he is held, and which diligent professors of this art are wont to use, but was unwilling to use greater diligence, out of hatred and inward envy against his client, that loss might thence follow to him: although this exterior omission be slight, yet conjoined with an inward depraved affection of harming, it can bring forth a debt of restitution. Read Vol. VII, Book I, dissertation 2, chapter 5, no. 8.

X. QUESTION VI. *Whether the professors of any art are bound to restitution for a slight or a very slight fault?* ANSWER. It has already been said that no one outside an office or a contract is held to restitution for a slight or very slight juridical fault, when the theological fault is removed. Now it is asked whether craftsmen, physicians, advocates, and such as these, who exercise their arts for an agreed price, are bound to restore on account of a slight or a very slight fault? The common opinion denies it. Since the aforesaid are bound neither from the thing received nor from unjust acceptance: because unjust acceptance is not found without a grave fault joined to a theological fault; nor finally from contract, because none of the said persons obliges himself to exercise his art with greater diligence than prudent men of the same professions are wont to use. From a grave juridical fault alone, therefore, conjoined with a theological fault, does the debt of restitution arise in them. If nevertheless the aforesaid should promise greater diligence than the rest of the professors are wont to use, then they would be held more or less, according to the diversity of circumstances, to restitution for a slight or a very slight fault.

XI. QUESTION VII. *What juridical fault is required in a contract, that it may bring in the debt of restitution?* ANSWER. The first opinion teaches that one is held to restitution for a slight or a very slight fault, if the contract turn to your advantage alone, as in a loan for use, and the thing perish or be made worse. And this is the disposition of law, *Digest,* book 13, title 6, law 18: *In things lent for use such diligence is to be furnished as each most diligent father of a family uses toward his own affairs*. This disposition is congruous with natural equity, namely that he who uses another's thing gratis should use the highest diligence in its custody. For unless you be most diligent in this contract, when will you ever be so? Common sense itself dictates that a borrower be bound to greater diligence than the rest. If therefore the rest are held for a grave fault … … here he will be bound for a slight or a very slight fault. An exception is *precarium,* in which he who receives is held only for fraud or for grave fault; since the lord can at any time demand back a thing granted on sufferance. If the contract be useful to both parties, as the contract of letting, of hiring, of pledge, each is subject to restitution for grave and slight fault,

but not for very slight. If the contract turn to the advantage of the giver alone, as happens in a deposit, he who receives is held to restitution for grave fault and fraud only.

XII. QUESTION VIII. *How is a possessor in good or in bad faith held to restitution?* ANSWER. A possessor in good faith is he who, invincibly reckoning another's thing to be his own, possesses it. A possessor in bad faith is he who knowingly retains another's thing, or who by vincible or affected ignorance persists in the possession of another's thing. A possessor in good faith can consume and sell another's thing so long as he perseveres in good faith; but as soon as he observes that the thing is another's, he is liable to restitution: because if he be in delay, he becomes a possessor in bad faith, unless a completed prescription go before. If, after he has consumed the thing, he observes it to be another's, he is bound to restore that in which he has been made richer. But if the thing subsist, if not in kind, at least in an equivalent, then you are bound to restore it. You have eaten another's thing, thinking it your own, and have preserved your own. Then another's thing exists equivalently in yours. Therefore you ought to restore it. But if you had consumed nothing of your own, you are held to nothing, because you have been made richer by nothing. If you doubt whether you have been made richer by another's thing, then the matter is to be settled in proportion to the doubt, at the arbitration of wise men.

XIII. QUESTION IX. *Whether one who in good faith buys or receives from a robber things consumable by use is bound to restore the thing, if it subsist, or that in which he has been made richer?* ANSWER. You have received money from a robber, or have bought wine, wheat, a garment, or the like; you have come to a supper made of food filched by theft in another's house, being about to consume just as much in your own. If the thief be made powerless for restitution, all confess that you ought to restore the thing, if it subsist, either in the thing itself or in an equivalent, that is, in that by which you have been made richer. But it is disputed whether you ought to restore, when the thief has goods with which he can himself restore. And the discourse is of a possessor both in good and in bad faith. For as regards this, they are equal. If the thing subsist, each is bound to restore the whole: if the thing do not subsist, each ought to render back an equivalent price, with this sole difference, that a possessor in good faith is bound to restore only that in which he has been enriched, whereas a possessor in bad faith is bound to restore the whole.

XIV. To me the more probable opinion is that each possessor, whether of good or of bad faith, is held to restitution with the sole assigned difference. Since a thing, wherever it be, cries out to its own lord, who has the right of demanding it back wherever it subsist, whether in itself or in an equivalent. This thing, wheresoever it comes, carries with it the inseparable burden of returning to its own lord. Some distinguish between things mingled and things not mingled with the robber's goods. But this mingling cannot despoil the lord of the right of demanding back his own thing wherever it subsist, either in itself or in an equivalent, provided it be certain that the thing subsists in one way or the other.

XV. He who possesses another's thing not consumable by use — namely a horse, a book, a picture, and the like — whether in good or in bad faith, is bound to restore the same if it subsist, because this, while it subsists, cries out to its lord, as the common and true opinion teaches. A possessor in bad faith, whether the thing subsist, or have been consumed, or sold, or have perished, even without his own fault, ought to restore either the thing or the price of the same. Besides which, the unjust plunderer or retainer is bound to compensate all the losses which the lord has suffered on account of

the privation of his thing. You have plundered or retained the moneys of a merchant, which if he had had he would have exposed to trade, or would have repaired imminent losses: beyond the restitution of the money plundered or unjustly retained, you are bound to compensate the losses and the gains not obtained on account of the privation of that money.

XVI. QUESTION X. *If a thief plunder a thing which would have perished with the lord, is he bound to restore the same if he preserve it, or the price, if it have perished?* ANSWER. If you doubt whether the thing could have perished with the lord, you ought to restore the same, or the price of the same, even if it should perish without your fault — at least according to the estimation of the doubt. The same is to be said of a depositary, and of a debtor who is in delay of restoring another's things. Again, even if it were certain that the thing would have perished with the lord unjustly — say because a thief was going to filch it — you are liable to restitution, because another's theft does not excuse your own. These things are beyond dispute. Similarly, when you knew for certain that the thing would have been lost with the lord by a fortuitous chance, say by fire or shipwreck, if you should snatch it away, you would owe to restore it or the price of the same, even if the thing perished with you at that time at which it would also have perished with the lord: since you plundered that thing not that you might keep it for the lord, but that you might turn it to your own advantage. Therefore you plundered with the burden of restitution. That the thing here perished with you, you ought to impute to yourself. Unjust acceptance by its own nature brings an injury upon the lord; nor is the injury here taken away by this, that the thing would have been lost with the lord. Therefore the debt of restitution which you contracted by that act by which you took the thing away always perseveres until it be compensated by you. It is not hidden from me that many defend the opposite. But to me this opinion seems the more probable. You have stolen in a raging fire a thing certainly about to be burned. If the thing subsist with you, or the price of it, you are bound to restore it, even if it perished with you in another fortuitous fire. In the sacking of a city you steal another's thing, which would certainly have been filched by other thieves: you ought to restore it to the lord if it subsist, or the price, if you have sold it.

XVII. If you snatch another's thing from a fire, and, the danger being past, retain it, and it perish with you, not being about to perish with the lord, you are held to restitution, all confessing it. He who in bad faith filches another's thing, which if kept would turn out better (say you have laid waste a vineyard or crops unripe at a time when they were worth fifty, but at the time of ripeness would be worth a hundred): if the lord was going to sell those things at the time when you plundered them, you ought to restore the price according to the value which they have in the former state; but if he was going to preserve the aforesaid things, there is to be restored as much as, according to the estimation of prudent men, is worth the hope of keeping those things until the better state.

XVIII. QUESTION XI. *To whom does a thing taken away by theft accrue?* ANSWER. It accrues to the lord, not to the thief. Wherefore the thing is to be restored with the increase made with the thief, even if the lord would not have kept it until this time. Hence, if the price be increased on account of the multitude of buyers, restitution is to be made according to this value. If a thing taken away by theft in a cheaper state has been made better, and afterwards reduced to a worse state, it is to be restored according to the increase, if the lord would have kept it until this time; and if at the time of the cheaper price you sold the thing, and the lord likewise would have sold the same at this time, restitution can be made according to this value. This all confess; but they differ as to what you ought

to restore when at the time of the increase you sold a thing which the lord would not have kept until this time. Many defend that you ought to restore only according to the value of the cheaper price, since at that time it would have been sold by the lord. Others maintain that you ought to make restitution according to the value of the increase, whether intrinsic or extrinsic, when you at the time of this greater value sold or consumed the thing, although the lord would not have kept that thing until this time. Since the value of a thing accompanies the thing itself. Therefore, if the thing is the lord's, as in fact it is, so is the value of the thing. You sell or consume the thing at the time of the greater value: therefore this value is to be restored. I yield. Are you not, at the time at which you unjustly sell or consume the thing, bound to restore it to the lord? Further, the price of a thing is equivalently the thing itself. Therefore this price is to be restored. Here the second opinion seems to me the more probable.

XIX. QUESTION XII. *How ought a possessor of doubtful faith to restore another's thing?* ANSWER. A possessor of doubtful faith can be regarded at the beginning of possession and in its progress. He who doubts that a thing is another's, and buys it not to be handed over to the lord but that he may retain it for himself, is a thief, and is held to restitution both by reason of the thing received and of the unjust acceptance, even with the danger of losing the price: because he willingly subjects himself to this danger. Wherefore he ought to use diligence to find the true lord, to whom he may hand over the thing bought. If after moral diligence he does not find the lord, and the doubt ceases, he becomes a possessor of good faith, and can by right retain the thing for himself. If the practical doubt persevere, the thing is to be divided among the poor, the price paid in the purchase being retained in proportion to the doubt. If the doubt occur in the progress, and the thing was consumed before any doubting, he ought to restore that in which he has been made richer: if the thing exist, diligence is to be used that the lord be found, and in proportion to the doubt the matter is to be settled by the counsel of prudent men; nor does that rule avail: *the condition of the possessor is the better.*

XX. QUESTION XIII. *What fruits is a possessor of good faith bound to restore?* ANSWER. He is bound to restore all natural fruits, if they subsist, expenses being deducted; if they have been consumed, that in which he has been made richer. Since a fruit-bearing thing brings forth fruits for its lord. And this holds true even if the lord would have left the thing untilled.

XXI. QUESTION XIV. *What fruits ought a possessor of bad faith to restore?* ANSWER. He is bound to restore all natural and industrial fruits which the lord would have perceived, expenses being deducted, whether they subsist or not, whether he has been made richer or not. The same is to be said of a possessor of good faith, from the time at which he became conscious that the thing was another's. If he defer restitution, he becomes a tardy debtor, and is bound to restore all the fruits which he perceives, and to compensate both emerging losses and ceasing gains. If a thief does not perceive the fruits which the lord would have perceived, he ought to restore the price of the same. On the contrary, if the lord would have perceived no fruits, then, although the robber does not perceive them, he is not held to their compensation. But if the thief perceive natural fruits which the lord was not going to perceive, he ought to restore the same, because the thing would have borne fruit for the lord.

XXII. QUESTION XV. *What expenses may a possessor, whether of good or of bad faith, deduct?* ANSWER. Of expenses, some are necessary, as the tillage of fields, the food and custody of animals, the repair of houses, without which things either suffer detriment or bring forth no fruits. Others are useful,

which tend to this, that things be made better or increased, as the planting of trees, the multiplication of a flock, and the like. Others are voluntary, as pleasure-gardens, paintings, birds, and the rest of that kind, which serve pleasure. Industry, labour, and inconvenience in gathering the fruits and in preserving the things come under the name of expenses.

XXIII. All useful and necessary expenses made by either possessor are to be deducted in restitution, and the lord is bound to reckon them: because no one ought to carry off advantage from another's labours. If nevertheless the lord would have preserved his things without these expenses by his own industry, then they are not to be rendered to an unjust possessor, but only to a possessor of good faith. If the expenses should exceed the fruits, the lord would not be held to pay them, because then the thing would not turn to his own advantage, and he would be compelled to buy his own thing too dearly. Authors dispute concerning the restitution of expenses which are voluntary. As regards practice, restitution ought to be made at the arbitration of prudent men.

XXIV. QUESTION XVI. *He who buys a thing in good faith, may he render it to the thief and demand back the price, or is he bound to restore it to the lord without the price?* ANSWER. If the buyer prudently judges that the thief will restore the thing to the lord, without doubt he can rescind the contract and demand back the price. The difficulty is when the buyer doubts whether the thing will be restored by the robber to the lord, and the buyer cannot receive the price from the thief unless he restore the thing bought. For if he could recover the price, all confess that the thing is to be restored to the lord.

XXV. The first opinion denies that the buyer is bound to restore the thing to the lord with the loss of his own price. The opinion true to me is that the buyer in the case proposed is bound to restore the thing to the lord, as St. Thomas teaches, II-II, q. 62, art. 6. *Concerning him,* he says, *who has received another's thing, two things are to be considered: the thing received, and the acceptance. By reason of the thing itself, he is bound to restore it as long as he has it with him: because what he has beyond that which is his own ought to be taken from him and given to him who lacks it, according to the form of commutative justice.* The buyer in the case proposed has beyond that which is his own, because the thing bought from a thief is not his but the lord's. To him therefore it ought to be rendered. Nor can the buyer sell the stolen thing to another, because no one can sell another's thing against the lord's will. Therefore neither to the thief, who is not going to restore it to the lord. For a buyer selling a thing to a thief who will not restore it becomes a partaker of the theft.

XXVI. Our adversaries object: A buyer of good faith inflicts no injury upon the lord. What of it? Therefore he is not held to restore from unjust acceptance, but from the thing received. They insist: In an equal case of innocence the buyer ought to provide for himself rather than for the lord. As the lord has a right to the thing, so the buyer to the price. Rightly, well. Therefore let the thief render the price to the buyer, and the buyer the thing to the lord, and all is just. But because the wicked thief refuses to render the price, must therefore the buyer unjustly retain another's thing? Because the thief commits an injustice, must you likewise do an unjust thing? Other sophisms I pass over. Read Vol. VII, Book I, dissertation 2, chapter 7, no. 17.

XXVII. QUESTION XVII. *He who in bad faith buys another's thing from a robber, ought he to restore it to the lord or to the thief?* ANSWER. De Lugo, Diana, and others contend that the thing is to be restored to the robber. But from the things which have been said, the opinion appears false by the better right. For here he is bound to restore to the lord not only from the thing received, but also from unjust acceptance.

XXVIII. QUESTION XVIII. *He who in good faith sells to another a thing bought from a robber, is he bound to render the price to the lord or to the buyer?* ANSWER. Some teach that you are bound to restore neither to the lord nor to the buyer, save that in which you have been made richer. The opposite opinion is to me the more probable. If the aforesaid seller of good faith retained with himself another's thing, the truth being known, he would owe to restore it to the lord. But the price succeeds to the thing: therefore this price is to be restored to the lord, not to the buyer. The buyer intends to pay the price to the true lord. But you who sell another's thing are not the true lord. Nor do you in the sale transfer dominion, since you lack it. Finally, a thing always, wherever it be, cries out to its own lord: therefore either the thief, or you, or the buyer are bound to make good to the lord. The first who is bound to make good to the lord is the thief. The second is you, who bought the stolen thing, supposing that the thief is unwilling to restore. Further, as the thief with respect to you is alone liable to restitution, since he is the first guilty party, so you with respect to the buyer, who succeeds in the third place, are prior in the burden of restitution. Therefore if the buyer should restore the thing to the lord, you would owe to restore the price to the buyer. On the contrary, if the buyer does not render the thing to the lord, you ought to restore the price to the lord.

XXIX. QUESTION XIX. *He who receives false money and hands it over to another in spending it, to what is he held?* ANSWER. Diana with others answers that he who spends money in good faith is held to nothing, even if he afterwards learn that it was false; but that he is bound if he spend it in bad faith. But the true opinion teaches that in each case he is held to compensate the loss. Would you not, if you spent lead in place of silver, whether in good or in bad faith, be bound to make good the loss? No one therefore who has received false money, even in good faith, may by right put it about: and if he has put it about, knowing this, he is held for the loss.

XXX. QUESTION XX. *He who sells another's thing at a greater price, is he bound to restore the increase to the lord?* ANSWER. That increase of price which proceeds from the thing itself remaining unchanged both in substance and in the circumstances of place and time is to be restored to the lord. If on the contrary the increase be the fruit of the seller's industry alone, either because he kept the ware, or because he transferred it to another place, then it is not owed to the lord, but the seller can retain it for himself.

XXXI. QUESTION XXI. *If you sell your thing to a thief, from whom you receive in good faith stolen moneys as the price, are you liable to restitution?* ANSWER. The Salmanticenses answer that if you have the moneys unmingled and separate, you are held to restitution; otherwise if the moneys be mingled with your own. I have already said above that this mingling does not hinder your being held to restitution. For when you are certain that another's moneys are found in the heap of your own moneys, no reason appears why by force of that mingling you should acquire dominion. You are therefore held to restitution of the thing received.

Chapter II — On those who either hinder others from obtaining some good, or cooperate in the loss of others

I. Theologians reckon nine kinds of persons who concur, either positively or negatively, in the loss of others, and who are comprehended in these verses:

Command, counsel, consent, flattery, harbouring, Partaking, silence, not opposing, not disclosing.

II. He who inwardly assents to a man already wholly prepared to inflict an evil, no counsel or persuasion being added, sins indeed against charity, but not against justice: therefore he is free from restitution, because he does not flow into another's loss. But before discourse be instituted concerning causes cooperating to evil, a few things are to be premised concerning those who hinder the obtaining of a good.

III. QUESTION I. *Whether one who applies an efficacious impediment, that a man may not obtain a benefice to which he has a right, whether in the thing or to the thing, is liable to restitution?* ANSWER. The common opinion affirms it, whether this impediment be applied by fraud, guile, or force, or by entreaties, persuasion, and gifts. It is to be observed nevertheless that if the collator had constantly decreed to confer the benefice, the whole loss is to be made good. If the collator was doubtful, the loss is to be compensated according to the degree of hope. That the impediment may bring in the debt of restitution, it must be efficacious, that is, that on account of such impediment the effect should follow. The reason is obvious. He who by force, guile, or fraud hinders a man from obtaining a benefice to which he has a right, whether inchoate or consummated, inflicts an injury upon him: he who by counsel and persuasion hinders the obtaining injures both distributive and commutative justice. Therefore he who hinders is bound to make good the loss, either wholly or in part, according to the quality of the greater or lesser right which the candidate had to the benefice. But if you turn away the candidate himself by entreaties, persuasion, or counsel, you are held to nothing; because to one willing and consenting no injury is done. And if you should secretly disclose to the collator a hidden but true crime, on account of which the candidate would be deprived of the benefice, you would owe to restore nothing, since that would turn to the public good, provided the offence rendered the candidate unworthy or less worthy.

IV. QUESTION II. *To what is he held who hinders a promise made from being fulfilled?* ANSWER. If the promise be accepted, the loss is to be made good, because the promisee had a right to the thing promised him. If the promise be not accepted, and by counsel or persuasion you draw back the collator, you are held to nothing. He who by guile or fraud draws back a rich man from bestowing an alms upon a poor man is bound to make good the loss inflicted upon the poor man. If you should persuade a testator lying sick, who had destined a legacy to Sempronius, to institute him his heir, or rather to leave the legacy to yourself or to a friend, Sempronius being neglected, authors commonly teach that you neither sin nor are held to restitution; but I assert that you should never do it. An exception is the case in the *Clementine On Privileges,* where it is severely commanded to religious that they draw not testators back from bequeathing goods to mother churches. Let all who assist testators counsel them to distribute their legacies justly and prudently, the order of charity and of justice being preserved. He who without fraud or guile persuades someone not to confer an undue good upon Peter out of vehement hatred, is to me more probably bound to restitution. Since although inward hatred does not bring in this debt, it is nevertheless conjoined with an outward persuasion, which, though absolutely regarded it be innocent, in these circumstances becomes evil. This opinion nevertheless I submit to the judgment of others.

V. He who hinders goods from being applied to the treasury, which on account of some crime are wont to be applied after the judge's sentence, is held to restitution; but not before the sentence pronounced: since before the sentence is passed no one has a right to goods of this kind. He who hinders legacies left by a testator, that they should be distributed among the maidens of this or that

city adorned with such prerogatives, from being distributed to them, and takes care that they be conferred upon others, sins and is held to restitution: because the maidens of such a city have a right to goods of this kind. What if a dispensation be obtained from a superior? Dispensations of this kind are commonly without just cause. In which case both he who asks and he who grants sin, and are liable to restitution. But if the cause of dispensing be just, there is no debt of restitution.

VI. He who hinders a collator from conferring an ecclesiastical benefice upon the worthier, is held to restitution, both he who hinders and the collator who knowingly deprives the worthier of the benefice. Which restitution is to be made both to the worthier man excluded and to the Church, as will be said more fully when the discourse shall be of benefices.

VII. QUESTION III. *What is to be said of those who cooperate in another's loss?* ANSWER. He who assents to a man already prepared to inflict an evil, all counsel and persuasion being removed, sins against charity, but not against justice: therefore he is immune from restitution, because in no way does he flow into the injury of another. That a cooperator therefore may be subject to restitution, his cooperation must flow in and be a cause. But if you should by counsel persuade one not prepared to steal or to injure another's right, then you are held to restitution. Nor does it matter that the executor would have been persuaded by another: because this does not take away that you are the cause of the loss. The same seems to be said of him who persuades one prepared to steal that he should execute the theft more quickly, when between the counsel and the execution there flows so much time that the executor could change his will. Read Vol. VII, Book I, dissertation 2, chapter 4, § 1.

VIII. QUESTION IV. *When you doubt whether by any of the cooperations recounted in the two verses you have been the efficacious cause of the loss, are you held to restitution?* ANSWER. You can doubt whether you have counselled, commanded, and so forth; or, being certain of the counsel, the command, and so forth, you doubt whether the evil followed; or you doubt whether your counsel, persuasion, and the like was the efficacious cause of the loss. The Salmanticenses, no distinction being made, absolutely deny that this doubter is liable to restitution, resting upon the axiom: *the condition of the possessor is the better.*

IX. But the question needs explication. If you doubt in the first way, whether you gave counsel, you are held to nothing: because no one is presumed evil unless it be proved. When, being certain of the counsel, command, mandate, and so forth, you doubt of the loss thence following, then in the degree of the doubt you are bound to compensate the loss. Since indeed, while it is certain that a cause of its own nature bringing loss has been posited, and it is doubtful whether the loss followed, then there is danger lest the loss have in fact followed. There is danger therefore that you have injured justice. Therefore you ought to withdraw yourself from this danger. When finally, being certain of the depraved counsel, mandate, and the like, and of the loss that followed, you doubt whether your counsel, mandate, and so forth was the efficacious cause of the loss, Molina, Bonacina, Lessius, Sánchez, and others assert that you are liable to restitution — some of the whole loss, others in proportion to the doubt. To this second opinion I incline. Since it does not seem equitable that he who doubts should be bound by the same burden as he who is certain of the loss inflicted. The circumstances nevertheless are to be regarded. Hence gather that I do not incline to the severer opinions, but to those which are plain by solid reason.

X. QUESTION V. *He who by his own depraved example is the cause that others perpetrate evil, is he held to restitution?* ANSWER. Many, seeing Sempronius stealing, laying waste another's vineyard, committing

adultery, and the like, are moved by this example to commit similar evils: is Sempronius held to restitution? The common and true opinion denies it, because although the depraved example be an occasion to them, it is nevertheless not an inflowing cause. Further, only an evil cause flowing into the loss inflicted brings forth the debt of restitution. Sempronius alone sins, as regards this, against charity.

XI. QUESTION VI. *What of those who by command, counsel, or consent flow into a neighbour's loss?* ANSWER. Under *command* are comprehended all those who order an injustice to be done, for the executing of which another was not prepared. This command can be imposed tacitly or expressly. When by force of that mandate the loss follows, he who commands is always held to restitution. Tacitly this command can be imposed in various ways. *What!* says a master to his servants, or a friend to his friends: *does none of you avenge my injury? He would do me the greatest favour who should kill my enemy.* By these and like expressions a tacit mandate can be made. All the circumstances nevertheless are to be regarded before it be determined that anyone is liable to restitution by force of a tacit mandate.

XII. If the mandate, before the execution follows, has been retracted, and this has become known to the mandatary, the debt of restitution fails. But if it be revoked either in mind only or outwardly, when it does not reach the ears of the mandatary, he who commands is not freed from restitution. If the mandatary exceed the limits of the one commanding, in practice the one commanding is with difficulty freed from the compensation of the whole loss. Wherefore in the chapter *He who commands concerning homicide,* in the Sixth, it is decreed that he who commands a beating from which homicide follows is subject to irregularity, even though the one commanding did not intend the homicide. For in practice mandataries scarcely ever contain themselves within the prescribed limits. Wherefore those who command freely cast themselves into these iniquitous consequences. Therefore they are bound to make good all the evils which in fact follow from the mandate. If nevertheless one commanding should enjoin something lawful, from which no evil to follow can prudently be foreseen, then he would be free from restitution, even if an evil should follow.

XIII. *Counsel,* by which the counsellor with guile, fraud, and evil mind persuades, brings in the debt of restitution. Authors dispute whether a counsellor, the counsel being revoked, is liable to restitution, when he who was counselled has in fact committed the evil. To me the more probable opinion is that a counsellor who with a sincere mind and all industry revokes his counsel is free from restitution. A mandate and a counsel differ indeed; but when a counsellor strives with true and solid reasons to dissuade his client from the evil which he had counselled, and leaves nothing untried that he may obtain his wishes, then the evil proceeds from the client's malice alone. If evils befall mandataries, or those receiving counsel, at their own asking, both the one commanding and the counsellor are free from restitution, because it was in their power to reject either the mandate or the counsel. If nevertheless the one commanding were a lord or superior, then he would be held to restitution, because a superior's command induces a certain coercion. If anyone steal or kill in your name, no counsel or mandate having been received from you, you are not bound to restore or to compensate the evil that followed without your knowledge, although you should ratify the evil committed, because ratification can afford no influx into an evil already committed. But if the executor should be moved by your complacency and ratification to omit restitution, then you would be liable to restitution.

XIV. *Consent* bringing in the debt of restitution is not a mere complacency in another's evil; but it is a cause efficaciously flowing into the evil to be made good. You subscribe to an unjust suit, you give your vote for an unjust war, for a theft, for a homicide to be perpetrated, for an unworthy master to be elected: you are subject to restitution of the loss that followed — when nevertheless your vote is necessary for the passing of the sentence, for the election of the unworthy man, and so forth. For if without your vote the sentence, the election, and the like was already concluded, then your vote does not flow into the effect: therefore you are free from restitution, but not from sin. If nevertheless you should give your vote first, although you foresaw that all the rest would give their votes, then you would be liable to restitution, because in truth your vote flowed into the evil. Wherefore in practice scarcely anyone is free who subscribes to an unjust sentence, or who gives his vote for an unworthy man, from restitution: because it can rarely be established whether the votes of the rest are antecedent or subsequent. Wherefore let each beware of this danger.

XV. *Flattery* indicates those who by praises, encomiums, and applause, or by reproaches and mockeries, provoke and impel someone to commit an evil. You reproach a husband for tolerating his wife's adultery, for suffering the injury done him: he, stirred by your mockeries, kills his wife, the reviler, the offender. You are the efficacious cause of the evil committed. Therefore you are liable to restitution. Nor is it enough that you should reply that you did not do this with an evil mind, nor intend the vengeance or the homicide: because it is enough to have brought in the outward speech to the committing of the evil. Whether ignorance, inadvertence, and other circumstances may sometimes excuse, I leave to the judgment of prudent men.

XVI. *Harbouring* signifies the receivers of thieves and malefactors, to whom they afford refuge, security, and opportunity for committing evil, all of whom are liable to restitution. Those who after evils committed receive malefactors under the title of mercy, that they may help them to take flight, are free from the burden of restitution.

XVII. *Partaking* is he who takes something of the plunder, or confers some aid to the committing of the evil. Wherefore a partaker is said to be either of the unjust action or of the thing received. Partakers of the unjust action are called all who concur to the evil: as smiths by fabricating false keys, watchers keeping guard that robbers may steal in safety, those who move ladders for entering houses, those who keep, hide, or sell things taken away by theft in the robbers' name, or themselves buy them. All these are held to restitution.

XVIII. QUESTION VII. *What of those who negatively cooperate in another's evil, as are the silent, the non-opposing, the non-disclosing?* ANSWER. These three indirectly cooperate in the committing of another's evil, namely by not crying out, by not hindering, by not disclosing, when they could and are bound in justice. These are held to restitution. Now they are bound in justice who are appointed to it either by office or by contract. Bound to restitution therefore are governors, public ministers, physicians, surgeons, guardians, curators, keepers, who do not hinder an evil which by their office they ought to hinder; shipmasters who do not hinder the sinking of the ship; fathers of families who do not oppose the dissoluteness of their sons; commanders of war who do not draw back their soldiers from unjust plunderings; princes who do not, so far as they can, hinder homicides, robberies, and monopolies.

XIX. Those who are bound by the title of charity alone, even if they keep silence with an evil mind, are held to nothing. Because the debt of restitution supposes an injury of justice. These are not obliged in justice. Therefore there is no debt of restitution. The Salmanticenses with others defend

that these are not held to restitution, even if they should accept money from a thief for keeping silence. Since, they say, if they can be silent without money, why not also with a price accepted? Is not this an excellent reason? He who accepts your price that he may be silent flows into the theft, and enters into an iniquitous bargain with you: therefore he is held to restitution.

XX. Servants who see strangers filching their master's goods are held to restitution if they keep silence and do not oppose according to their strength. Since by reason of their service they ought in justice to guard and defend their masters' goods from foreign invaders. Servants also who see goods entrusted to their own custody filched by domestic thieves, if they keep silence, if they do not oppose, if they do not disclose, are held. But if they see common things stolen, they sin against charity if they keep silence, but they are free from the burden of restitution, since they are not bound in justice to guard the aforesaid common things against domestic thieves. The circumstances, customs, and agreements nevertheless are to be regarded.

XXI. Keepers of fields, vineyards, meadows, and woods, hired at an agreed price by the lord that they should watch and guard the aforesaid goods from any invader whatsoever, are bound to make good the losses if they keep silence and do not resist according to their strength. The same is to be said of keepers hired by a prince, that they suffer not wares to be carried out or brought in without the customs being paid.

XXII. QUESTION VIII. *What order is to be observed among cooperators in an unjust action, when they are held to restitution?* ANSWER. When many concur to a theft, those first of all are bound to restore … … in whose hands the goods subsist, or the price of the same. Restitution having been made by these, the rest are free. When the goods do not subsist, because nothing was filched but only an evil inflicted, it is to be made good first by those who were the principals, and by the others in default of them. Those are called the principal cause who direct, who incite, and who animate others to inflict the loss. And those who by threats, guiles, and frauds induce others to commit an evil, ought to restore as principals. After the principal cause, nevertheless, the executors themselves of the theft are bound to make good the loss. These, however, would have an action against the principal cause, which is always bound to compensate the executors, if these should restore. When many secondary or principal causes equally concur, each is held according to the advantage which they carried off. But if one neglect to restore, then each is held *in solidum,* and the rest are always bound to compensate him who bore the whole burden of restitution. The principal causes and the executors failing or refusing to restore, there succeed in the debt of restitution the negative causes, who ought to restore *in solidum,* more or less according to the greater or lesser duty of hindering, regard always being had to that cause which is more strictly bound to hinder.

XXIII. QUESTION IX. *How are all the causes recounted bound to restore in solidum?* ANSWER. The discourse is of many causes executing the same theft or loss, not of many partakers of the same thing taken away by theft. For it is certain that you, having been invited to a supper made of things taken away by theft, are held only to the restitution of that part alone which you ate. Similarly, when many enter to lay waste a vineyard, no conspiracy having been made among them, but each ignorant of the other's design, and each of himself bringing in the loss, then each is bound to compensate the loss inflicted by himself, since he conferred no influx into the loss inflicted by the others. These things are beyond dispute.

XXIV. When many concur to the committing of the same evil, if one be the principal mover, he ought first and *in solidum* to restore. Thus princes and their counsellors are bound to make good the losses of war; captains and tribunes the losses of the soldiers, because these are the principal movers. Inferior soldiers, in default of the principals, ought to compensate those losses which they themselves immediately execute; when they concur to the same individual loss — say to the burning of the same ship or house, to the killing of the same man, to the electing of the same unworthy person — all and each are bound *in solidum* to make good the loss which they brought in by common conspiracy, as the common and more probable opinion teaches: since although physically each executes a part of the loss, morally nevertheless each flows into the whole loss. For by reason of mutual counsel and reciprocal conspiracy all constitute one moral cause of the whole loss. Therefore each is held *in solidum.*

XXV. QUESTION X. *Whether from a shameful promise there arises an obligation of performing the thing promised?* ANSWER. Sempronius, that he might induce a maiden to fornication, a wife to adultery, an assassin to homicide, promised a fixed wage. That before the execution the promise brings in no obligation, and is to be rescinded, all confess. It is disputed whether, the promise being fulfilled, the price promised is to be paid. The Salmanticenses affirm it, tract 13, chapter 1, point 6, no. 154, and assert that this is the common opinion of the Doctors.

XXVI. The opposite opinion is defended by Adrian, John Medina, Navarrus, Vigerius, Paul Comitolus, Henry of St. Ignatius, and the Continuator of Tournely. Since indeed the laws, both sacred and civil, decree that stipulations, agreements, and promises entered upon for a shameful cause have no force, and are to be held as void. Gregory IX in the chapter *Pactiones* established these things: *According to lawful sanctions, an agreement shameful, or of a shameful or impossible thing, brings in no obligation either of right or of fact*. The civil laws in the law *Generaliter,* 26, *Digest, On Verbal Obligations,* title 1, decree these things: *Generally we know that shameful stipulations are of no moment*. Again in the law *Mercedem,* the same title, *On Contracts,* these things are added: *That actions are to be denied for a shameful cause, upon a stipulation interposed against good morals, is demonstrated by the authority of law.* Finally the law *Pacta,* Code, *On Agreements: That agreements which are made against the laws and constitutions, or against good morals, have no force, is of undoubted right*. Many other things from either law I pass over.

XXVII. The laws recounted, since they are absolute, urge equally before and after the crime committed: and it is proved by reasons. For if after the evil committed the price is to be paid, the stipulation has force. But the laws declare that it has no force. What of this, that the Doctors themselves, defenders of the common opinion, teach that stipulations of this kind are to be rescinded? Therefore by their own confession they are of no moment. Besides, if the stipulation here has force after the deed, as those Doctors contend, it assuredly has it not from a new agreement or convention between the contracting parties, but from the agreement which preceded the deed. It is necessary therefore that those Doctors confess one or the other: either that this stipulation is valid both before and after the deed, or that it is null both before and after the deed.

XXVIII. Finally, does an obligation once altogether extinguished revive? All deny it. Therefore far less can an obligation which was null before the deed, and by every law natural, divine, and human is held null, revive. God and all laws punish more severely the depravity of a crime committed than of one to be committed. Therefore if on account of the shamefulness of a thing not yet done they take away the force of obligation from a stipulation, much more ought they to take it away on account of

the iniquity of the thing done. Again, obligations which impel to evil and foster crimes ought not to be tolerated. But if stipulations and agreements of a wage to be paid for a crime to be committed were to be observed, the licence of sinning would range more freely, and an entrance would be opened to infinite crimes. Lastly, vows and oaths concerning a sin to be committed are by the common opinion null: therefore far more are human promises null, which surely bind less than vows and oaths made to God.

XXIX. The cited Doctors object. Two things are to be distinguished in a crime: one, the depravity of the action and the offence of God; the other, the pleasure, the delight, the entity of the action, the trouble, the danger to which the shameful person is exposed. The first cannot be venal. The second by its own nature and of itself is vendible. ANSWER. This distinction being laid down, the soul, an angel, the sacraments are vendible, inasmuch as they are beings. The aforesaid crimes do not fall under contract inasmuch as they are beings of a metaphysical precision, but as involved in their own conditions. The pleasures which are in crimes are wicked. Therefore if the crimes themselves are not venal, neither can the pleasures which accompany crimes be sold. Therefore the cited opinion of the Doctors is to be reckoned false.

XXX. QUESTION XI. *What is to be said of a harlot's gain?* ANSWER. That a harlot's gain may be retained, and ought to be paid, all commonly confess. Therefore the opinion hitherto defended is false, and the opinion of our adversaries true. I answer that a harlot can demand back and retain the price of her whoredom, not on account of any stipulation, not on account of consent to fornication, not on account of the pleasure, not on account of any danger or trouble, not finally because she can let out the use of her own body; but because the laws, which for the avoiding of greater evils permit harlotry, punish fornicators with this mulct, that they pay a wage to the harlot in penalty of the crime committed. I add that those laws are permissive. Whether before the divine tribunal they are always just, is not established for us. This is certain, that princes can permit lesser evils, that they may avoid greater. But hence it does not follow that subjects can use those same laws. Wherefore I would urge all harlots compunct with a sincere heart to distribute the gain of harlotry among the poor, and would grant to them, as to the poor, something more or less for their sustenance according to the diversity of circumstances.

XXXI. QUESTION XII. *Whether maidens, wives, and honourable women receiving a price for chastity sold are bound to restore it?* ANSWER. Fr. Leonard Lessius writes these things, Book II *On Justice,* chapter 14, doubt 8, no. 52: "And although the evil work for which he gave is not appraisable at a price inasmuch as it is evil, nevertheless inasmuch as it is delightful or useful to the one and detrimental to the other, it is appraised at a price among men. Therefore what has been received for it on this account is not to be restored, unless perhaps someone exceed the estimation; as if a harlot, who is accustomed to grant the use of herself for one gold piece, should extort fifty from some young man as the price. This, however, has no place in her who is reckoned honourable; as if some matron or daughter should accept a hundred gold pieces for the use of her body from one who was able to give: for he who was able to give could also RETAIN. SHE CAN VALUE HER OWN CHASTITY AT SO MUCH, AND AT MORE. For things which have no fixed price, and are not necessary to life, but are sought for the sake of pleasure, can be appraised at the seller's discretion, and, as Peter Navarra and others probably teach, at others' too." Thus far he: which doctrine assuredly, like others of this kind, St. Francis de Sales did not commend, although he commended the works of the same author, which are indeed

praiseworthy for many rightly handed down instructions. That women or girls of this kind can, justice alone being regarded, retain a gift spontaneously given by one who has the faculty of giving, I do not absolutely deny. Concerning these gifts, nevertheless, I inculcate that the same is to be done which St. Thomas hands down, II-II, q. 100, art. 6, reply 4, concerning a price simoniacally received: namely, that it is not to be rendered back to the guilty party himself, but to be laid out either upon the worship of God or upon the poor: both that the handle of sinning may be taken from women prone to avarice, and that no monument of past unchastity may remain, and that by the things wherein a man sins, by these he may be tormented, according to the saying of the Holy Ghost. To this so equitable an opinion no one can be repugnant, save perchance he who does not do penance, but feigns it.

XXXII. QUESTION XIII. *Are harlots, whether public or secret, bound to restore the price received from a religious for a shameful union?* ANSWER. I would not stir up such little questions, did I not find them agitated by others. Pellizarius, *Manual of Regulars,* tract 4, chapter 2, section 4; Malchardus, Vol. I, book 5, part 2, tract 1, document 1; de Lugo, disputation 3, section 3; John of the Cross, book 1, chapter 5, doubt 10, and others defend the negative opinion. When, they say, a religious obtains a faculty from his superior of disposing of the goods granted him for use, while he draws them off into shameful things, although in the mode of alienating he acts against the superior's will, nevertheless the alienation itself is valid. And to this alienation absolutely regarded the superior consents. These things are not so much to be refuted by arguments as to be lamented with bitter tears. No superiors can grant licence for paying a price for a shameful act. The alienation therefore is invalid. Therefore restitution is necessary.

XXXIII. QUESTION XIV. *Whether one receiving a price for an unjust sentence to be passed ought to restore it?* ANSWER. The positive laws detest and prohibit all donations to be made to judges for unjust sentences, to advocates for the unjust defence of clients, to witnesses for false testimony. The Salmanticenses, tract 13, chapter 1, point 7, no. 169, teach that donations of this kind, natural law being regarded, are valid. But this opinion is to me false, and to be rejected.

XXXIV. It is disputed whether by force of positive law prohibiting donations of this kind they ought to be restored. A twofold opinion is found, and each is reputed probable by the Salmanticenses. The former denies the debt of restitution, because the laws indicated oblige only in the exterior forum, say authors of this kind, but not in the interior forum. This opinion I reject as false and improbable. Since indeed the aforesaid laws, resting upon the law of nature, oblige in each forum. Let St. Augustine be heard upon this argument, who in Epistle 54 to Macedonius writes thus: *But an advocate ought not therefore to sell a just judgment, or a witness true testimony, because an advocate sells just patronage and a jurist true counsel. For those bend themselves to the examination of either party, and these take their stand on one side. But since judgments and testimonies, which ought to be sold neither false nor true, are sold when iniquitous and false, assuredly money is much more wickedly taken, because it is also wickedly given, although by the willing. But he who gave for an unjust judgment would indeed wish to demand it back, did he not fear, or were he not ashamed, to have given it. … Nevertheless, if justice be more sincerely consulted, justice says to the advocate: Render what you received, when you stood against the truth, favoured iniquity, deceived the judge, oppressed a just cause, and conquered by falsehood.*

XXXV. This testimony Fr. Leonard Lessius objects to himself, Book II *On Justice,* chapter 14, doubt 8, no. 55, in these words: "You will say: St. Augustine in the fifty-fourth epistle to Macedonius says that

it is more wickedly that money is accepted for an unjust sentence than for a just one, for false testimony than for true. But money accepted for a just sentence is to be restored. Therefore also for an unjust one. So Soto." But he adds: "I answer by denying the consequence. For it is not because a thing is more wicked that it therefore obliges more, or equally, to restitution. For this obligation does not follow the magnitude of the crime, but the loss given by the injury. But he who accepts *for an unjust sentence inflicts no injury upon the giver,* as does he who accepts for a just one. Now the former is more wicked than the latter: both because it is worse to pass an unjust sentence, to the passing of which he who accepts the money has already set his mind, on account of the injury which is done to the other party, than to accept money for a just sentence to be passed; and because (as Augustine there says) it is more wickedly given for an unjust one than for a just one, although it be given voluntarily and willingly. For he is speaking of a sentence to be passed. Add that Augustine in the same place signifies that this money, though more wickedly accepted, is not to be restored once the work is performed, since he says it was given *by the willing*. For to one willing no injury is done. It is otherwise if it be given for a just sentence, which is reckoned given under compulsion, from fear of an unjust sentence."

XXXVI. If in explaining some article of faith a man should with this liberty, and with a most vain wrapping of distinctions, entangle and elude the opinions of the holy Fathers, it would be all over with the articles of faith. And because in explaining the commandments of morals the opinions of the Fathers are in fact adulterated with various cavils, therefore Christian theology has been in a deplorable manner relaxed and obscured by not a few casuists. The doctrine of St. Augustine is unshaken. Wherefore Vásquez and de Lugo, disputation 18, section 5, no. 57, confess that St. Augustine stands on our side; nor nevertheless do they themselves fear to defend an opinion disapproved by Augustine. The reason of our opinion is evident. A judge by force of his office is bound to pass sentence. Therefore he cannot receive a price. *For a just sentence,* someone will say, *I grant. For an unjust one, I deny.* Since he is compelled by force of his office to pass a just sentence, therefore he cannot receive a price for a just sentence to be passed, and if he receives it, he is bound to restore it. But he is not obliged to pronounce an unjust sentence, and therefore he can receive and retain a price for an unjust sentence to be passed. Would you have things yet more absurd? Because we set forth such paradoxes, which strike common sense, to be derided, some refute us. But we entreat them to prove that these are not paradoxes worthy of severe confutation. But let Marcus Tullius come forth into the midst, who in Book II of the *Offices,* chapter 21, wrote these things against the reproved opinion: *But the chief point in the whole management of business and of a public office is that even the least suspicion of avarice be driven away. "Would that," said Gaius Pontius the Samnite, "fortune had kept me for those times, and that I had been born then, when the Romans began to accept gifts: I would not have suffered them to rule longer." Truly he would have had to wait many generations. For this evil has but lately invaded this commonwealth. And so I the more gladly suffer that Pontius lived rather then. … There is therefore no viler vice … than avarice, especially in princes and in those who govern the commonwealth. For to make merchandise of the commonwealth is not only shameful, but wicked and abominable.*

XXXVII. QUESTION XV. *When that which is restored does not reach the creditor's hands, is the debtor bound to restore anew?* ANSWER. Many things hinder immediate restitution, which therefore must be made either through a confessor or through another person. If the intermediary person be designated by the creditor, or if he grant the debtor the faculty of choosing him, and the debtor in good faith choose a person reckoned worthy, it is certain that the thing perishes to the creditor, and that the debtor is

immune from a new restitution. The same is to be said when the person is designated by the judge. It is disputed only when the debtor of himself chooses this person. Many defend that the thief is not liable to a new restitution after he has consigned the thing to be restored to a faithful and honest man, even if it perish.

XXXVIII. The opposite opinion is to me the more probable. Since indeed the nature and essence of restitution is to constitute the equality injured by unjust acceptance; and the creditor is always unwilling so long as he does not obtain his own thing or dispose of it, and the equality is restored. But here the equality is not restored unless the thing taken away return into the creditor's hand. The thief is the cause of the unhappy outcome. He, by taking away another's thing, exposed himself to these dangers.

XXXIX. If a possessor of good faith send a thing found by an honest man to its lord, and it perish, he is not liable to a new restitution. Since he is held neither from unjust acceptance nor from the thing received. But if the thing be owed from a contract of loan, of deposit, of pledge, and the like, authors distinguish. If the thing to be restored be the same in kind — as this garment, this horse, which you received on loan for use — and it be sent by an honest man, the thing perishes to the creditor, because it was his, and therefore it perishes to the lord. On the contrary, if the thing be not the same in kind, but in genus — as moneys, wheat, wine, which you received on loan — they perish to you, not to the creditor, because those things were yours. These things are common ground.

XL. QUESTION XVI. *In what place, and at whose expense, ought restitution to be made?* ANSWER. A possessor of good faith ought to restore in the place where the thing subsists. If the lord be absent, he is to be admonished, and at his expense the thing ought to be carried to him. But if this possessor of good faith has transferred the thing elsewhere, then he ought to send the thing to the lord at his own expense. On the contrary, a possessor of bad faith is bound to restore the thing in that place where the thing would have been, had it not been taken away, and at his own inconvenience. Restitution owed from a contract ought to be made where the contract was celebrated, unless it be otherwise appointed by the contracting parties. A loan is to be restored at the borrower's expense, since it turns to his advantage. On the contrary, a deposit, since it turns to the depositor's advantage, is to be demanded back at his expense.

Chapter III — On those to whom restitution ought to be made; and on the order to be observed in restitution

I. QUESTION I. *To whom ought a thing received from a possessor of good faith to be restored?* ANSWER. The thing is to be restored to the lord, because it always cries out to its own lord. And if he to whom restitution is to be made be dead, the goods ought to be restored to the heirs, either by testament or *ab intestato*. If you have received goods from religious, they are to be restored to the monastery; if from a son of a family, to the parents; if from a wife, to the husband — unless it be established that alienations of this kind were made with the consent of the lords.

II. If the thing to be restored be pernicious to the lord, you ought not to restore it to him at the time at which it is harmful to him. Wherefore arms deposited with you you ought not to render to a madman, or to another who will make ill use of them. Similarly out of charity you ought not to restore money which you foresee will be squandered by the lord upon harlots or other crimes.

III. QUESTION II. *To whom is restitution to be made when the lord is unknown?* ANSWER. Of the restitution of things found it has been spoken above. Now the discourse is of things taken away by theft, or by another title, which are found with a possessor. First, all diligence is to be used that the lord be found. If it be doubted whether the thing is to be restored to Peter or to John, the restitution is to be divided in proportion to the doubt. If finally the lord can in no way be found, the goods are to be distributed among the poor. Similarly, that goods acquired by simony are to be laid out upon pious works, the more probable opinion teaches. Goods gathered by usury, if those from whom the usuries were extorted are known, ought to be restored to them; if they are unknown, they ought to be conferred upon the poor. When the buyers of some community have been injured by unjust sales, then the buyers of the same place ought to be compensated by sales at a cheaper price, when the injured buyers are unknown. In these cases the parish priest or the bishop is to be consulted.

IV. Authors dispute whether a payment made not to your creditor, but to another to whom your creditor owes just as much, is valid. Loyseau, Castropalao, Layman, and Bonacina affirm it, who cite Molina, Valentia, and others. This opinion is to me false. Since Peter your creditor has a right to exact from you your debt. But Paul, Peter's creditor, possesses no right of demanding anything from you. By what reason therefore can you pervert these rights? Who constituted you Peter's curator, that you should pay his debts? Can you filch goods from Peter, that you may pay his debts? Why therefore will you be able to pay the hundred which you owe him, and which are his, to his creditor?

V. QUESTION III. *What order is to be observed in restitution?* ANSWER. When a debtor is not solvent for all his creditors, the laws determine that some of these are to be preferred to others. For some are creditors who by natural law ought to be preferred to the rest. Others the positive laws decree to be preferred. These laws oblige in conscience, whatever Diana, Machado, Serra, and others say to the contrary; whose opinion the Salmanticenses undeservedly repute probable, or at least not improbable.

VI. Creditors whose goods subsist in kind with the debtors, and whose dominion has not been transferred — as are pledges, things lent for use, deposits — ought by natural law to be preferred to all creditors, as all confess. That certain debts, when they subsist in their proper kind, are to be preferred to uncertain debts, the more common opinion holds. What is safer I scarcely perceive. Wherefore the circumstances are to be regarded, and the case, which rarely occurs in practice, is to be resolved by the judgment of prudent men.

VII. QUESTION IV. *Whether a seller ought to be preferred to privileged creditors, while the thing subsists in kind with the buyer?* ANSWER. There are commonly excepted the goods of the Church, of minors, and of the treasury, whose dominion is not transferred to the buyer until the price be paid. It is disputed only concerning creditors who sell wares on credit to other buyers, namely whether these, when their wares subsist in kind with the buyers, the price not having been paid, ought to be preferred to other creditors. The more common opinion affirms it, which seems also more conformable to the usage of the external forum; and this seems more consonant with natural equity, that when the seller's thing subsists in its own kind, it be not applied to strangers, the lord or seller being unwilling.

VIII. QUESTION V. *What order is to be observed among debts either from an onerous or from a gratuitous contract, or from a delict?* ANSWER. Debts from an onerous contract — namely from sale, exchange, letting, and the like — ought altogether to be preferred to debts from a liberal promise even accepted, from a legacy, a testament, and so forth. And this holds true even if the debt were contracted on

account of a promise of paying a daughter's dowry, or of giving a legacy to a church, to the poor, and the like. Since God does not accept sacrifices made from robberies.

IX. There is disagreement whether debts from a delict ought to be preferred to debts from an onerous contract. The first opinion defends that debts from a delict are to be preferred, when the other debts are not confirmed by hypothec, or when the thing does not subsist in kind. The second opinion defends the opposite, namely that debts from an onerous contract are to be paid first. The third opinion contends that no order at all is to be observed, but that payment is to be made to all in proportion. The Salmanticenses say that all those three opinions are probable. And yet one alone is true. What in a matter obscure and involved enough seems to me the more probable is that debts contracted earlier ought to be paid earlier, whether they be from a delict or from a contract. The reason is that, while the debtor contracted the earlier debts, he was, as is supposed, solvent, and the creditor acquired a certain right. Further, this lawful and certain right cannot be injured by later debts: because while the debtor contracts these later debts, he has not wherewith to pay, since his goods are already obligated to the earlier creditor.

X. QUESTION VI. *How are hypothecary creditors to be preferred to others?* ANSWER. A hypothec affords a right in the goods which are subjected to it. Wherefore creditors to whom the debtor's goods have been designated under hypothec, whether express and special or tacit and general, ought to be preferred to all other personal creditors, even privileged ones, as all teach: because these have a right not only against the person, but also in the goods hypothecated. But among hypothecary creditors, he who is prior in time is stronger in right.

XI. Those who confer moneys to be laid out upon the building of a house, upon the tilling of a field, upon the redeeming or buying of a fixed property, which goods are burdened with a hypothec for the security of the creditors, who expressly demand that these goods be obligated to them, are to be preferred to earlier creditors having only a general hypothec. But as regards this the customs of tribunals are various, according to which the debts are to be paid.

XII. Among simple or personal creditors, who have an action only against the person, those are preferred who give moneys for the cause of funerals. Under the name of funerals come also expenses in the curing of an illness. A betrothed woman handing over a dowry before marriage, the marriage not following, contracts a privileged credit to be preferred to other personal creditors who have neither an express nor a tacit hypothec. He who deposits moneys with a public depositary or banker, no usury being perceived, is preferred to all personal creditors of the same public depositary; but otherwise if he should perceive usury, because then he is not a depositor but a lender.

XIII. QUESTION VII. *What order is to be observed among simple, non-privileged creditors?* ANSWER. Preference among these is to be referred to the rules of natural law, since the laws determine nothing concerning them. One opinion defends that no preference is to be admitted among debtors of this kind, but that the goods are to be divided and distributed in proportion. The other opinion contends that those creditors are to be preferred who are prior in time. And the reason assigned above seems pressing enough: therefore this opinion is the more probable, whether the creditors be poor or rich. There are many laws which favour the first petitioners. Wherefore each ought to regard the laws of his own country.

XIV. QUESTION VIII. *Can a debtor secretly admonish a friendly creditor to sue first, and pay him the whole debt to the detriment of the other creditors?* ANSWER. There are not wanting those who affirm it, especially Fr. La Croix, who in Book III, part 2, no. 405, writes these things: *According to the probable opinion that the first suitor is to be preferred, a debtor will be able to admonish a creditor friendly to him that he intends to pay him who sues first; and thus without doubt the other will be moved to sue.* This opinion prepares the way for frauds and guiles, and betrays its own falsity. How far this and other like paradoxes are abhorrent from Christian equity and simplicity, everyone sees.

Chapter IV — What are the causes on account of which restitution may be omitted or deferred

I. Impotence, which excuses from restitution, is twofold. The one physical, of which no one doubts; the other moral, which brings a most grave, or grave, difficulty. Beforehand, nevertheless, I would have you observe that there is a difficulty innate in any restitution whatsoever, on account of the cupidity and avarice of men. But this difficulty in no way excuses from making restitution. Under the name therefore of the difficulty which constitutes moral impotence is understood either extreme want, or a notable and grave evil, or scandal, or a danger of sinning to be undergone on account of the restitution.

II. Hence you may infer, first, that a debtor can defer restitution when a danger of grave loss is imminent — say, if the creditor were going to abuse his thing to the harm of the common good or of a neighbour. Secondly, if the debtor himself would undergo a grave loss by restoring at once, whereas the creditor would suffer little or no inconvenience. For restitution is ordained to preserve equality between the parties. But there would not be equality when the debtor had to restore to the creditor at so great a cost, and the latter scarcely feels an inconvenience on account of the delay. And in this case a man would be unreasonably injured. Thirdly, the precept of restitution does not urge when from the execution of it a spiritual danger would be imminent; as if on account of restitution the chastity of one's daughters would have to be prostituted, or if you could not in fact feed your sons. A craftsman is not bound to sell the instruments of his art, by labouring with which he acquires what is necessary for his food; he ought nevertheless to exercise his art, that he may pay his debts. In an equal case, extreme necessity of someone excepted, the creditor ought to be preferred, as the innocent to the guilty. Delay of restitution is not lawful for the procuring of gain, especially if the creditor suffer loss.

III. Wherefore the greatest caution is needful with debtors, since men are prone to retain what belongs to others. Debtors, as I have said elsewhere, are commonly rich men or nobles, who under pretext of maintaining their estate defer the payment of debts, and strive to foster the splendour of their pomps and the pride of their display with the blood and sweat of hirelings and merchants. Wherefore again and again confessors are to be admonished that they altogether keep these back from the sacraments until they have paid their debts. For these are tramplers upon every justice, inhuman and savage, both because they defer the payment of the wages they owe, and because they cruelly compel poor debtors, like that creditor in the Gospel, to pay them to the last farthing.

Chapter V — On restitution on account of homicide, or mutilation, or defloration, or adultery

I. Hitherto of restitution in general: now restitution in particular is to be treated; and first of all restitution on account of voluntary homicide, in which two losses can be regarded. The first is the taking away of life or of members; the other is that which follows upon the privation of life or the mutilation of members. He who voluntarily snatches away another's life injures commutative justice — for the discourse is not now of mutilation or homicide which follows upon necessary defence. But life once snatched away, or a member cut off, cannot be rendered back. What therefore is to be done, that injured justice may be repaired? If the judge punish the slayer or mutilator, no other satisfaction is required: since the judge commands that all the losses which are to be repaired in justice be repaired. It is disputed therefore concerning what is to be restored by a slayer or mutilator not punished by a just judge.

II. QUESTION I. *Is a slayer or mutilator bound to compensate a personal injury with goods of fortune?* ANSWER. There is a twofold opinion. One denies that anything is to be restored on account of a personal injury, that is, on account of the mere taking away of life or the mutilation of a member. The other opinion, which is the more probable, affirms it. Because he who kills, mutilates, or injures another violates commutative justice. Therefore this justice ought to be repaired by that way which is possible. But although life or a cut-off member cannot be rendered back, it can nevertheless in some manner be compensated with goods of fortune. He who owes to restore a thousand, but can only a hundred, will he be free from the restitution of a part, because he cannot render the whole? As regards practice therefore, it is the confessor's part to hand down that a homicide or mutilator, besides the compensation both of ceasing gain and of emerging loss to be made to the heirs, should bestow something for the life or member taken away, should take care that sacrifices be offered and alms laid out, and should study to console and help with all his might the whole family of the slain or mutilated man.

III. QUESTION II. *What losses ought a slayer to compensate?* ANSWER. All the losses which follow from the killing or mutilation are to be made good. There are to be compensated the expenses of the cure, and all the gains which the slain or mutilated man could have obtained by his art, trade, or industry, when there are sons, or sisters, a wife, and other relations who suffer such losses from the killing or mutilation. But if there be no one who suffers loss, nothing is to be restored. Authors dispute how many years of life are to be reckoned in the slain man. To settle the matter in few words, all these things are to be subjected to the judgment of prudent men. Killings among nobles are wont to be made good by no compensation. If a homicide should pay the penalty of retaliation, the heirs would be liable to no restitution, because when the penalty of death is inflicted all things are reckoned remitted: so the common custom obtains. If anywhere an opposite reasonable usage prevail, it is to be observed.

IV. If one provoked to a fight kill the provoker with the moderation of a blameless defence, he is bound to restore nothing. But if he had gravely exceeded the limits of moderation, then he would owe to restore in proportion. If they have mutually provoked one another, nothing is to be restored, because each yielded his right. If one has provoked the other by casting up the mark of cowardice, the provoked slayer is not held to restitution, say many of the younger authors: because he could not refuse the duel without disgrace. This reason seems to me to fight with the Gospel. Wherefore to me

the following opinion of Fr. Viva is false, unless all things deceive me, who in Vol. III, part 3, question 7, article 1, no. 2, says: "Although he sometimes sins by not fleeing against charity, if namely he could flee without loss of honour, yet he does not sin against justice. Therefore he is not held to restitution." What? Does a Christian sin against charity when he cannot flee without loss of worldly honour, and yet not sin against justice? But who would not disapprove this doctrine? For he is bound to take to flight, while the way lies open, with the loss of that honour which is set in the opinion of a raving world.

V. QUESTION III. *Whether from casual homicide there arises a debt of restitution?* ANSWER. Titius wounded Sempronius with a wound by no means mortal: by the negligence of a surgeon or physician Sempronius dies. Titius is bound to compensate the losses which follow not upon the death but upon the wound. If nevertheless Sempronius die of the wound received because a surgeon is not found, Titius the wounder is bound to compensate the losses which follow the death. From homicide following by accident nothing is to be restored. A cleric exercises forbidden hunting, uses all diligence that he may avoid a homicide: if this follow, he is bound to restore nothing. If on the contrary the homicide followed from gravely culpable negligence, then all the losses would be to be restored.

VI. QUESTION IV. *To whom is restitution of the losses which follow from homicide to be made?* ANSWER. It is to be made to the heirs — not to the free heirs, but to the necessary. Brothers and blood-relations, though they succeed *ab intestato,* are not necessary heirs, and consequently to them no restitution is to be made. Wives, sons, and parents are necessary heirs, to whom restitution is to be made.

VII. Moralists disagree whether a homicide is bound to pay the debts of the slain man to his creditors. The more common opinion denies it, since no action is given to the creditors against the slayer or mutilator in the exterior forum, nor even in the interior. The circumstances nevertheless are to be regarded, and the counsels of wise men to be heard, when like cases occur, that in most grave delicts that which is just may be determined.

VIII. If a wounded lord be absolved, and before he dies remit, together with the injury done him, also the losses to be made good, the slayer is free from restitution. For the rest, although a wounded man be bound to remit every injury done him and to love his wounder, he is nevertheless not obliged to remit the losses thence emerging; nay, if his wife, sons, grandsons, or parents should be gravely in need, he would sin against charity if with so great a cost and detriment to his own he condoned the losses.

IX. QUESTION V. *What ought a deflowerer of a maiden to restore?* ANSWER. Authors commonly absolve a deflowerer from restitution when the maiden consented spontaneously, and is her own mistress. The civil laws appoint that a ravisher either endow or marry the maiden ravished, because they always presume that she was seduced by blandishments and fraud. And indeed in practice a ravisher is scarcely to be absolved except from marrying or endowing the maiden. The circumstances nevertheless are to be regarded. If the defloration be public, accomplished by threats or fraud, then not only is the stain of corrupted virginity to be compensated, but also the mark of infamy inflicted upon her parents. A deflowerer is not bound to give a whole dowry, but to increase the dowry to be given by the parents. If nevertheless the deflowered woman be poor, then a whole dowry is to be given by the ravisher. If a doubt occur whether the maiden had been previously deflowered, the safer part is to be chosen, because no one is presumed wicked unless it be proved. Wherefore even in a

doubtful case the losses are to be compensated. Nay, if in fact she was not a virgin, but was nevertheless so reputed, and the ravisher defamed her, then the losses are to be compensated. But if from such intercourse she suffered no infamy, nothing is owed to be restored. The same which has been said of a maiden is to be said of an honourable widow.

X. If by entreaties, blandishments, and little gifts alone he draw a maiden into consent, authors commonly teach that he is held to nothing, as has been said, because all these do not take away liberty. If nevertheless the entreaties were so repeated, and the blandishments so assiduous, that they were equivalent to violence, then the losses would be to be compensated. Whosoever has deflowered a maiden under hope of marriage is bound to marry her, because this contract is onerous and binds both parties, even if the promise were feigned. For although a contract concerning a shameful thing be null, the penalty of the crime committed is nevertheless to be undergone.

XI. These things are absolutely true: but for the rest, if the girls of our time be regarded, they are not seldom so shameless, so stripped of modesty, so brazen, crafty, and bold, that they themselves attack young men and men, and they themselves circumvent, bewitch, and craze them with their blandishments and tricks, either to plunder their purse or to draw them into matrimony. Wherefore, for the repressing of so great an audacity of girls, a law ought to be established that the deflowered should mourn their ravished virginity in perpetuity. This is always to be held before the eyes, that maidens modest, bashful, lovers of solitude, and fleeing the meetings and conversation of youths and men, are violated by no one. If therefore they themselves are forward, and hawkers of their own virginity, that others may learn, they ought to be punished as a public example, not endowed; especially if the deflowerers be of a nobler and higher estate. This nevertheless I submit here to the judgment and decision of prudent men, that that may be determined which is expedient for the public good.

XII. QUESTION VI. *What is to be restored on account of adultery from which offspring follows?* ANSWER. When from certain signs it is evidently established that the offspring was conceived from union with the adulterer — either because the husband was absent, or because he was sick, or because he was impotent — then all the losses are to be compensated which the husband has suffered from the third year of age in rearing the boy: for in the first three years the mother, but afterwards until the time at which the son can provide for himself, the father is bound to feed the son. What if a doubt occur whose the offspring is? Some, resting upon that axiom, *the condition of the possessor is the better,* deny the debt of restitution.

XIII. What seem to me the more probable are the following. When the adulterer and the adulteress have perpetrated the adultery by mutual consent, both are held in proportion to feed the boy and to compensate the losses to the husband or his lawful heirs: if one fail, the other is held *in solidum.* On the contrary, if the adulterer provoked the adulteress, and drew her into adultery by blandishments and little gifts, then the adulterer alone, as the principal cause, is liable to compensation. The adulterer failing, nevertheless, the adulteress is held. When it is doubted whose the offspring is, then judgment is to be made in favour of the marriage. But if the doubt persist, and reasons equally probable or more probable persuade that the offspring is spurious, I should judge that compensation is to be made in proportion to the doubt.

XIV. When an adulteress admits two men, one after the other, and it is unknown whose the offspring is, who of these is held to compensation, when it is established that the offspring was conceived by

the work of one or the other? De Lugo, López, Trullench, Sánchez, Soto, and others free both; this opinion the Salmanticenses and Cardinal Cozza also defend. This opinion is to me improbable. What? It is certain that one or the other is the true parent, and both shall go free! If each perpetrated adultery, each ought to undergo the penalty. If each had attempted homicide, though it were unknown which of them had in fact perpetrated the homicide, in what forum would each go free? Each perpetrated adultery, each exercised the procreative action. Therefore neither is innocent, although one begot the son. Therefore each is bound in proportion to feed the son and to compensate the losses. The arguments of the opposite opinion do not press. They would have him innocent who did not beget. But how innocent, if he committed adultery and posited the generative action? There are therefore two guilty. Therefore both are to be punished: both ought to concur in making good the losses; and one failing, the other is held *in solidum*.

XV. QUESTION VII. *An adulterer knowing for certain that offspring was procreated from his adultery, what is he bound to render to the lawful sons?* ANSWER. Diana, Henríquez, Soto, Ledesma, and others contend that an adulterer is not bound to compensate the losses which the lawful sons undergo in the portion of the inheritance or of the legacies which the spurious son receives, when he did not persuade the substitution of the spurious son. This opinion is commonly disapproved; and they teach that both the adulterer and the adulteress ought to compensate all the losses which come to the lawful sons by reason of the spurious son, even if the adulterer did not persuade the substitution. Since each was the cause why the spurious son is reputed lawful: therefore each is subject to the reparation of the losses. First therefore each ought to use all diligence that the losses of the lawful offspring be avoided, while this can be done without loss of reputation. If the wife have paraphernal goods, or others free, she ought to give these to the lawful sons. But if the adulteress possess no free goods, what then? Ought the adulteress to betray herself, that she may avoid the losses of the sons? If the adulteress conceive no morally certain hope of preventing the losses which threaten the lawful sons on account of the offspring procreated from adultery, she is not bound to disclose the crime to the spurious son, even if she cannot compensate the losses: since she would imprudently squander her reputation, while she prudently doubts that the manifestation of her crime would profit. Nor is it to the purpose that you object that a defamer ought with the loss of his own reputation to retract what he said, even when he doubts that his retraction will profit: since indeed the defamer injured his neighbour in reputation, and therefore ought in the same kind, with the loss of his own reputation, to make good the blackened reputation. But an adulterous mother inflicted losses upon her sons not in reputation, but in money. Wherefore while she cannot compensate in the kind of money, she does not seem bound to make good losses of this kind with the loss of her reputation and honour.

XVI. A son is not bound to give credence to a mother testifying, even with an oath, that he is spurious, as the common opinion holds: because the word of one witness does not bring in a necessity of believing, especially while she lays open her own shame, with detriment to him who believes. There is added that, since the son by the common persuasion and by his own is reputed lawful, he cannot by right be deprived of the inheritance unless it be established by certain witnesses and proved that he is spurious. If the woman be of a lower condition and of slight reputation, and a vast inheritance is to be taken by the spurious son, then she ought to reveal her crime, as all commonly teach: for indeed a woman of slight reputation can easily be induced to make the loss of it. On the contrary, authors commonly free an honourable woman of bright reputation from the manifestation of her crime, even if a vast inheritance were to be taken by the son. But as regards this,

the circumstances are to be regarded, and, all things weighed, it is to be determined what is more expedient. For a certain rule can scarcely be assigned.

Dissertation III — On contracts, universally and particularly

Chapter I — The definition of a contract, its causes and properties

I. QUESTION I. *What is a contract?* ANSWER. The common notion of it is assigned thus. It is *the deliberate consent of a twofold will, of the giver and of the receiver, concerning some thing to be done or not done, manifested by some exterior sign.* Four things therefore are required in any absolute and perfect contract. The first is the declared consent of that twofold will. The former will is called offering, provoking, and challenging; the latter receiving, provoked, and challenged. The seller's will offers and provokes; the buyer's will is receiving and provoked — although sometimes the buyer offers and provokes. The second is the conjunction of that twofold will. The third is obligation. The fourth is the efficacious action by which each contracting party fulfils his own debt. And so the contract is prior to the obligation, and this precedes the action. The obligation and the action are of two kinds: the one civil, the other natural. The civil needs the proof either of records, or of a bond, or of a written instrument. The natural is content with the testimony of the mind and of conscience. And so in any contract a twofold form can be regarded. The first is essential, which always and everywhere among all nations obtains. The other is adventitious, or accidental, which is constituted in the law of some people or prince. Of the four prerogatives recounted, the first two pertain to the form of the contract: for a contract, strictly taken, is a mutual convention concerning something to be done. This reciprocal concord of wills obligation follows, as a formal effect.

II. The proximate matter of a contract is human acts pertaining to justice. All contracts are reduced to these four: *I give that you may give; I give that you may do; I do that you may give; I do that you may do.* While contracts of this kind are committed to execution, they put on some determinate species or form. And this is exceedingly to be noted for the forestalling of frauds and usuries.

III. Conrad assigns thirty species of contracts, which partition Fr. Dominic Soto disapproves, who digests the named contracts into three orders, and reduces them to seven species. The first order is of those by which dominion is transferred; the second of those by which the usufruct; the third of those by which the use. In the first order he places liberal donation, exchange, buying, selling, and lending. In the second, emphyteusis. In the third, loan for use, letting, and hiring. From the species of contracts he removes deposit, pledge, and suretyship.

IV. The first contract approved in the holy Scriptures is that of matrimony. Others are contracts approved in general, as is gathered from the Apostle, 1 Thessalonians 4, where it is said: *That no man overreach nor circumvent his brother in business.* The contract of loan is clearly commended in Luke 6: *Lend, hoping for nothing thereby.* The contract of letting is declared in the parable of the vineyard let out to murderous and criminal husbandmen, Luke 20; and the contract of hiring in the other parable concerning the labourers hired. The contract of buying is recounted in Genesis 47, where Joseph bought the estates of Egypt, and let out the same to the Egyptians themselves at a fixed agreed rent.

V. QUESTION II. *How are contracts perfected?* ANSWER. In any contract a twofold perfection is distinguished: one substantial, the other adventitious. The former is had when all those things are added which are necessary to the species of the contract. Thus a sale is perfect as regards its species

as soon as it has been agreed between buyer and seller concerning the price. But by the delivery of the ware it is perfected accidentally and as regards the integrity of the contract. In four ways contracts are wont to be perfected. By consent declared by an exterior sign. By words, or a determinate form of words. By writing, when it is necessarily required. By delivery of the thing, without which some contracts are not completed. By consent are perfected those contracts which signify a mutual convention of the contracting parties, as are buying, selling, letting, hiring: writing, or the instrument which the contracting parties draw up after the mutual convention, is required not for the nature but for the proof of the contract. Other contracts demand a determinate form of words, as in a stipulation, in which, one asking: *Do you promise me?* the other replies: *I promise. Will you give me? I will give.* Which form of words, although it once obtained among the Romans, has now wholly grown obsolete, and it is enough that the consent of the contracting parties be proved by any words whatsoever. By writing are perfected emphyteusis and other contracts which, before they be written by a notary, have no force, custom or law so obtaining. The contracting parties can also suspend their consent until the writing be drawn up. By delivery of the thing are perfected loan, donation, loan for use, deposit, exchange, pledge. These before delivery are not reckoned perfect, but bare agreements.

VI. If contracting parties celebrate contracts with outward words without an inward mind of contracting, the contract is null: although in the exterior forum the deceiver is deservedly compelled to fulfil the contract, because consent is presumed. Nay, in the interior forum also the deceiver is bound to give consent. In few words I will touch upon the nature of obligation.

VII. Obligation is the bond by which a man binds himself to furnish something. Among these, one is *friendly,* resting upon the honourableness of the thing, by which a man is grateful to his benefactor; the debt of this is moral, not a precept of justice. Another obligation is founded in a commanding law, and is called a legal debt, which can arise either from charity, or from religion, or from justice, or from obedience. Obligation proceeding from justice alone brings in the debt of restitution. Obligation flowing from justice is either merely natural, which binds in the forum of conscience, but in the exterior forum gives no action; or merely civil, when according to what is alleged and proved a man is convicted a debtor who in truth is not, and is compelled to pay; or it is at once natural and civil, which binds in each forum.

Chapter II — On the various contracts

I. QUESTION I. *Whether a contract celebrated from grave fear is valid?* ANSWER. Many conditions are required that fear be called grave. First, that the imminent evil be grave. Second, that there be present probable grounds for fearing the evil. Third, that he who inflicts the fear be wont to commit the threatened menaces to execution. Fourth, that the terrified man be unable to decline the evils. The evils of death, of mutilation, of exile, of defloration, of the loss of one's estate, of vast goods, are, according to all, grave. Fear of infamy, of an excommunication unjustly passed, is likewise grave.

II. Theologians disagree upon the validity of this contract celebrated from grave fear. The first opinion denies that it is valid by natural law; the other affirms it, which St. Thomas clearly teaches, I-II, q. 6, art. 6: because things which are done from fear are absolutely voluntary, involuntary only in a certain respect. Fear therefore does not take away the liberty necessary for entering upon a contract.

III. Positive laws declare many contracts celebrated from grave fear null. And these are matrimony, betrothal, religious profession, the payment or promise of a dowry, the election of a prelate, the authorization of guardians, vows made to God, the handing over of ecclesiastical things, absolution from excommunication.

IV. The disagreement of theologians in this cause is of no moment: because although the contract be valid by natural law, nevertheless he who inflicts grave fear is bound by natural law to rescind the contract, that he may make good the injury inflicted. Nay, authors commonly defend that a contract vitiated even by slight fear is to be rescinded, since even slight fear inflicts an injury which ought to be repaired.

V. QUESTION II. *Whether guile makes a contract void?* ANSWER. Guile is taken for deceit, or for fraud, or for craft, by which one deceives another. Error, or guile, which precedes or accompanies a contract, if it be concerning the substance of the contract, makes it null and empty, because it takes away altogether the voluntary consent. When therefore guile, error, and craftiness are the cause of a contract, it is certain that it is null. On the contrary, if the guile or error be not against the substance, but against some accidental quality, it does not make void the contract, because it does not take away liberty as regards the substance of the contract. What if error or guile concerning a quality were the cause of contracting, so that if the guile or error were known by the deceived contracting party, he would in no way have entered upon the contract? In this case I judge that the contract is null. For although a quality in the physical order be accidental, yet while it gives cause to the contract, in the moral order it puts on the character of a principal cause. Nothing is more frequent in contracts of buying and selling than that the qualities of wares are the chief cause for carrying out the purchase; which cause being removed, voluntary consent fails. Hence it is that the civil laws in fact rescind contracts to whose entering upon guile or error gave cause. If losses follow, the party which circumvented the other contracting party is bound to make good the same. Whether therefore the contract be of strict right or of good faith, they are altogether null when guile or error is the chief cause of celebrating them. I do not deny, nevertheless, that in contracts of strict right one must adhere more severely to the formulas of words and expressions: for they are therefore called of strict right, because one must stand by the rigour of the words. But natural equity, which is the soul of every contract, ought always to be regarded.

VI. Adulations and blandishments do not hinder, but rather allure contracting parties to enter upon a contract. But two kinds of blandishments are to be distinguished. Blandishments, importunate entreaties, and flatteries, which by the courtesy of speech, the enticement of gesture, and the sweetness of the voice, falsehood and fraud being excluded, soothe and delight men's minds. That this kind of flattery does not destroy contracts is agreed among all. Other blandishments, crafty, malicious, furnished with frauds, lies, and arts of deceiving, which turn the mind away from virtue and from truth. That by this kind of flattery contracts are annulled and destroyed, no one can by right deny, when they give cause to the contract.

VII. QUESTION III. *What is to be said of contracts entered upon under a cause, a mode, a demonstration, or a condition?* ANSWER. A contract is said to be celebrated under a cause when the cause inducing to contract is set forth. The cause is twofold. One final, which so moves the contracting party that, it being removed, he would not contract. The other impelling, which allures the contracting party that

he may more easily contract; he would nevertheless contract even it being removed. The contract is valid in the latter, null in the former case.

VIII. A *mode* added to a contract is a certain burden to be fulfilled by him who undertakes and accepts the contract. This mode does not suspend, but supposes a perfect contract. A *demonstration* in a contract is when something is indicated either of the thing concerning which the disposition is made, or of him with whom the contract is made; for example, if it be said: *I sell you the horse which I bought at Padua for your sake; I enter upon a contract with you because you are my friend.* These circumstances commonly do not vitiate the contract, because they do not give cause to the contract. Nor is every cause therefore a chief cause which, had the contracting party known it, he would have abstained from the contract; but that is called the principal cause which in fact brings in a grave change, and which, being known, would have drawn back the contracting party from entering upon the contract.

IX. QUESTION IV. *How is a contract made to a day, or under a disjunction, to be interpreted?* ANSWER. If the day designated be determinate, the contract is to be celebrated on that day. The debtor is not bound to complete it before the appointed day, nor can he defer it after the appointed day. If the day be not appointed, but uncertain and annexed to a condition, then the condition is to be awaited. If no condition have been added, the time ought to be designated at the arbitration of prudent men. *Disjunction* comprehends diverse species; as if you say: *I promise you a horse, or fifty gold pieces:* both species remain disjunctively under obligation, but the choice is at the promiser's arbitration. One species perishing, nevertheless, the other remains under obligation.

X. QUESTION V. *How does a contract bound by a condition oblige?* ANSWER. A condition added to a contract regards time either past, or present, or future. That which regards the first two times is not properly a condition, since it does not suspend the contract, but makes it absolute. A condition therefore properly taken regards the future. Conditions intrinsically necessary do not suspend a contract. Impossible conditions make the contract null, as do shameful conditions — two contracts being excepted, of matrimony and of last will, in which shameful conditions are held as not added.

Chapter III — On those who can enter upon contracts validly and lawfully; on the solemnity of law that is necessary; what firmness an oath adds to a contract; to whom restitution *in integrum* belongs

I. QUESTION I. *Who can enter upon a contract?* ANSWER. All who are endowed with the use of reason, and have the free administration of their own goods. Hence infants lacking the use of reason, madmen, the demented, the drunken, the sleeping, prodigals, wards before the fourteenth year, and minors before the twenty-fifth, cannot enter upon contracts without the assent of curators and guardians. Prodigals, nevertheless, must have been declared unfit for contracting by a judge. He is called a *ward* who has not attained the year of puberty. This year in males is the fourteenth, in females the twelfth. The age next to puberty is in males the tenth year up to the fourteenth; in females the ninth and a half up to the twelfth. They are called *minors* who have not completed the twenty-fifth year: after it they are called *majors*. Wards and minors, when they are capable of guile, can enter upon contracts concerning goods of which they themselves have the free administration, such as are goods which are conferred upon them either by parents, or by guardians, or by friends, that they may use them at liberty. These commonly require, even for this disposition of goods, the age

next to puberty; which opinion I approve: because before this age they do not so possess the use of reason that they can enter upon contracts with astute and crafty men. But immovable goods, or movable goods which by keeping can be kept, wards and minors cannot alienate without the faculty of a judge, which cannot be granted without just cause, because the laws so dispose. A minor can contract concerning movable goods, if he lack a curator, and can use the benefit of restitution *in integrum,* if he be injured; otherwise a ward, to whom administration is forbidden. But the faculty of a curator or guardian being had, both a minor and a ward can contract concerning movable goods which by keeping cannot be kept, and can undergo an obligation both natural and civil. Those movable goods are said to be able to be kept by keeping which can be kept beyond three years, as gold, gems, and the rest of that kind. Those which do not last beyond three years are said to be unable to be kept by keeping. If wards and minors, without the licence of guardians and curators, enter upon contracts concerning those goods of which with the faculty of the same they can dispose, the contracts are null in each forum, the civil and that of conscience.

II. QUESTION II. *What solemnity of law is required for the validity of a contract?* ANSWER. Solemnity is twofold: one accidental, the other substantial. That which regards the substance of the contract, it being lacking, there is no contract; but if the former solemnity be lacking, it does not destroy the contract made. Whence is this diversity of accidental and substantial solemnity to be gathered? From the diversity of laws. One law forbids a contract without this or that formula, yet does not annul it. This is called accidental, and does not dissolve the contract: whence comes that proverb: *Many things done hold good which are forbidden to be done.* Another law, which not only forbids but also annuls a contract made without this or that formula, is substantial, and makes the contract null, if the prescribed rite be lacking.

III. Authors dispute whether a contract destitute of substantial solemnity is valid at least in the forum of conscience. All confess that contracts of matrimony and of monastic profession are null in each forum, if the prescribed solemnities be lacking. But they disagree concerning other contracts. Many affirm that contracts destitute of substantial solemnity, which in the exterior forum are null, are valid in the forum of conscience. To me it is more probable that they are null in each forum: since all the goods of subjects are subject to the government and direction of the supreme powers, regard being had to the order of carrying out public commerce. Therefore subjects are bound in each forum to observe the forms and rites prescribed by the supreme powers, by which human society is governed and public commerce is directed to the public good. Unless all things deceive me, it is a manifest error, hostile to human society and to public commerce, to assert that subjects are not bound in the forum of conscience to the observance of those laws. For the Apostle says, Romans 13: *Let every soul be subject to higher powers. For there is no power but from God.* Many other things I pass over for brevity's sake.

IV. QUESTION III. *How does an oath confirm contracts void by natural or by positive law?* ANSWER. It is certain that an oath does not confirm a contract null by natural law, because an oath cannot change the nature and essence of contracts. As regards contracts voidable by positive law, when the law annuls or declares the contract rescindable in hatred of the creditor, then it is certain that the contract is not confirmed by the oath: because then the law deprives the creditor of any action whatsoever against the swearer. Thus he who swears to a robber, a usurer, or others, out of grave fear, that he will pay a hundred, this promise is not ratified by the oath, nor valid; and robbers or usurers

acquire no right against such a promiser who swears; the oath nevertheless, on account of the majesty of the divine name and the reverence due to it, is to be observed. When a contract is decreed rescindable by law on account of the public good and the common utility, likewise it is not confirmed by an oath: because then the contract is unlawful and null. But an oath is not the bond of an unlawful and depraved thing.

V. QUESTION IV. *To whom does the benefit of restitution* in integrum *belong?* ANSWER. Restitution *in integrum* is *the reintegration of the former state made by the judge's authority:* which benefit has been instituted chiefly in favour of minors, and has place when the contract, the form of law being regarded, was valid and ratified; but a minor was injured in it before the completed twenty-fifth year, and therefore by the judge's authority he is recalled to his former state. This recalling to the former state is made either by rescinding the contract, or by increasing the price in which the minor was injured. A notable injury is nevertheless required, that this benefit may be sought. This restitution *in integrum* has place in the contract of sale, if the minor was injured, either because he sold for less than the just price, or because he sold a thing which he ought not to have sold. Again, if a minor receive money on loan, and squander it, he is not bound to restore save that in which he has been made richer. But if the contract be according to the formulas of law and the rules of equity, restitution *in integrum* has no place.

Chapter IV — On the contract of selling and buying. On those who can sell and buy. What things are vendible

I. QUESTION I. *What is buying?* ANSWER. It is *the agreement of giving a determinate price for a ware.* Selling is *the agreement of giving a ware for a determinate price.* These two partial contracts coalesce into one. That contract is onerous. The dominion of the ware is not transferred before the delivery of the same. The buyer before delivery has a right to the thing, but not dominion. Wherefore if before delivery a second buyer buy, and the thing be delivered, he acquires dominion, nor is he bound to deliver the thing to the earlier buyer. That dominion therefore may be transferred, the payment of the price and the delivery of the thing are required. If either of these conditions be lacking, authors commonly assert that dominion is not transferred. Wherefore if the buyer alienate the thing, the price not being paid, the seller retains the right of demanding it back wherever he find it. If nevertheless the seller trust the thing to the buyer, and hold the price as paid, then dominion has been transferred.

II. QUESTION II. *A thing sold to two buyers, to whom is it to be delivered? To whom does it perish before delivery?* ANSWER. It is to be given to the earlier buyer, who, since he is prior in time, is also prior in right. If to the one it was only sold, and to the other both sold and delivered, the thing is that man's, unless the first be privileged, as pious places, a church, cities. In which case indeed the thing is owed to the earlier buyer, even if the ware has been delivered to the second buyer. The same is to be said when to the earlier buyer, even though not privileged, a pledge was given in testimony of greater security. A thing sold perishes before delivery to the seller, because a thing perishes to its lord. But dominion before delivery pertains to the seller. If the thing have been delivered to the buyer, and the price be held as paid, it perishes to the buyer.

III. QUESTION III. *To whom do the fruits of a thing sold pertain before the payment of the price?* ANSWER. If the fruits hang upon the plants at the time the thing is sold, they pertain to the buyer, because they

are then parts of the thing sold. Authors dispute concerning future fruits, before the price be paid. The price can be regarded in two ways. First, when it is held as paid: namely when the seller grants the buyer a definite time for payment: then it is certain that the fruits pertain to the buyer. Secondly, the price is considered as promised by the buyer to be paid continuously, or at such a time, so that the seller does not hold that price as paid. Concerning this second case there is dispute.

IV. The first opinion defends that the fruits pertain to the seller, because he alone is lord of the thing sold before the price be paid or held as paid. The other opinion defends that they pertain to the buyer, because the civil laws, which deny that dominion is transferred before the payment of the price, have been abrogated by canon law forbidding all usury. But as regards this, the custom and usage of each region is to be regarded, and what laws obtain in this matter in the forum: and according to these the question is to be decided.

V. QUESTION IV. *Can contracting parties enter upon an agreement that the buyer render to the seller the fruits of the thing, or the price of the same, until he has paid the price?* ANSWER. Molina, Bonacina, Viva, and others affirm it. But this opinion is to me false, since that agreement is usurious, and a loan disguised by an agreement. But, says Fr. Viva, the buyer does not pay on account of the delay of payment, but on account of the gain which ceases to the seller by reason of the protracted payment. These are evasions. If the seller suffer loss, let him either defer the delivery of the thing until the price be paid, or exact compensation of the loss which he in fact suffers. If the seller grant a delay of time for the payment of the price, and the buyer be tardy, then he is bound to compensate the loss, and the seller can by right demand back reparation of that loss which he in truth suffers. These things are just and equitable. But the aforesaid sale with the burden of rendering the fruits of the thing delivered bears of itself the appearance of usury, and is therefore to be avoided.

VI. QUESTION V. *Whose are the fruits perceived in the meantime, when it happens that a contract of sale is dissolved?* ANSWER. Authors teach that a contract can be dissolved in four ways. First, if you sell in this manner: *I sell you a house on this agreement, that if within a year a better condition offer itself to me, the house be free;* or if you add the *lex commissoria,* as if you say: *I sell you the house, that within a year you pay the price: otherwise let the contract be null.* Second, if the sale be celebrated with an agreement of resale: as if you contract in this manner: *I give you moneys, that you may sell me the house; and I will sell the house back again on this law, that as often as you render the moneys, I will sell it again.* Third, if by mutual consent after a year the contract be rescinded. Fourth, if the contract be conditional, and the condition be not fulfilled. These things being laid down, the Salmanticenses, Lessius, and Bonacina teach that a contract celebrated expressly and manifestly with an agreement of adjudication to a day, or with the *lex commissoria,* is by that very fact null, and consequently that the fruits pertain to the seller. Similarly, if the sale be affected by an agreement of resale, they teach that the fruits of the intervening time produced from the time of the sale up to the time at which the contract is dissolved pertain to the buyer; but those which are gathered at the time of the resale belong to the seller. Whether this contract bears the appearance of usury shall be said elsewhere. But if the sale be dissolved by mutual consent, the fruits pertain to the buyer, according to what is said in no. 4, because the contract before the dissolution was valid. If finally the condition be fulfilled, the fruits are the buyer's; if it be not fulfilled, they are the seller's. For the rest, in these contracts the wills of the contracting parties are to be regarded, guiles and pretences being removed.

VII. QUESTION VI. *Who can sell and buy, and what things are vendible?* ANSWER. All who are apt for celebrating contracts can by right sell and buy, unless the laws forbid; as it is forbidden to guardians and curators to sell the goods of wards and minors; and to executors of testaments it is forbidden to buy the goods of the deceased. But those things whose dominions can be transferred are vendible. Hence spiritual things cannot be sold or bought, nor those which are annexed to spiritual things, as benefices, rights of patronage, the holy oils, the relics of saints, a temple, and the rest of that kind. Forbidden also is the sale of an inheritance before the testator's death.

VIII. QUESTION VII. *Are things bought with another's money the buyer's, or the money-owner's?* ANSWER. They become the buyer's when he uses another's money in his own name — say a deposit — and buys at his own advantage and risk, no law standing in the way. But when goods are bought with the money of wards, of soldiers, of churches, of minors, then the buyers acquire the goods not for themselves, but for the churches, the soldiers, the wards, the minors.

IX. QUESTION VIII. *Is the sale of another's thing valid?* ANSWER. In a sale dominion is transferred. The seller of another's thing has not dominion. Therefore he cannot transfer it. If a robber sell you another's thing, since he lacks the dominion of the same, he cannot transfer it. But if he acquire the dominion of the money received from the buyer, he is nevertheless bound to restore it, and to compensate the losses thence coming to him.

X. QUESTION IX. *Whether the sale of those things which are applied to depraved uses is lawful?* ANSWER. Certain things are evil by their own nature, as maleficent charms, libellous pamphlets, and rings to which demons are said to be bound, and the rest of that kind. That wares of this kind cannot be sold is certain. Those who publish or sell libellous pamphlets against the Pope, the cardinals, or the mendicants, incur excommunication. The author of a libellous pamphlet against laymen is punished with the penalty of death, Code, *On Famous Libels,* law 1; by canon law he is to be beaten with rods. Chapter *Qui in alterius.* Read the constitution of St. Pius V which begins *Romani Pontificis providentia,* published in the year 1572.

XI. QUESTION X. *Do those sin who sell poisons, women's paints, playing cards, idols, and the rest of that kind?* ANSWER. Those who absolutely sell poisons, no regard being had of the buyers, sin gravely, and ought to be punished as betrayers of human society, because they kill men by another's hand. But those who sell poison to an honest buyer, prudently judging that he will apply it to a good use, as indeed it can be applied, do not sin.

XII. That women's paints can be sold the Salmanticenses teach, and for this opinion they cite St. Thomas, who, II-II, q. 169, art. 2, reply 2, writes these things: *The painting of women, of which Cyprian speaks, is a certain species of feigning, which cannot be without sin.* These are decisive words. Cyprian is speaking of women who apply paints to counterfeit and display beauty. In confirmation of his doctrine St. Thomas alleges the authority of St. Augustine: *To be painted with pigments, that one may appear either more ruddy or more fair, is an adulterous deceit, by which I doubt not that even husbands themselves are unwilling to be deceived — to whom alone are women to be permitted to be adorned, according to indulgence, and not according to command.* It is lawful for women to hide from men a deformity, a hump, a scar, and the rest of that kind: but the deformities of countenances are not hidden by paints. Paints are commonly applied to counterfeit a lie of beauty. Women, while they stay at home exposed to the eyes of those who deserve it, commonly neglect all ornaments; but when they go out in public, and, as though fixed upon a stage, they would burst forth as mimes, then they appear painted, curled,

adorned, decked out, and hedged about with all the tricks of worldly or rather of infernal vanity. Who would say that these do not sin, and consequently the sellers themselves, who knowingly hand over paints to women of this kind? But if paints be sold for the hiding of deformities, then the sale is not unlawful. If the paints serve only for the counterfeiting of beauty, and this be perceived from the condition of the buyers, the sellers sin. Wherefore from the circumstances it must be perceived whether the sale be lawful or unlawful.

XIII. That dice, knucklebones, and playing cards can lawfully be sold, the younger authors everywhere teach. St. Thomas, St. Raymond, St. Bonaventure, St. Antoninus, and the rest of the saints and the graver theologians condemn games of chance, of dice and cards, of sin in those who give themselves without measure to games of this kind. Cards can be applied in those games which depend upon industry and art, and can serve for recreation or solace. In these games laymen can indulge without fault for some short time. For those things which are applied for the sake of recreation have narrow bounds: for man is born for labour and for serious works to be carried out. Recreation and honourable solace are medicines destined for the restoring of strength. If men leap beyond these limits of medicine, they straightway decline into vices. Sellers of knucklebones, of cards, and of idols cannot therefore be absolutely condemned: because these can be applied to games not of chance but of industry; idols can be applied to ornament, and to the illustrating of antiquarian study. But because knucklebones, cards, and paints are for the most part applied to depraved uses, therefore merchants are to be exhorted to abstain from selling these wares. These things are rigid, you will say. I confess it. But the way of heaven is narrow, and the life of Christians is a continual penance.

XIV. QUESTION XI. *Whether probabilism is vendible by a judge?* ANSWER. Lest anyone suspect that I propose this truly festive question to create odium against probabilism, it concerns me to admonish the reader that Fr. Thomas Tamburini disputes this controversy, Book VIII, *On the Decalogue,* tract 3, chapter 7, § 3, no. 13, where he proposes this title: *The sale of a probable opinion;* and in these words discusses the question proposed: "There occurs here a difficulty not unlike that concerning a judge. Let us suppose that opinion to be probable of which I have spoken at large in Book I, chapter 3, which, besides those cited there, Dicastillo follows, Book II *On Justice,* tract 1, disputation 5, doubt 7: that it is lawful for a judge to choose one of two equally probable opinions, and according to it to pronounce sentence. Now I ask, will a judge lawfully and justly accept money, that he may rather choose the one which favours me than the one which favours my adversary?"

XV. He answers that he disapproved this opinion in the place cited. "Let him nevertheless read it" (he adds) "who will, in Lessius, Book II, chapter 14, doubt 9, no. 64; Valentia, 2-2, question 63, article 4, disputation 5, question 7, part 4; Salón, 2-2, question 61, article 4, conclusion 2." Further, Fr. Lessius in the place cited, besides Valentia, Salón, Diana, and many others, maintains this opinion — namely that a judge can by right accept money for passing sentence according to one probable opinion rather than according to another — in these words: "It can be doubted whether he (the judge) sins against justice, if he accept something that he may follow this rather than that in judging. It seems that he does not so sin … because he is not bound to the one or the other determinately, but it is free to him to follow whichever he prefers. Therefore if he accept something that he may follow this rather than that, he does no injury to anyone. The consequence is plain. Because since the thing is not owed, it is not against justice (*if we regard the law of nature alone*) to exact a price for it, if

otherwise it be appraisable at a price. Thirdly, because he does not accept a price for the justice of the sentence, but because in this cause he prefers this opinion to that, to which he was in no way bound. Now this is appraisable at a price: both because it is most useful to the party, and because by following this opinion he loses the favour of the other party, whom he could have gratified."

XVI. Would you have things better? Probabilism teaches that it is free to select either of two probable opinions. When two contradictory probable opinions occur, a judge can pass sentence according to that which shall have pleased him more. Further, that he select this rather than the other is appraisable at a price. Therefore he can by right sell this preference of one opinion over another. Therefore probabilism is matter of selling and buying. What wonder then, if a ware so precious be defended with so great a heat of disputation? See how true is the oracle of Alexander VII, that this manner of opining is the head of all evils.

Chapter V — On trade, and on those to whom it is forbidden or permitted

I. Three kinds of trade are wont to be distinguished. The first, by which the things necessary for food are bought, and what remains over is sold. The second, by which material is bought — say wood, metals, and many other things — out of which by the labour of art those things are made which conduce either to ornament, or to convenience, or to the necessity of life. The third, by which wares are bought that the same, unchanged, may be sold more dearly. The first two bear the name of trade in a less proper sense. The third is the trade of which we shall speak. This the divine Scriptures and the holy Fathers of the Church assert to be liable to guiles, frauds, perjuries, and lies. For it is said, Ecclesiasticus 26: *Two sorts of callings are hard … a merchant is hardly free from negligence, and a huckster shall not be justified from the sins of his lips.* With difficulty is a merchant stripped of negligence in the business of eternal salvation, because he is bewitched with the cupidity of increasing riches. Hence the Apostle, 1 Timothy 6, says: *For they that will become rich fall into temptation and into the snare of the devil, and into many unprofitable and hurtful desires, which drown men into destruction and perdition. For the desire of money is the root of all evils; which some coveting have erred from the faith, and have entangled themselves in many sorrows. But thou, O man of God, fly these things; and pursue justice.* Very many testimonies of the Fathers I pass over from a study of brevity.

II. QUESTION I. *Is trade forbidden to clerics and religious?* ANSWER. There are many canons which forbid trade to clerics and religious under penalty of excommunication. Chapter *Secundum,* under *Clerics or Monks,* where these things are had: *Under the threat of anathema we forbid that monks or clerics trade for the sake of gain.* Again chapter *Consequens,* distinction 88; the *Clementine* 1, *On the Life and Honesty of Clerics;* chapter *Canonum,* cause 14, question 4. The penalties imposed by these canons are excommunication and suspension, which the Council of Trent renewed, session 22, and to which it added others. Authors commonly teach that these penalties are not *latae* but *ferendae,* which no one incurs save after the judge's sentence. Those laws comprehend all clerics constituted in sacred orders, nay even those in minor orders, if they be beneficed. Many of the younger authors except from this prohibition clerics constituted in minor orders … … even if they be beneficed, without any foundation: they distinguish for themselves, and we are not bound to distinguish.

III. Moralists dispute whether clerics or monks who trade once and again sin mortally. But I am wont to abstain from defining the degree of malice, unless the truth be expressed. The Salmanticenses

defend that a cleric or monk does not sin mortally if he trade twice or thrice, and they cite Diana, de Lugo, Molina, Filliucci, and others. But I answer that the law is to be observed. Whether the sin be grave or slight escapes our mind. That the law is to be observed our mind evidently recognizes. Therefore these little distinctions are evasions for eluding the law.

IV. QUESTION II. *Can clerics or monks trade through others?* ANSWER. The Salmanticenses affirm it, who cite Molina, Lessius, de Lugo, and others: because, they say, the sacred canons forbid to clerics and monks trade to be carried out by themselves; for this indeed bears an unseemliness and brings with it a distraction of mind; but it is otherwise when clerics and monks leave the whole care to another, and exercise merchandise by the ministry of others.

V. If this be not a circumvention of the law, what will be? The end and spirit of the prohibiting law tends to this, that it may draw clerics and monks, consecrated to God, away from the heaping up of riches, that they may give themselves wholly to the divine worship, that they may render God propitious to themselves and to the people. But clerics and monks who trade by the industry of others are tormented by avarice, by cupidities, by cares, by straits, by continual perplexities and solicitudes. What trade is permitted to clerics and monks is described in Vol. VII, Book 3, dissertation 1, chapter 3, no. 10 and following.

VI. QUESTION III. *In how many ways does trade become unlawful?* ANSWER. It can become unlawful: first, if its end be gain alone; second, if frauds, lies, perjuries, or monopolies be mingled with it; third, if the matter be not vendible, as sacred things, or wares which we are forbidden to sell to unbelievers, such as arms, iron, and the others which are enumerated in the Bull *In Coena Domini;* fourth, if merchandise be carried on either on feast days or in a sacred place.

VII. QUESTION IV. *Can those who exercise merchandise lawfully sell wares more dearly than those who do not exercise trade?* ANSWER. All affirm it, since the profession of merchants is necessary to the commonwealth, and these must live by their profession and sustain many burdens from which those are free who do not exercise merchandise. They cannot, however, exceed the limits of the price customary among merchants. It is forbidden them to gather up corn while it is worth less, that it may be sold more dearly. This trade natural and positive law reject. For rich men of this kind who accumulate corn, that in a time of scarcity they may sell it more dearly, are oppressors of the poor and pernicious to the commonwealth. The law itself, not only the common law, chapter *Quicumque,* cause 14, question 4, but the peculiar law also of every kingdom, forbids such trade.

Chapter VI — On monopolies lawful and unlawful. On sale with an agreement of resale

I. A monopoly is a convention or conspiracy by which many deliberate concerning such a ware not to be sold, save at this or that price designated by themselves. There are four (others reckon twelve) chief kinds of monopoly. First, when one or many seek out and buy up wares, that, scarcity being brought in, the rest may be compelled to buy from them at a dearer price. Second, when one obtains a privilege from a prince, by force of which he alone, the rest being excluded, can sell such wares. Third, when many hinder foreign wares from being brought into a city, that they themselves may be able to sell at a dear price their own, perceived from their own estates or sought out elsewhere, to the detriment of the common good. Fourth, when merchants conspire together and determine that wares

are to be sold at so much and not less; or on the contrary, when buyers conspire together and determine that so much and not more is to be paid for wares.

II. A monopoly of the first kind all disapprove. The second they approve, when the privilege obtained from the prince is a just one and consonant with the public good. For if the privilege were obtained from the prince by crafty art and fraud, and turned to the prejudice of subjects, then it would be unjust, and the use of it unlawful. The third kind of monopoly all condemn as unjust, and teach that the monopolists are subject to restitution. The fourth is similarly unjust, as will presently be plain.

III. QUESTION I. *Is it lawful for sellers to enter upon an agreement of not selling wares save at the highest price?* ANSWER. The Salmanticenses affirm it, who cite Lessius, de Lugo, Tapia, Navarrus, and others: because merchants have a right of selling at the highest price, which is otherwise just. The contrary opinion is to me the more probable. For although the highest price be within the confines of the just price, nevertheless a conspiracy of not selling save at the highest price, and of not buying save at the lowest, is unjust and detrimental to the commonwealth. For this perverse convention being excluded, many merchants would buy and sell now at a middle, now at the lowest, now at the highest price, which would turn to the great advantage of the commonwealth. The end of merchandise is the public good. Therefore trade becomes vicious as often as it is opposed to this end.

IV. QUESTION II. *A monopoly being once constituted by merchants of selling wares at an unjust price by excess, do other merchants, not partakers of that monopoly, sin against justice if they sell their wares at this unjust price?* ANSWER. The Salmanticenses with Diana, Bonacina, and Reginald deny it, because, they say, that the price is unjust is *by accident* to them, from the injustice of others. Is not this an excellent reason? Is it by accident to you that the price is unjust? It is by accident that the monopolists fixed the price; but the price is unjust *per se*. Do not the monopolists sin in exacting this unjust price? You say yes. Why? Because the price is unjust. Therefore you also will sin by accepting an unjust price. Distinguish the sin which the monopolists committed by increasing the price from the injustice of the price constituted. The former is by accident to you. But the exaction of an unjust price is of itself a sin to you. The said opinion therefore is to me false. Read what Cicero writes, Book III of the *Offices,* chapter 12.

V. QUESTION III. *What is to be said of an agreement of reselling and of rebuying?* ANSWER. This agreement can be added either in favour of the seller, or in favour of the buyer, or in favour of both together. It is made in favour of the buyer if you say: *I buy from you this book on this agreement, that at a time appointed by me you buy it back from me.* It is made in favour of the seller if you say: *I sell you this book on this agreement, that at an appointed time you sell the same back to me.* It is made in favour of both when to each is left the faculty of withdrawing from the contract.

VI. An agreement of this kind is lawful when it is made in favour of the seller alone, if the following conditions be observed. First, that contracts of this kind be celebrated in good faith and with a sincere mind of selling and buying, all palliated usury being excluded. Second, that the quantity of the price be tempered according to the added condition of the burden. Third, the condition is that the thing be sold at the price current at the time of the resale. Fourth, that the danger or advantage of the thing sold be thrown back upon the seller, and that the identity of the thing sold be preserved: as if a vineyard be sold with its fruits, it ought likewise to be resold with the fruits.

VII. QUESTION IV. *Is the contract of kinship lawful?* ANSWER. In Italian that contract is called the *jus di ricupera,* or the right of redeeming a thing sold. This right is granted to the blood-relations of the seller of recovering within a prescribed time an estate sold. For movables, however precious, can in no way be redeemed. The right of drawing back estates sold is confirmed by the laws of all nations and princes. And this order is observed in such a contract. The price at which the estate was bought ought to be paid to the buyer. This right is granted to the nearer blood-relation, and by degrees to the rest. If the nearer yield this right, the next of kin succeeds. He who by guiles and frauds hinders this right sins against justice. Blood-relations also sin when they recover estates sold in favour of friends, from whom they receive money with which they redeem the estate. Likewise when they recover in order to sell at a greater price. At the least they work against the end and spirit of the law, which regards the preservation of families, and by no means affords a handle for thrusting out lawful possessors and disturbing the public peace.

VIII. QUESTION V. *Is the Mohatra contract lawful?* ANSWER. The *Mohatra* contract is entered upon when a man in need of ready money buys from a merchant wares of which he has no need, at the highest price — say, 56 — with an agreement added by the merchant that they be resold to him by the buyer at the lowest price — say, 50. The agreement can be added either expressly or tacitly. The contract can also be celebrated without any agreement, whether tacit or express, either with a different or with the same merchant. In the first way it is a usurious contract, condemned by Innocent XI in this thesis: *The Mohatra contract is lawful even in respect of the same person, and with a contract of resale entered upon beforehand with the intention of gain.* Under the cloak of a contract of selling and buying usury is hidden, as is plain to all. For the feigned seller gives 50 on loan, that he may receive 56. Now all disapprove this contract, once defended by some. Cardinal de Lugo, Vol. II, disputation 26, section 1, no. 208, although he adheres to the common opinion, nevertheless widens the buckles. Read Vol. VII, Book 3, chapter 5, no. 9.

IX. Theologians dispute whether, every agreement both tacit and express being excluded, and scandal and the danger of infamy being excluded, the aforesaid contract be lawful. The common opinion of the younger authors affirms it. But in practice it scarcely happens that the prescribed conditions are observed. Wherefore the contract of sale is to be separated in mind and in fact from the contract of loan, the masks being stripped off.

X. QUESTION VI. *Can those who undertake wares to be sold from a lord retain anything for themselves, if they sell the same for more than was prescribed by the lord?* ANSWER. If these, whom St. Antoninus calls *Riratticri,* exceed the limits of the just price in the sale, they are bound to restore the excess to the buyer. If they recall the wares to a better state by their own industry, they can retain for themselves the increase of price which corresponds to their industry. Similarly, when the lord consents that they retain for themselves what they receive beyond the price which is prescribed — provided nevertheless that the limits of the just price be not overleapt — they in no way sin. This agreement and peculiar industry being removed, brokers are bound to render the whole price to the lord. Since by no title can they retain anything for themselves. Not by reason of the ware, because it is the lord's; not by force of the common industry employed in the sale, because they let out this industry to the lord at an agreed price. Nor is it to the purpose that you object that the lord designated the price: since he designated that the ware was to be sold at so much and not at a cheaper price; but for the rest his intention was not, nor can it by right be presumed, that it should not be sold for more, the occasion being given,

unless, as I have said, they expressly declare it. In good faith therefore ought intermediaries of this kind to conduct the lord's business, since they cannot enrich themselves with another's wares. What has been said of selling is to be said also of buying. Wherefore tailors are thieves when, buying cloths for the making of garments by the lord's commission, they retain something for themselves, under pretext of having bought more cheaply.

Chapter VII — On the just price of things, and on its increase on account of deferred payment

I. The just price is twofold. One legitimate, fixed by the prince's law; and this is individual, excluding any increase or decrease. The other natural, which according to right reason, all things regarded, is reckoned just, and is called the common price. This admits three degrees: lowest, middle, highest. From the judgment of prudent men and from common usage the justice of the price is to be sought. When the middle price of some cheap ware is 5, the lowest will be 4, the highest 6. If the middle price of a precious thing be 100, the lowest will be 95 and the highest 105, and thus the latitude will be 10. When a legitimate price is not predetermined, wares ought to be sold at the natural and common price.

II. QUESTION I. *Are those who increase or diminish the price of things liable to restitution?* ANSWER. He who by fraud increases the price deceives his neighbour. Even if, fraud being excluded, he increase the price beyond what is just, or buy a thing more cheaply than it is worth, he sins against justice. While the seller suffers no loss on account of the sale of the thing, although the buyer perceive a great advantage from the purchase, it is not therefore lawful to increase the price, as St. Thomas teaches, II-II, q. 77, art. 1. He who testifies that he sells a ware at the lowest or the middle price cannot deceive the buyer by accepting the highest. Otherwise he sins, and is held to restitution. Besides, a merchant swears that the ware stands him at so much: and this is false. A buyer swears that he could have bought for so much: which likewise is false. The Salmanticenses, tract 14, chapter 2, point 9, § 1, teach that these indeed sin the sin of lying or perjury, but not against justice: because, they say, *these are the common lies of sellers and buyers, and men commonly know that these are the stratagems of traders, to whom they give no credence; and if they incautiously give them credence, let them impute it to themselves, since they are easy of belief.* Are these things common between sellers and buyers? Are men therefore to impute it to themselves if they are easy of belief? Is this Gospel theology? Injustice is defended by the multitude and usage of sinners. The doctrine recounted is false, and these liars and perjurers are liable to restitution.

III. QUESTION II. *Are there any causes for which it is lawful either to sell for more or to buy for less than the ware absolutely is worth?* ANSWER. When the sale brings loss to the seller, then the price can be increased, that the loss may be repaired. For the just price is not fixed by comparison to the ware absolutely regarded, but as clothed with circumstances. Further, the inconvenience which the seller suffers, and the utility of which he is deprived, are appraisable at a price, and fall under the seller's dominion. Therefore they are just causes of increasing the price — when nevertheless the buyer solicits and urges the seller to part with the ware; but not if the seller himself offer the ware unasked: for in this case the seller himself spontaneously undergoes the loss, if he suffer any. The mere affection of the seller toward the ware is not absolutely a just cause of increasing the price. Since this affection brings no advantage to the buyer. If the affection be reasonable, as if the ware be adorned

with some prerogatives, and the seller suffer loss, then for the repairing of this loss the price can moderately be increased. Often sellers consult their own advantage with the advantage and utility of the buyer. But the buyer's convenience is not commonly a just cause of increasing the price, as the true opinion teaches. Can precious gems, statues, and paintings be sold and bought at any price whatsoever? Many theologians affirm it. But the more probable opinion teaches that these wares also have a price, and that it ought to be determined by the judgment of prudent and expert men.

IV. QUESTION III. *Can those things which are exposed for sale at auction be bought or sold at any price whatsoever, whether the highest or a cheap one?* ANSWER. Wares of this kind can be sold at whatever price a convention be made between the parties. Since the public power, which instituted this market, at the same time decrees that price to be just upon which the consent of sellers and buyers has settled. Wherefore if buyers either buy more cheaply or pay more dearly, the excess of price in this contest is reckoned to be remitted and condoned on either side. Care must only be taken against frauds in bids of this kind, especially when wares pledged to the sacred *monti* are sold. Since indeed sometimes the buyers enter upon a monopoly of offering only so much a price, that the sellers may be compelled to sell more cheaply. Sometimes the sellers and the broker propose wares for sale at that time at which they know that few buyers gather to buy, that they may favour friends from whom they receive little gifts; and they betray the cause of the poor, and make themselves friends of the mammon of iniquity. On the contrary, the bidders themselves are wont sometimes to send in trusty buyers of their own, who feignedly offer prices and provoke the true buyers to increase the price. All those frauds are contrary to justice and equity, and oblige to restitution.

V. QUESTION IV. *Whence is the common or natural price to be taken, and what are the causes of increasing it?* ANSWER. It has already been said above that the price is constituted by the common estimation of men, and admits a latitude of middle, lowest, and highest. Which latitude is not constant but variable, on account of the diverse circumstances of time, place, and persons. And as regards time, if a present ware be sold, it ought to be sold at the price obtaining. If a future ware be sold, as fruits about to be born, account is to be had of the price which shall prevail at the time of delivery. Wherefore those who buy wheat in the month of February at the price then obtaining, to be delivered in the month of July or August, at which time it is believed it will be sold for more, sin against justice, and are held to restitution of the increased price. The price therefore is to be determined according to the value which the ware has at the time at which it is to be delivered.

VI. As regards place, if a seller give wares at Rome and have them at Bologna, they ought to be sold at the price at which they are worth at Bologna, not at Rome. If nevertheless he were about to carry the same to Rome, he could, expenses being deducted, exact the price at which they are worth here. If a seller be willing at his own risk and expense to carry his wares to the place where they are sold for more, he can by right sell them at the price of that place.

VII. The circumstance of persons regards merchants, who by reason of their profession useful to the commonwealth, and necessary to their own proper sustenance, can sell wares for more than other private men. The price fixed by law, nevertheless, neither can they lawfully exceed, nor can they increase the common price once fixed.

VIII. QUESTION V. *What are the circumstances in which the prices of things decrease?* ANSWER. First, on account of the fewness of buyers and the abundance of wares, the prices of things are wont to be diminished. Second, when a ware is bought in favour of a seller offering it unasked, which otherwise

would not be bought, because the ware is then not useful and convenient to the buyer — just as the price is increased when it is sold for the buyer's advantage, when otherwise it would not then be sold. A measure nevertheless is to be used, and care is to be taken cautiously in these circumstances, lest anyone should wish to grow rich out of a brother's want and scarcity. That evangelical rule is always to be held before the eyes: *What you would not have done to yourself, do not to another.* The price can be increased and diminished according to the variety of circumstances; but always equity and justice are to be preserved. The personal necessity, whether of the buyer or of the seller, can never be a just cause of varying prices: otherwise wares could be sold more dearly to the poor.

IX. QUESTION VI. *Can merchants sell wares at the current price, when they know that an abundance of wares will shortly come, and consequently that the price of things will be diminished?* ANSWER. Tullius denies it, narrating the case in Book III of the *Offices* concerning the Alexandrian corn-merchant, as I have indicated above. St. Thomas, II-II, q. 77, art. 3, reply 4, says: *Whence a seller who sells a thing according to the price which he finds does not seem to act against justice, if he does not set forth what is future. If nevertheless he should set it forth, or should subtract from the price, it would be of more abundant virtue; although he does not seem bound to this by the debt of justice.* The doctrine of Cicero, says the Angelic, pertains to the perfection of virtue, but not to the debt of justice. A merchant does a thing worthy of a Christian if he give warning of the coming abundance of wares. But to manifesting it he does not seem bound by the bond of justice. If a merchant foresee that the price will be increased, he cannot sell more dearly. Therefore neither, if he foreknow that the price will be diminished, is he bound to sell more cheaply. This is diligently to be guarded against, that merchants do not through their brokers allure buyers to buy when a coming abundance of wares is imminent; for then they would sin against justice. If an occasion offer itself of selling at the current price, let them sell, all artifice being removed. But for the rest, if they were to seize occasions of selling, I would not free them from restitution.

X. QUESTION VII. *Can he who foreknows that money will be interdicted by the prince's law, or its value diminished, put away his money before the promulgation of the law?* ANSWER. The Marquis Bellonus, master of a banking table, when some few years ago this case occurred to him, chose to lose many thousands of crowns rather than to put away his gold pieces to the detriment of other merchants. This honest and ingenuous Christian I have therefore commemorated, that I might propose an example of imitation to the rest. From the preceding question it is plain that the banker is not urged to this by the bond of justice. I confess that he can carry out the payments and exactions which naturally occur. But if he craftily sought a putting away of his money, and to lodge it in the hands of others, that they might undergo the loss near at hand, I would not free him from the debt of restitution: since what you would not have done to yourself, do not to another. Now no one in these cases would wish to be deceived.

XI. QUESTION VIII. *What is to be noted concerning a price prescribed by public authority?* ANSWER. Navarrus denies that it is expedient for a prince to fix the prices of things, because many frauds follow such a law: which reason, if it held good, would require all laws to be abrogated. Wherefore the common opinion teaches that it is exceedingly expedient that the prince predetermine the prices of things, as St. Thomas teaches, I-II, q. 96, art. 1, reply 2, saying: *It is better that all things be ordered by law than left to the judgment of the judge,* and so forth. When nevertheless a ware is of inferior value, the seller cannot sell it at the fixed price, but ought so to diminish the price as to equal the defect of the ware: since the fixing was made on the supposition that the wares have the common value. Besides,

those who preside over the determining of prices ought to fix the price with regard to scarcity or abundance. A seller cannot compel a buyer to pay the price in gold or silver money, because this would be a burden above the fixed price. When wares are so precious that they exceed the common value, then, proportion being preserved, the price can be increased, provided the excess of value be evident, and the increase of price correspond to this excess of value: for not every excess is enough for increasing the price. Otherwise the fixing of the price would be in vain, since wares are commonly in some way better one than another.

XII. QUESTION IX. *Can cheaper wares be mingled with choicer ones, and be sold at the fixed price?* ANSWER. When wares by such mixture are reduced to the common goodness of those wares which are sold at the fixed price, according to the opinion of many of the younger authors, a mixture of this kind is lawful. But mixtures of this kind seem to me to be rejected, as full of frauds and contrary to sincerity. Besides, it rarely happens that generous wine mixed with water (say the same of other things) does not become of a worse condition than common wine.

XIII. QUESTION X. *Can a merchant sell wares more dearly on account of deferred payment of the price?* ANSWER. All absolutely confess that they commit disguised usury who sell wares more dearly on account of the deferred payment of the price alone. *Whatsoever* (says St. Thomas, II-II, q. 78, art. 2, reply 7) *is exacted beyond the just price for expectation of this kind is as it were the price of a loan.* There are wont to be alleged the titles of ceasing gain and of emerging loss, of which below. They obtrude also the expenses which the merchant is probably about to make in obtaining the price, which expenses they repute as emerging loss. And if in truth this danger be present, and the buyer be warned of the increased price and consent to it, a moderate increase corresponding to the loss which the seller suffers does not seem to be disapproved. Moralists also dispute whether it be lawful to buy more cheaply by anticipated payment if the wares will be worth less at the time of delivery; and on the contrary to sell more dearly on account of awaited payment, if it be believed that at the time of delivering the price the wares will be worth more. In each case authors commonly affirm it, provided the merchants would have kept the wares until the time at which they would be worth more; but they deny it if this condition be lacking. Hence they infer that it is lawful to buy corn in the month of January by anticipated payment, to be delivered in the month of August, at the price current not in the month of January but that which shall recur in the month of August. Wherefore it would be manifest injustice to buy at a cheaper price on account of anticipated payment wares which would be worth more at the time of delivery.

XIV. QUESTION XI. *Is the contract lawful by which in Spain and elsewhere certain wares are commonly sold on credit at a greater price than they are wont to be sold for ready money?* ANSWER. Ships laden with wares come from the Indies into Spain. These wares cannot all be sold for ready money. And those which are sold for ready money are sold at a lesser price. The Spanish theologians discuss that case at large, especially Navarrus, Gutiérrez, Medina, Córdoba, Molina, de Lugo, the Salmanticenses. All deny that the price can be increased on account of deferred payment, as Sylvester notes under the word *Usury,* against a certain Raphael Pornasius, says de Lugo. Nor ought it to be a wonder that this Pornasius taught usurious laxities, if he wrote most laxly concerning monastic poverty.

XV. And so, extrinsic titles being removed, Navarrus, Gutiérrez, Valentia, Garcías, Medina, and Bartholomew of St. Faustus deny that it can be sold more dearly for money not counted down: since, they say, the increase of price is exacted solely on account of deferred payment, which according to all

is usury. They urge further. If a sale for money not counted down at a greater price be just, a purchase at a lesser price for money counted down will be unjust: since whether the money be counted in the present or in the future, it does not bring it about that the wares increase or decrease. But a purchase for money counted down is just, as all confess: therefore a sale on credit, as it is commonly called, at a lesser price is unjust.

XVI. The opposite opinion is maintained by Báñez, Serra, Rebello, Villalobos, de Lugo, Sánchez, Lessius, Diana, Castropalao, the Salmanticenses. These assign various reasons. That which can settle this contract is the one which Soto sets forth, Book 6, question 4, article 1, reply 4. These wares are carried from the Indies with very many and very great dangers, and moreover cannot be transported save in great quantity, as much as suffices to load huge ships. Whence it comes about that the factors themselves, who load the ships, are compelled to buy many wares on credit, at a dearer price. Therefore the necessity of unloading the ships at once compels that at least a great quantity of the wares be sold on credit at a greater price. The peculiar circumstances therefore of a far-distant region where the wares are bought, and the maritime dangers of the voyage, seem able to constitute a special title, by force of which they are sold more dearly — not on account of deferred payment, but because such merchandise is of such a nature that it compels wares to be put away quickly. But from this peculiar contract it can in no way be inferred that this is lawful in other common contracts.

XVII. The Spanish theologians similarly dispute whether it be lawful there to buy wool at a cheaper price by anticipated payment. Bannez, La Cruz, Prado, Navarrus, Martínez, Valentia, Rebello, Mercado, and others deny it, resting upon that principle, that it is manifest usury to buy more cheaply on account of anticipated payment. But wools are in fact bought in the month of December or January at the price of 20, to be delivered in the month of May, when they are worth 30. Therefore the price is diminished on account of anticipated payment alone, which all condemn as usury. For why are wools sold beforehand more cheaply? That grass may be bought for pasturing the flocks. No title therefore occurs for diminishing the price, save the want of the seller.

XVIII. The opposite opinion is defended by Soto, Serra, Covarruvias, Medina, de Lugo, Sánchez, Bonacina, Trullench, Lessius, Diana, and the Salmanticenses, tract 14, chapter 2, point 2, no. 133. Since, say these, *a practice so continual in Spain is not altogether to be condemned, and it is exceedingly hard to condemn the multitude of such traders, who buy in the month of October or November for 50 gold pieces, say, wool which in the month of May, when it is to be delivered, is worth 40, on account of the anticipated payment, of which the owner is in need for the paying of pasturage.*

XIX. Behold, Christian reader, one of the principles whence the relaxation of evangelical morals proceeds. *It is exceedingly hard to condemn the multitude of such traders!* This same principle the pagans used for the maintaining of the religion of their deities. *All nations for so many ages have worshipped the deities. It is exceedingly hard to condemn so many nations upheld by so long a prescription.* So the heathen prated against the Christian religion, which they called a new superstition. Most futile therefore is the argument drawn from the multitude of sinners, so often disapproved by holy Scripture and by Augustine. What of this, that this usury is more than Jewish? Not five, not eight, not ten, but more than twenty in the hundred are exacted. This second opinion therefore is false, and the first true, and consequently safe and to be embraced. Read Vol. VII, Book 3, dissertation 3, chapter 7, no. 5.

XX. QUESTION XII. *Is it lawful to buy credits or bonds at a lesser price than they are worth, on account of anticipated payment?* ANSWER. That contract is most frequent. A man has a bond of exacting from a

prince, or from another debtor, 100 after a year. You buy it for 95, or 93, in ready money. If the credit be doubtful, or of difficult payment, or liable to dangers, all confess that it is worth less, and that according to the quality and gravity of the difficulties the price can be diminished. It is disputed only whether, when the debt or credit is of easy payment, liquid and certain, it be lawful to buy at a cheaper price on account of anticipated payment. Sánchez, Diana, Rosella, and others affirm it: since, they say, it is less to have an action to a thing than the thing itself. But those who buy bonds or credits of this kind do not buy the thing itself, but the action of having it. Therefore it can be bought at a lesser price. Besides, these are vendible wares like others which have their price. But in the common estimation of men the price of such debts paid in the present is less than the sum to be paid in the future. Therefore they can by right be bought at a lesser price.

XXI. The contrary opinion is common. Since the price is unjust when for a hundred 95 are paid: for a virtual loan intervenes. And the distinction between a right to 100 gold pieces and the 100 gold pieces themselves is sophistical and fraudulent in this contract, devised for the covering of usury. I prove it. Let us suppose a credit of 100 gold pieces, liquid, certain, of easy payment, and to be exacted today, while you buy it, without difficulty: in this case would the price of 95 be equal and just? You assuredly deny it. Therefore it is evident that the diminution of price is on account of the expectation of time. Therefore you value present money more than future. But this is proscribed by the Church. You insist: Men commonly esteem this ware of credits, payable after a year, at less than present money. But this is true of men boiling with avarice and forestalled by the opinions of the vulgar; not so of Christian men imbued with the divine law. Since indeed, if 100 to be rendered after a year are not worth so much as 100 counted down today, why could not a borrower be compelled to render 106 after a year for a hundred received today? Hear the author of opusculum 67, attributed to St. Thomas, who writes thus: *He who owes for a fixed time, if he pay before the term, that something of the debt may be remitted him, seems to commit usury, because he manifestly sells the time of payment. Whence he is bound to restitution. Nor is he excused, because he is burdened by selling before the term, or because he is induced to this by another: because by the same reason all usurers could be excused.* This doctrine both the ancients and the younger authors commonly defend: St. Antoninus, Sylvester, Salas, Báñez, Tapia, Malderus, Soto, Lessius, La Croix, Billuart, Viva, and many others. Cardinal de Lugo contends that this question is speculative, not practical, on the ground that in practice credits or debts of this kind are scarcely free from all danger, trouble of exaction, or ceasing gain and emerging loss. But men often feign to themselves a ceasing gain and an emerging loss. When the debts of a prince are bought, what true title occurs here? Scarcely one out of so many buyers of this kind in a century has suffered an emerging loss — namely, that he has not exacted the debt at the prescribed time. Therefore the title is only *possible,* which cannot be a just cause of diminishing the price.

XXII. QUESTION XIII. *What is to be said of the seller's obligation of laying open the defects of wares?* ANSWER. There is a mutual obligation, both of the seller and of the buyer, of manifesting the vices or the goodness of wares. If a seller does not manifest a hidden vice of a ware to the buyer, he is bound to restore not only the quantity of the price, if he sell for more than the ware affected with such a vice was worth, but also the losses which the buyer incurs on account of the ware's vice. A threefold defect can be in a ware. The first concerning the substance, as if you sell silver for gold, glass for a gem. To this defect is referred the mixture of wares of a diverse species, as if you mingle barley with wheat, or pour water into wine. Other defects regard either an accidental quality or the quantity; as when wares are sold by a lesser measure and bought by a greater. What is said of the

seller is to be said also of the buyer. If he should buy a thing at an unjust price — say, below the lowest — whether in good or in bad faith, the vice being detected, he ought to compensate the seller by equalling the quantity of the price. If he should buy a ware as corrupt which in truth was sound; an estate as mortgaged which was free; if he bought gold for silver, a gem for glass: all these things the buyer ought to manifest to a seller who is either ignorant or careless, and to increase the price according to the value of the wares. If a seller keep silence about a vice of the ware in no way harmful to the buyer, and diminish the price according to the quality and quantity of the vice, he commits no fraud, provided the buyer do not ask: for if he ask, the seller is bound sincerely to manifest the defect; nay, if the seller foresee that the buyer will not buy the ware if the vice be detected, even with the quantity of the price diminished, he would be bound to warn him. For merchandise is to be exercised sincerely, and what you would not have done to yourself, do not to another.

XXIII. Fraudulent and guileful accordingly are those merchants who pour a drop of mercury into the ears of horses and asses, that they may appear swift, spirited, and generous, when by their own nature they are slow, sluggish, and as it were stupid; who upon the topmost surface of a sack or vessel place the best wheat and the best wares, that the deceived buyer may believe the rest of the wares to be of the same goodness.

XXIV. A certain and general rule concerning the various defects of wares, in respect both of buyer and of seller, can scarcely be assigned. For if the vice does not render the ware notably less useful to the buyer, the price being diminished in proportion to the vice, the seller when not questioned is not absolutely bound to manifest the vice. Circumstances can nevertheless occur on account of which the defect is to be manifested. Account is also to be had of commerce and trade. For wares of the same kind are not all of the same quality and goodness. And if traders had to declare even the least defects, and to sell only perfect wares, it would be all over with trade. Since indeed buyers also are often tardy and morose, who on account of the slightest defect would wish to diminish the price beyond what is just. Good and sincere faith therefore is to be preserved, and every circumvention to be guarded against.

XXV. Sellers ought chiefly to beware of mingling wares. The vices of coins are altogether to be declared. He who knowingly puts about false money for true is a thief and a robber. If he do it unknowingly, he does not sin, but when he learns of it he is held to restitution. If it fall slightly short of the just weight, it is commonly reputed as nothing. On the contrary, when it falls short not slightly, then it is to be manifested.

XXVI. What of those who sell by a lesser measure? It is certain among all that a seller is held to restitution if he subtract anything from the quantity of the ware, as when he sells by an inferior balance or measure. The younger authors dispute whether it be lawful for sellers to use a lesser measure when the price has been unjustly fixed by the prince. Cardinal de Lugo with others affirms it, and the Salmanticenses adhere to him. If the fixing of the price were manifestly unjust, neither would I resist. But for the rest, private men, and in their own cause, are not lawful judges of the fixed price. The fixing of a price made by the prince regards the common good and the solace of the poor. Wherefore although in fact wares stand the merchants at more, and while they sell them at the fixed price they suffer loss, the price is not therefore unjust, because it pertains to the prince or the magistrate to determine what prices are expedient for the common good of the city, and not to the merchants. Wherefore they are not to be excused who diminish the measure of a jar of wine, who

diminish weights, who subtract one ounce or another under pretext of an unjust price. These sin, and are held to compensation. For if they suffer loss, that is to be ascribed to the adverse lot of trade, not to the injustice of the price. For such is the condition of merchandise, that it brings forth now gain, now loss.

Dissertation IV — On loan and usury

Chapter I — The definition of loan, and its properties

I. QUESTION I. *What is a loan?* ANSWER. It is *the delivery of a consumable thing into the use of consumption, and the dominion thereof, that after some time has elapsed just as much be restored.* The matter subject to loan is by its own nature consumable, and delivered into the use of consumption. These two things are necessary to a loan. If coins were delivered not for consumption but for display and pomp, it would be a loan for use; if for custody, a deposit, not a loan. Since to the nature and essence of a loan it is required that the thing lent be consumable and delivered for consumption: although money be not consumed materially, it is nevertheless consumed formally while it is put away: for the same in number is not restored to the lord, just as neither the same wheat, nor the same wine, and so forth. But in a loan for use the same thing in number is restored. The consumption of things is twofold. One natural, by which the thing itself perishes, as wine, corn, oil, and the like. The other civil, in which the thing is alienated, as money, which while it passes into another's dominion perishes to its own lord, and becomes another's. The last particle, *that after some time has elapsed just as much be restored,* signifies that some time ought to flow between the delivery and the restitution. For he who lends spontaneously imposes upon himself the obligation of demanding back the thing delivered, not at once, but after some time. If a point of time be prescribed, when it has elapsed restitution ought to be made, otherwise the debtor will be tardy. And if no day be appointed, the circumstances of the giver and the receiver being regarded, restitution ought to be demanded. For a certain rule cannot be prescribed. The thing to be restored ought to be of the same value as the thing received, and of the same species: as wine for wine, money for money. In this restitution, nevertheless, not so much the physical species is attended to, unless it were agreed upon, as the formal value. A thing lent increases and decreases to the borrower. Wherefore if the value of money be increased or diminished, it turns to the advantage or loss of the borrower. Things which theologians call *consumable* the jurists call *fungible,* that is, those which in their own kind admit of function, that is, consumption. The definition explained all Catholics approve, diversity of words being removed.

II. The chief property of a loan, which necessarily follows from its nature, is the transfer of dominion. For if things subject to loan are consumed by use, and by force of the loan are given for consumption, it follows that he who gives things on loan confers also the right of consuming, putting away, and alienating them. Money alone is consumed by alienation; other fungible things lent perish by consumption. He who receives moneys on loan buys wares with them: the seller of the wares becomes absolute lord of the moneys. Whence does he acquire that dominion? Assuredly from the borrower. He therefore was lord of the moneys, because *no one can transfer more right to another than he himself has.*

III. The heretics Salmasius and other patrons of usuries confess that the dominion of the bodies, but not of the quantity, is transferred in a loan. Those who are wont to deride the little distinctions of the casuists do not blush to produce this witty fiction. Everyone would most gladly receive the bodies of gold pieces, the quantity being left to Salmasius. Bodies are so bound up with quantity that they cannot subsist without it. Therefore while the bodies are alienated, the quantity is alienated, which

cannot be separated from the bodies. The lender therefore loses the dominion of the thing lent, but retains the right of demanding back just as much. This right the patrons of usuries too grossly confound with dominion, since they are two things altogether distinct. Since indeed dominion is a right in the thing, and the faculty of using it at the lord's discretion. Of this dominion of the thing lent the lender is destitute; but he retains a right or action of demanding back just as much, and this right or action he can sell, bequeath, and give. All these things are clear.

IV. Hence a loan differs from a sale, in which a price is paid for a ware; from exchange, in which one thing is delivered for another; from donation, in which no right of demanding anything back is retained; from letting, in which a price is paid for the use of a thing; from a loan for use, in which dominion is not transferred but only use, and the same thing in number is to be restored; from a deposit, in which a thing is consigned to be kept; from a pledge, which is given for the sake of security, without transfer of dominion, with the burden of restoring altogether the same thing.

Chapter II — The notion of usury: all usury, whether small or great, whether exacted from a rich man or from a poor man, is forbidden by divine law

I. QUESTION I. *What is usury?* ANSWER. It is *gain perceived from a loan by force of the loan.* Whensoever gain is exacted by force of a loan, whether from a rich man or from a poor man, it is usurious. The vulgar are wont to constitute the whole crime of usury in the excess of gain. Which error of the vulgar the younger heretics have adopted, and one or another unskilled Catholic. But I shall show below that all err basely.

II. Some contend to disguise the doctrine concerning usury by a new distinction. They distinguish a twofold kind of loan: one of *consumption,* which is delivered to the needy; the other they call of *trade,* which is delivered to merchants for the enlarging of their money and the increasing of merchandise and business, whence vast utilities come to the commonwealth. The gain which is perceived from the first loan of consumption they confess to be usurious. That which is exacted from the other, the trading loan, they assert to be lawful, provided it be moderate and consonant with the laws of the country.

III. These crafty and inept fictions both the divine Scriptures and the Fathers explode. In Leviticus 25 these things are had: *Take not usury of him, nor more than thou gavest.* Here the particle *more than thou gavest* excludes altogether every accession added to the principal delivered. Similarly Christ the Lord says: *Lend, hoping for nothing thereby.* This word *nothing* disapproves not only excess, but any increase whatsoever, however small. I omit the testimonies of the Fathers, that I be not long.

IV. Usury is divided into real and mental. Real is the usurious gain itself. Mental is the will by which it is intended that something beyond the principal be perceived by force of the loan, as a debt, although it be not expressed by any agreement. It is also wont to be divided into *lucrative, compensatory,* and *punitive.* They call lucrative that gain which is perceived by force of the loan beyond the principal. Compensatory is that which is exacted for the compensating of the loss which the creditor suffers. Punitive is the gain which is imposed to be paid by a tardy borrower. Lucrative usury alone is usury properly so called, and vicious. And this alone is commonly understood by the name of usury.

V. They divide usury besides into *conventional* and *necessitated.* The former is owed from convention; the latter from delay, that is, on account of the postponement of paying the price from a contract of selling and buying, or on account of the postponement of rendering the principal lent. Others divide usury into *formal,* or express and open, perceived from a loan; and *palliated,* or virtual, which is hidden in other feigned contracts. Usury is also distributed into usury *of the principal* and usury *of usury.* The gain which is perceived from the principal, commonly called the capital, is usury of the principal. Usury of usury is when the agreed gain is not paid but is constituted into the principal, that it may again bring forth usury. And so gain from usurious gain is called usury of usury, and by Ulpian is called *interusurium.* Lastly, among the Romans one usury was *centesima,* that is, by which one in the hundred was paid every month, and consequently twelve in the year. Lower usuries were *deunces,* which paid eleven in the hundred; *dextantes,* ten; *dodrantes,* nine; *bessales,* eight; *septunces,* seven; *semisses,* six; *quincunces,* five; *trientes,* four; *quadrantes,* three; *sextantes,* two; *unciariae,* or *uncia,* one in the hundred. Some contend that under the name *unciaria* the *centesima* is understood. For the *as unciarius* consisted of twelve ounces. But for the rest, usuries *unciariae* are commonly held for the least.

VI. QUESTION II. *Is all usury, whether perceived from the rich or from the poor, prohibited not only by natural but by divine law?* ANSWER. Catholics commonly affirm it. I have examined this controversy with a full pen in Vol. VII, Book 3, dissertation 3. Here in few words I will touch upon the same. In any contract, if anything beyond the just price be exacted, justice is injured. When in a contract of loan you receive something beyond the principal, you exceed the measure of the just price: therefore you injure justice. For there is no title by force of which you can exact something beyond the principal. For money by its own nature is barren. Usurers laugh when they hear money called barren. But they offer themselves to be basely derided when they blurt out such things. A field also, they say, is barren; a house is barren; and yet from the use of them a price is paid. ANSWER. They betray themselves as more stupid by these things. A house by use becomes worse; therefore its use is separated from its dominion. If the house falls, it falls to the lord, to the letter. A field by its own nature is fruitful, though it needs to be helped by industry, that it may bear these fruits rather than others. If the field perishes by alluvion or other misfortune, it perishes to the lord. Money alone delivered on loan perishes to the borrower. Therefore in it the use cannot be distinguished from the dominion. What say the patrons of usuries here? If money can be let out just as a house, a field, a horse, why must money alone perish to the borrower, and all the rest to the letter? Let them afford a clear answer. They will never give another, save that money is civilly consumed by use, and that from this use dominion is inseparable. That the parity may press, lenders ought to lie under the danger of the money, just as letters lie under the danger of the horse, the house, the field. They will not have this. They will not, therefore, and yet gain is necessary. The patrons of usuries deny that gain can be exacted from money delivered on loan to the poor. And yet from a house, a field, a horse let out to the poor gain is by right perceived. Therefore they do not reason well when from the gain perceived from the letting of a house, a field, a horse, they infer that gain can be exacted from money delivered on loan.

VII. The patrons of usury object again: Although money be barren by its own nature, it is nevertheless fruitful. For money is equivalent to the thing, and with money are bought estates, houses, and other things which bear fruit. Nor does a field bring forth money; but because it bears fruits, from which money is gathered, it is called fruit-bearing. Similarly, although money does not

bear money, yet because with money fruit-bearing things are procured, it is to be called fruitful, no otherwise than a field, a house, and the like.

VIII. These words rest upon no solid foundation. A borrower can by right buy fruit-bearing things, because he is lord of the money. If an estate bought with borrowed money be evicted, if it be swallowed by a river, if the house perish by fire, to whom does it perish? To the borrower. But to the lender the whole principal is to be rendered. Let those tell us, who are wont to display a skill in natural law, what natural law prescribes that he who suffers no inconvenience ought to experience the convenience. All things perish to the borrower — both the money lent and the things bought with the money. No danger of this loss, no inconvenience, will the lender undergo. But if the borrower, by his own industry, fortune complying, should gain something, does the lender dare to claim a part of that gain for himself? What law of nature, what equity, permits this?

IX. They insist again. Moderate usury is useful to the commonwealth. It being taken away, commerce falls, fairs fall, and all things are disturbed. Moneyed men refuse to lend gratis. So many merchants, so many craftsmen cannot conduct their business without borrowed money. Take away moderate usuries, and you have taken away business.

X. What then? Does the Christian religion break up human society, and destroy civil commerce, and forbid the enlarging of riches and merchandise? By no means. Nay, it recalls all these things to the laws of equity, and permits their sober and moderate use to man, weak and labouring under a thirst for riches. Let the patrons of usuries awake, and emerge at last from the darkness. Hitherto I have made plain the iniquity of usury, the law of nature alone being regarded, every other circumstance being removed. But now I say that, even if usury, all precision being made, were lawful, nevertheless in this state of lapsed and corrupt nature it would be destructive to human society and to civil commerce, and consequently would have to be prohibited. From original sin man contracted, among others, two most grave wounds: namely, concupiscence of the flesh, and of riches. With so great an impulse is he carried away toward riches, by which he fills all his appetitions, that he prescribes no measure for himself. Imagine usury committed to a man sound and an absolute moderator of his own cupidities. Will it therefore be expedient for a man infirm, wounded, and impotently thirsting for money? A drink of wine wholesome to a sound man can be poisonous to a sick man. Let those usurers hear the most severe declamations of Christ Jesus against men desirous of growing rich. *Woe to you that are rich. … Go to now, ye rich men, weep and howl. It is easier for a camel to pass through the eye of a needle, than for a rich man to enter into the kingdom of heaven.* Let them hear the Apostle Paul thundering: *They that will become rich fall into temptation, and into the snare of the devil, and into many desires hurtful, which drown men into destruction and perdition.* Let them again lift up attentive ears: *For the desire of money is the root of all evils; which some coveting have erred from the faith, and have entangled themselves in many sorrows. But thou, O man of God, fly these things; and pursue justice.* 1 Timothy 6.

Chapter III — Certain little questions concerning usury are resolved

I. QUESTION I. *Is there given a smallness of matter in the sin of usury?* ANSWER. Some deny it. But since usury is opposed to justice, just as there is given a smallness of matter in other faults against justice, so in usury it seems to be admitted. This question I do not discuss more fully, because as regards

practice it is idle. For which of the usurers delivers a very great sum on loan for the gain of one *julius* or another?

II. QUESTION II. *Is present money counted down more valuable, apart from titles, so as to justify accepting something beyond the principal?* ANSWER. Caramuel affirms it, Book II of his *Moral Theology,* disputation 14, where he praises many others. This opinion is false and lax, and deservedly proscribed by Innocent XI in thesis 42. For from this opinion it would follow that all usury is lawful.

III. QUESTION III. *Is it lawful to accept something above the principal on account of the trouble arising from the privation of the money delivered on loan?* ANSWER. Caramuel in the place cited proposes this question in witty words, and jestingly eludes the evangelical doctrine. A few of his words I transcribe: *Is there not truly some recreation in seeing precious things — why not also in possessing them? A price is given for hearing a comedy or seeing a beast, and no one contradicts: why not for seeing or possessing the best pieces of gold? By reason therefore of this trouble arising from the want of money, every other danger being set aside, Medina affirms that something above the principal may be accepted; and the interpreters of St. Thomas, question 78, article 1, judge it speculatively probable. Dicastillo contradicts, and says:* "To me this opinion seems speculatively improbable and morally pernicious in practice." *You see a censorious Cato condemning the doctrine with a severe brow. Hear him nevertheless at no. 154 contradicting himself.* The contradiction being related, by which Dicastillo proves the doctrine which he had asserted to be pernicious, Caramuel thus resumes his discourse: *The mountains are in labour; a ridiculous mouse will be born. Why were those things said before? An opinion which a few lines ago was speculatively improbable and practically dangerous is now at last asserted to be true. For truth is truth, though, prepossessed with other notions, you condemn it; and while you condemn it, it shines forth, and you will defend its sincerity against your very self.*

IV. Good heavens! Those who refute lax opinions full of scandal are severe and censorious Catos who speak from a lofty brow. And a most grave error Caramuel calls shining truth! And Fr. Lessius, Book II, chapter 20, doubt 14, no. 105, himself exhibits as probable the condemned opinion, which on account of the want of money and the will of not demanding back the loan within a fixed time exacts something. *Because,* he says, *as upon other things and burdens some price can be imposed, so also upon the burden of being without one's own money for such and such a time. For since money is the instrument of trading, and to deprive oneself of the instrument of one's art is appraisable at a price, why could not merchants also, by the consent of all, impose some price upon the want of money, especially if the reason of the common good demand it?* He adds nevertheless that so lax reins are not to be given to merchants, because this opinion is new and therefore not easily to be admitted. If it is false, as it is, it is always to be rejected. Wherefore Fr. Nocetius wholly went astray, who by an unhappy endeavour strove to excuse his Lessius from this laxity. Fr. Thomas Tamburini says that this doctrine of Caramuel is uncertain to him.

V. These things I have indicated in passing, that the reader may hence gather whither the new manner of theologizing impels even theologians honest and learned, such as chiefly was Fr. Lessius. This doctrine of Caramuel utterly destroys the evangelical dogma against usury, and therefore has been condemned by the Church: *As a price is paid for seeing a comedy or a beast, so for seeing and possessing pieces of gold?* Therefore usury will always be lawful. For money cannot be given on loan without the privation of the sight of the same. And the more avaricious men are, the greater the sadness and trouble with which they are affected while they deprive themselves of it for a time. Therefore if avaricious men on account of the aforesaid sadness exact five in the hundred, the most avaricious will be able to exact seven or ten. There is no need that we refute this unheard-of opinion more fully,

since it betrays its own horror and has been condemned by the Church. No less false is the other opinion which Caramuel teaches in the same place: namely, that a lender can accept something because he deprives himself of the faculty of trading with his money. The privation of that faculty is appraisable at a price, says someone. This doctrine likewise takes away all usuries out of the midst; and is therefore to be disapproved as anti-evangelical.

Chapter IV — On the danger of losing the principal. Certain lax opinions are refuted. The chapter *Naviganti* is set forth in its true sense, the comments of the younger authors being rejected

I. QUESTION I. *What is the danger of the principal, and of how many kinds is it?* ANSWER. It is the uncertain outcome of losing or recovering the principal. It is twofold: *of fact* and *of right*. Now of the first, afterwards of the second. By reason of the danger of fact, not a few of the younger probabilists defend that gain can be exacted in a loan without the stain of usury. For they assert that this danger is always inherent in every loan. One for many I allege, Fr. Claude La Croix, who in Book III, part 2, *On Usury,* no. 854, writes these things: *Sylvius, Serra, and others in Mendo, In the Balance, disputation 6, no. 58, have taught that there is ALWAYS a danger to the principal when a loan is given: and therefore that by reason of the danger something can ALWAYS be exacted.* Neither Calvin, nor Salmasius, nor the rest of the patrons of usuries maintain so lax a doctrine. For they teach that when money is delivered on loan to a poor man, or to a rich man pressed by necessity, nothing can be exacted, and they defend only trading usury. Therefore they cry out that the Catholic casuists in words disapprove usury in the abstract, but in fact uphold it more laxly than the rest. If danger is always inherent in a loan, gain is always lawful. Where then in the world is usury? This error Benedict XIV routed in his Encyclical against usury, no. 3, in these words: *But this is diligently to be observed, that anyone would falsely, and not without rashness, persuade himself that there are ALWAYS to be found, and everywhere at hand, together with a loan, other lawful titles, or* and so forth. Read our commentary upon the aforesaid Encyclical.

II. Others of the younger authors, to cover this error with some paint, distinguish danger into ordinary and extraordinary. By reason of the second, not of the first, they defend that gain can be exacted from a loan. Extraordinary danger is, they say, when you deliver moneys on loan to borrowers of doubtful faith, to prodigals, to bankrupts, to men given to gaming, and so forth. But these are chimerical paradoxes devised for encrusting usury. What prudent man will give his moneys on loan to prodigals, bankrupts, gamesters, litigious men, and men known to be of doubtful faith? Other younger probabilists, dismissing this extraordinary danger, assert that a price can be exacted in a loan when this danger of fact is true and not feigned.

III. My proposition is this. *Gain from a loan on account of the danger of losing the principal, whether ordinary or extraordinary, is usurious.* Where, I ask, in all holy Scripture, where in the Fathers, is there mention of that danger? But the danger which is with the creditor is to be distinguished from the danger which is with the debtor: which two dangers the younger authors commonly confound. Of the first danger I shall now discourse. This is inherent in every loan: for by this very fact, that a man lends for some time, there is always present a true danger of losing. Therefore if by reason of this danger gain can be exacted from a loan, there will be no gratuitous loan, no usury among Christians. The danger which is with the creditor can have its rise from this, that the affairs of the borrower are desperate, or will be, or can be. In the first case the danger is evident and certain. But no lender will deliver his

money to such a borrower, unless, burning with charity, he wish to succour him with the loss of principal and gain. Similarly in the second case, namely when the future ruin of the borrower is foreseen, no prudent man will entrust his moneys to him. The whole difficulty therefore is reduced to the third case, namely to *possible* danger. This danger is, but is not certain, inherent in every loan. For any man, even a rich one, can be reduced to misery on account of various circumstances: for money is always safer, absolutely speaking, in the hand of the lender than of the borrower. If therefore on account of this *possible* danger gain be lawful, there will be no usury among men.

IV. Diana and Tamburini answer that it is false that the danger of losing the principal is inherent in every loan. Since, they say, a loan is without danger if the borrower deliver a pledge or a surety. Excellently! But the acute probabilists have thrust themselves into snares. By force of a pledge or of an assurance the danger can be separated from the loan. Therefore, the pledge or assurance being removed, the danger is always inherent in a loan. Therefore always from a loan without a pledge or suretyship gain can be exacted. But this doctrine is anti-evangelical, because it makes all usuries lawful.

V. By another reason I prove the falsity of the opinion recounted. That a lender may be able to exact the said gain by reason of danger, he ought to take upon himself the danger of the principal. But the lender does not take upon himself the danger of losing the principal. Therefore the gain perceived is usurious. That the lender does not take upon himself that danger is a truth of fact. For if the principal delivered on loan be snatched away by theft, or perish by shipwreck or in trade, the borrower, if he be solvent, ought to restore the principal. The danger therefore is with the debtor, not with the creditor: therefore the debtor is unjustly burdened while he is obliged to pay a price for a danger to which not the creditor but the debtor himself is liable. They insist: It can happen that the debtor be not solvent and become bankrupt; and in this case the creditor loses the principal: therefore this danger is always with the creditor. The evasion is vain. For this danger is only possible and most remote. For all lenders, before they entrust their moneys to borrowers, severely weigh their state, their substance, and all the rest: and while they foresee a probable danger of losing the principal, they abstain from the loan. Therefore that danger is most remote, and inherent in any loan whatsoever. If it were a just title of demanding a price, there would be no usury in the world. It is confirmed. A thief commits a theft, and let the thief restore in penitence: he is compelled to pay nothing for the danger, as all confess: and yet the danger of money plundered is greater than of money lent. The thief is not bound, they say, to pay the price of the danger, because no convention preceded between the thief and the lord. An inept evasion. For now the discourse is whether that danger be a just title of a price to be paid. What do you answer? Do you deny it? It is therefore usury to exact a price for it. Do you affirm it? Therefore the thief is bound to pay by a stronger right than the borrower. A convention supposes a title, without which the convention is unjust. When a true title is present, even without a convention the price ought to be paid. Because emerging loss is a true title, a thief is bound to compensate this loss, even if no convention preceded. Besides, imagine someone compelled by force and fraud to lend. What ought the violent borrower to restore? The principal, and all the losses which the compelled lender has suffered, although no agreement preceded concerning these losses to be made good. What ought he to pay for the danger of losing the principal? Nothing at all, as all confess. Therefore that danger is not a title of a price to be paid.

VI. QUESTION II. *What is to be said of the title which de Lugo and Tamburini devised?* ANSWER. Cardinal de Lugo, disputation 25, section 6, no. 81, and after him Tamburini, Book VIII, tract 3, chapter 8, § 4, no. 1, devised a most witty title of exacting something above the principal. And this is the trouble, disturbance of mind, and anguish of soul which the lender suffers in putting away and counting out his money, if the lender be timorous. Behold the words of de Lugo: "If therefore you could exact beyond the principal when the future loan would be to you a cause of headache, you will be able also to exact when the future loan would be to you a cause of grief and internal fear on account of the danger of losing the principal: because that grief and fear, as contradistinguished from the principal itself, is something which can be brought into an agreement for a price." More clearly in the same place, no. 83, de Lugo confirms this doctrine of his: "Because if I, because I am lame for example, must undergo a peculiar trouble in bringing the money from my house to lend to you, which trouble others would not undergo, I could well" (N.B.) "exact a peculiar price for that trouble to be undergone by me. If therefore likewise, because I am timorous and fearful, I cannot lend to you without great anguish and fear of losing the principal, it seems that I may exact something for this trouble and burden, without which I cannot lend to you. This nevertheless I leave to the judgment of others."

VII. This doctrine being admitted, horrid absurdities follow. All lame men will be free from usury, because they will be able to demand a price from a loan on account of the greater labour in bringing the money from the chest. Those who labour under dullness of the eyes must use spectacles in counting the coins, and on account of this trouble can demand a price. What of women, what of nobles fearful and timorous, who the more avaricious they are, the more fearful they are? And shall the price be increased for greater fear and anguish? The doctrine alleged therefore is false, and altogether to be repudiated.

On the celebrated chapter *Naviganti*

VIII. At the outset a twofold danger is distinct. The one *of fact,* which is with the debtor, inasmuch as the debtor out of all his goods is bound in any event, even of the principal lost, to restore just as much. The other *of right,* which the creditor takes upon himself, entering upon a new contract by which he assures the principal, so that if the principal by any chance without fraud or fault of the borrower perish, it perishes to the creditor himself. This danger of right is extrinsic to the loan itself, because it is undertaken by the creditor through a new contract of assurance. And yet this danger also is rejected by Gregory IX in the Decretal directed to St. Raymond O.P. in the year 1236, in which these things are had: *One lending a quantity of money to a man sailing or going to the fairs, on the ground that he takes the danger upon himself, being about to receive something beyond the principal, is to be reckoned a usurer.* If not even then, when the lender takes the danger upon himself, is it lawful to exact a price, how much less will it be lawful when the whole danger is with the borrower?

IX. Many of the younger authors play the critic in this cause. They say that the pontifical text is corrupt, in which the particle *Non* is wanting, omitted by the carelessness of copyists. But that evasion is inept, vain, and fictitious, as I have made plain at length in dissertation 1, chapter 5, § 2, *On the Triple Contract of Usury.* Not only do all the codices lack the particle *Non,* but — which is decisive — St. Raymond, to whom, as I have said, the Decretal was directed, reports the pontifical text without the aforesaid particle. They insist. In the same Decretal a second case is added, whose beginning is *He also who gives,* and so forth, *ought not on this account to be reputed a usurer.* What

grammarian, says a certain most recent writer, does not observe that that particle *also* signifies uniformity with what was said before? But theologians read in the praised Decretal two contracts diverse in species: of loan in the first case; of selling and buying in the second. What uniformity, I ask, is there between these two contracts? To the authority of St. Raymond is added the authority of Lancellotti, who in Book IV of the *Institutes,* title 7, § 10, *On Usuries,* sets forth the case of the Decretal in these words: *But it is another matter of right, if one lend a certain quantity of money to a man sailing or going to the fairs, and, on the ground that the lender takes the danger upon himself, agrees to receive something beyond the principal: for here he is to be reputed a usurer.* What more? The Gloss itself sets forth the case in this manner also: *Someone lent a certain quantity of money to a man sailing or going to the fairs, and, on the ground that the lender takes upon himself the danger of the principal, receives something beyond the principal: it is asked whether he be a usurer? The Pontiff answers that he is.*

X. This opinion St. Thomas defends, or the author of opusculum 73, chapter 6, saying: *If anyone should commit money on loan to one sailing, on account of the hope of some gain, although he should also have received upon himself the danger of the principal, nevertheless he is judged a usurer, even if he lose the whole.* St. Raymond in his *Summa,* title *On Usuries,* § 7, where he sets forth the Decretal *Naviganti* given to himself, writes thus: *Such men always make such a loan on account of the hope of monetary gain, which is not lawful.* These authors were contemporaries of Gregory IX. And if they condemn gain on account of a danger of right, which is otherwise appraisable at a price, as is plain in a third assurer, how much more do they condemn gain on account of a mere danger of fact, inherent in every loan?

XI. Graver theologians also subscribe to St. Thomas and St. Raymond: Navarrus, Soto, Báñez, Gutiérrez, Rebello, Toletus, Tapia, Conrad, López, Genet, Ballerini, Gennaro, the theologians of Louvain and of Paris. The canonists also commonly accede. Honoratus Leotardus, *On Usuries,* question 18, observes that formerly maritime interest was permitted by civil law on account of the danger undertaken. *But now,* he says, *this maritime usury is altogether condemned, and the civil laws permitting maritime interest have been abrogated by the constitution of Gregory IX, chapter Naviganti, On Usuries.* But after he has demonstrated that gain on account of a danger of right undertaken by the creditor is usurious, at no. 13 he disapproves by a stronger right, as usurious, gain perceived on account of the danger of fact to which the creditor exposes himself: *although,* he says, *Leonard Lessius and very many theologians indeed hold that this is lawful … but our opinion is the safer, and received among jurists.* Wherefore Fr. Nicholas Gennaro exclaims, part 1, page 56, in these words: *So think the Doctors. O the confusion of theologians! And, O good God, into what opinions do so many heads go off! To what end? To justify maritime interest. They sweat that they may favour human cupidity and thirsty avarice.*

XII. And what shows me more clearly that that danger is a pure and mere mask devised for covering interest is this: that those younger authors never prescribe to those lenders that they abstain from the loan, when they refuse to deliver it without gain. Wherefore I thus reduce them to a stand. Either they repute that danger true, or false. If false, let the question cease. If true, let them enter upon a contract of partnership, in which according to all there is present a true danger and a true title of gaining. Do they refuse? Therefore they do not want the true danger. And yet this is a certain and safe title of gaining, approved by the consent of all the Doctors. Why do they not want this safe gain? Let them give the reason. Assuredly they will give no other, save that they want the gain and do not want the danger, unless it be fictitious. But if they do not want the dangers of a partnership, let them abstain from the loan. Abstain from the loan? The evangelical law prescribes the loan. True; but a

gratuitous loan, and it forbids a usurious loan. The evangelical loan is a fruit of charity without any hope of gain. This gratuitous loan you refuse, unless you obtain usurious gain. With Christ's Gospel therefore I declare to you, either that you deliver a gratuitous loan, if you are able, and if your brother is in need; or, if you cannot, or if the other is not in need, abstain from giving a loan. If at last you intend to make your money fruitful, enter upon lawful contracts either of partnership or of another trade.

XIII. The objections of our adversaries are almost these. They object the decree of the Sacred Congregation of Propaganda Fide given in the year 1645 to the Chinese missionaries, in which these things are had: "In the aforesaid kingdom it is established by law that in a loan thirty per hundred be accepted without regard to ceasing gain or emerging loss: it is asked whether it be lawful for the Chinese, for the loan of their moneys, although there intervene no ceasing gain or emerging loss, to accept the aforesaid quantity of thirty per hundred fixed by the law of the kingdom: the cause of doubting is, because in recovering the money there is some danger, namely that he who receives the loan may flee, or may be tardy in paying, or that it may be necessary to sue before a judge, or on account of other things of this kind." The resolution of the Sacred Congregation to that query is of the following tenor: "They judged that by reason of the loan immediately and precisely nothing is to be accepted beyond the principal; but if they accept by reason of a danger probably imminent, as in the case, that they are not to be disquieted, provided account be had of the quality of the danger and of the probability of the same, and proportion being preserved between the danger and that which is accepted."

XIV. To Henry of St. Ignatius alleging this decree in a public disputation it was answered: first, as he himself narrates, Book I, part 1, no. 377, that it is not sufficiently established; second, that the resolution is not approving, but tolerating. Against the first answer he produces Fr. Thomas Hurtado C.M., who produces an authentic copy. But that author obtrudes other pontifical decrees as authentic which are altogether apocryphal. I say therefore that the praised response is either of no credit, or merely permissive and tolerating. Is not this clause found at the end of the boasted decree? *Until His Holiness or the Apostolic See shall have ordained otherwise.* Further, the Apostolic See in the year 1679, thirty-four years after the response was given, condemned the opinion of the theologians saying: *Since money counted down is more precious,* and so forth. What of this, that the Apostolic See had for many ages already defined in the chapter *Naviganti* that he commits usury who, having undertaken the danger of the principal, should receive anything from a loan? This is a pontifical constitution inserted into the code of the sacred Canons, and it suffers no exception.

XV. Finally, the very law of the Chinese kingdom proposed to the Sacred Congregation is most iniquitous. For by that law the quantity of thirty in the hundred is fixed, to be paid yearly on account of the flight of debtors and other dangers. But such a law lays open its own injustice. The Romans reputed the *centesima* a biting usury. But the Chinese law imposes not twelve but thirty to be paid. Who does not perceive that law to be most iniquitous and most full of savagery?

XVI. They object, secondly: St. Thomas, II-II, q. 77, art. 4, reply 2, teaches that the price can be increased on account of the danger to which a merchant exposes himself in transferring a thing from place to place. Therefore on account of the danger of the principal. A most inept argumentation. Hear the whole text of the Angelic. *Not everyone who sells a thing more dearly than he bought it trades, but only he who buys for this, that he may sell more dearly. But if he bought a thing not that he might sell it but that he might*

keep it, and afterwards on account of some cause wishes to sell it, it is not trade, although he sell it more dearly. For he can lawfully do this, either because he has in some way improved the thing, or because the price of the thing has changed according to the diversity of place or of time, or on account of the danger to which he exposes himself in transferring the thing from place to place, or in causing it to be carried. And according to this neither the buying nor the selling is unjust.

XVII. What of it? In a contract of selling and buying the price can be increased, as the Angelic teaches: therefore also in a loan? Is borrowed money therefore a ware subject to a greater and lesser price, like other wares, on account of danger? Is there therefore no usury in the world? A merchant in transferring wares from place to place sustains many labours and dangers. If the wares be filched by robbers or by pirates, they perish to the merchant himself. On the contrary, if borrowed money, or wares bought with that same money, perish, they perish not to the lender but to the borrower. Therefore there is no parity.

XVIII. They object, thirdly: The danger of the principal is extrinsic to the loan, joined to it by accident, because it arises from the qualities of the borrower — a prodigal, a gamester, a deceiver, and the like. But this danger is appraisable at a price, since a third party can receive a price for assuring it. ANSWER. When Christ commanded, *Lend, hoping for nothing thereby,* was he ignorant that men are deceivers, prodigals, gamesters? This little distinction being admitted, there is no usury in the world. I yield. Who, unless a fool, delivers his moneys on loan to prodigals, bankrupts, gamesters? What law commands that a loan be delivered to these men? If dangers are here imminent, why do they not abstain from the loan? Give an answer. A loan is commanded that succour may be brought to needy brethren, not that the vices and crimes of prodigals, bankrupts, and gamesters may be fostered. They want the loan, because they desire to gain from the loan. For prudent men would never expose a hundred to a true danger for the hope of gaining five. But because they know that the dangers are commonly chimerical, and they want a certain gain, therefore they lend and refuse to enter upon other contracts liable to true dangers.

XIX. They object, fourthly: The exaction of gain is lawful on account of the danger of emerging loss: therefore also on account of the danger of losing the principal. ANSWER. Each proposition in the sense produced by our adversaries is false. Contracting parties can indeed agree concerning the paying of a loss which threatens the lender, if it in fact come about. But if the loss does not in truth emerge, nothing can be accepted, as I shall make plain below. And the consequence drawn hence is vain. The distinction of intrinsic and extrinsic danger is commonly chimerical. All men can be deceivers. Hence an intrinsic danger arises, as our adversaries confess, by force of which no one can gain. But they call the danger extrinsic when money is lent to borrowers known to be prodigals, gamesters, and bankrupts. Let all lenders be questioned: if they will speak candidly, scarcely one in a hundred will be found who delivers a loan to the men described. Every lender will say that he uses all diligence that he may entrust his money to the safer and more faithful borrowers. Therefore the distinction of intrinsic and extrinsic danger is vain and chimerical. That lenders sometimes entrust their money to such borrowers proceeds from an impotent cupidity of gain and a burning avarice. Similarly, that honest and trusty borrowers sometimes become bankrupt is by accident. What is by accident and rarely happens cannot establish a rule concerning extrinsic and intrinsic danger. A loan is to be given to the poor and needy according to the evangelical law. In respect of them the danger is greater than if it be delivered to the rich. Therefore more gain could be exacted from the poor by

reason of the greater danger than from the rich. This is the necessary consequence from the doctrine of the younger authors. But this anti-evangelical doctrine even the heretics themselves detest — Calvin, Salmasius, Heineccius, and other patrons of usuries.

XX. QUESTION III. *Is it lawful to exact something above the principal by reason of the labour in counting out the money?* ANSWER. Fr. Thomas Tamburini, Book IX, tract 1, chapter 5, § 1, no. 1, teaches that it is lawful to exact something for the preparing of moneys in a great quantity, for the measuring of wheat, and so forth; and he cites for this opinion Molina, Medina, and Navarrus. This opinion is false: for the counting of money is inherent in the loan.

XXI. QUESTION IV. *Is it lawful to exact something on account of the obligation of lending, or of not demanding back the loan within a predetermined time?* ANSWER. The affirmative opinion Alexander VII condemned, no. 42: *It is lawful for a lender to exact something above the principal, if he bind himself not to demand back the principal until a certain time.* Fr. Tamburini, Book VIII *On the Decalogue,* chapter 8, § 5, no. 18, in this manner: *I have already said that under this title of a promise not to demand back money lent, five per hundred may be exacted for any year in this money-getting age of ours.* So Caramuel. Our money-getting age? In this money-getting age lived Alexander VII, who in the year 1666 condemned the aforesaid doctrine. But Tamburini died in 1675. And therefore I report the lax and proscribed opinions of the casuists, that readers may beware. Let them recall that proscribed opinions are principles whence many other erroneous consequences flow.

Chapter V — On emerging loss

I. QUESTION I. *What is emerging loss?* ANSWER. It is that detriment which a lender suffers by cause of the loan alone. You have moneys ready for the repairing of ruinous buildings, or for the tilling of fields, or for the buying of wheat for the whole year. Kindled with charity, you deliver these moneys on loan to a needy brother. If hence your house fall down, or your fields remain untilled, the loss which you sustain is by right to be compensated. This is emerging loss, which can be brought into an agreement. Who is there who would wish to undergo such a loss in order to succour a needy brother by a loan? They are very rare; and yet nothing is more frequent in the mouths of some than emerging loss.

II. Wherefore many conditions are necessary for a true title of emerging loss. First, that the loss be true, certain, and real. Second, that it emerge by reason of the loan alone. Third, that the loan be the cause of such a loss *per se* and not by accident. Fourth, that this loss be manifested to the borrower. Fifth, that the loss brought into an agreement be not compensated before it emerges. Sixth, that equality be preserved between the loss and the compensation.

III. Hence evidently false is the opinion teaching that it is not usury if from a loan of 100 gold pieces you are certainly about to receive a detriment of ten gold pieces, even if, the borrower not being warned of this loss, you bargain that 110 be rendered you. This opinion is against the fourth condition indicated. It is manifest injustice that a borrower should undergo a burden and pay it without his own consent.

IV. QUESTION II. *Is the danger of a loss about to emerge a true title by force of which a convention can be made of paying something above the principal?* ANSWER. It has already been said above that danger is an uncertain outcome of a thing. Concerning the danger of losing the principal enough also has been

said: concerning the danger of a loss which can come about by cause of the principal lent, it is now to be spoken. Some of the younger authors affirm it, whose opinion is to me false. Since the title which renders an accession above the principal lawful is a loss true, real, and certainly future, and which is not compensated save after the event. For if the loss does not come about, recompense can have no place. If nevertheless a lender should probably foresee a determinate future loss, he could bargain with the borrower concerning a future compensation in the case in which that loss should come about by cause of the loan. I said *determinate,* that I might exclude indeterminate losses coming from elsewhere. The lender therefore ought clearly to declare such a loss in the individual, which he fears will be future, so that, the condition of the event being posited, the borrower may be bound to compensate it.

V. Hence gather that it is never lawful to exact anything beyond the principal on account of a merely probable, or even most probable, danger of a loss about to emerge, unless it in fact emerge. Some of the probabilists affirm this, nay even some who are not probabilists. But this opinion is evidently false, and opens the way to all usuries.

VI. QUESTION III. *Whether it be lawful at the beginning of a contract to make an agreement of a conventional penalty if the debtor be in delay?* ANSWER. A debtor is in delay, and is called tardy, when at the appointed time he does not pay the debt, and when he can pay and omits it. Delay is twofold: one *from the thing,* which of itself warns the debtor to pay; the other *from the person,* when the debtor, warned by the creditor to pay, neglects payment. The aforesaid agreement of a conventional penalty, confirmed by mutual consent, many of the younger authors defend: Henry of St. Ignatius and Fr. Billuart call this opinion common.

VII. The more probable opinion to me is this. *A conventional penalty, unless there intervene that which is the creditor's interest, that is, unless it be imposed for the quantity of the emerging loss, is usurious.* I prove it. The agreement of a conventional penalty concerning an accession above the principal in a loan is therefore called lawful, because by this agreement the lender keeps himself indemnified. But that agreement is inept for keeping the lender indemnified, unless it be imposed for the quantity of the emerging loss. Therefore it is usurious. The first proposition is plain. A lender adds an agreement of a penalty to be paid either because he fears that the principal is in danger after the appointed time, or because he foresees evils threatening himself if at the appointed time the principal be not rendered, or finally because he judges that this agreement is a spur for urging the debtor to pay. The first reason is a manifest cloak of usury. For he who fears that the principal — say a hundred — will not be restored, ought the more to fear that 105 will not be rendered. But to exact gain on account of the danger of losing the principal is usury, as I have shown above. Therefore in the case of which we treat, the conventional penalty is a cloak of usury. If our adversaries allege the second, they agree with us. But they expressly assert that gain imposed by an agreement of conventional penalty is lawful, the titles of emerging loss and ceasing gain being excluded. For that a penalty can here be imposed for the compensating of emerging loss all confess. The third consideration is empty. For if a lender should foresee that the borrower would be faithless and contumacious in deferring the restitution of the principal, he would never entrust his money to him, or would demand a pledge or a surety.

VIII. Lawful therefore is an agreement of conventional penalty when there truly occurs that which is the lender's interest, namely emerging loss and ceasing gain, to be explained below. Indeed many laws approve a conventional penalty, no regard being had to that which is the creditor's interest; but,

as Honoratus Leotardus the celebrated jurisconsult observes, *On Usuries,* question 81, these laws are abrogated, just as those which granted moderate usuries. I explain the matter more clearly. I deliver to you on loan a hundred to be paid within a year: the year having elapsed, a convention is made between me and you that in penalty of delay, if you do not restore, you must pay ten. If I am truly about to suffer a loss of ten in the case of the payment deferred not from impotence but from malice, then I shall justly receive ten, supposing that I have suffered such a loss; if I have suffered a lesser loss, I ought to receive less; if no loss come to me, I cannot exact anything, because I should receive something from the loan, which is usury; if finally I have suffered a greater loss, I can exact more, that there may be equality between the loss and the compensation. A conventional penalty is not appraisable at a price: it is imposed for terror and appearance. Therefore when the creditor suffers no evil, he can exact nothing by force of the conventional penalty. If you desire more concerning this penalty, read Vol. VII, Book 3, dissertation 3, chapter 14, § 1 and § 4.

Chapter VI — On ceasing gain, and its conditions

I. There is among all the Fathers a deep silence concerning this title, as Dominic Soto also observes, Book 6, question 1, article 1. St. Thomas expressly disapproves this title, whatever some may cavil. Durandus, Scotus, Innocent upon the chapter *Naviganti,* the most learned Fr. Ignatius de Camargo, and others rightly reject this title. The first who maintained the title of ceasing gain, with fear and trembling, was Conrad Summenhart, hedged about with many conditions. After him Sylvester, Cajetan, and Adrian, who confess that this doctrine is a novelty.

II. QUESTION I. *What does St. Thomas hold concerning this ceasing gain?* ANSWER. He openly denies that anything can be exacted above the principal by reason of ceasing gain, absolutely speaking. For thus, question 78, article 2, reply 1: *It must be said that he who gives a loan can without sin bring into an agreement with him who receives the loan a recompense of the loss by which is withdrawn from him something which he ought to have. For this is not to sell the use of money, but to avoid loss. And it can be that he who receives the loan avoids a greater loss than he who gives incurs. Whence he who receives the loan makes good another's loss with his own advantage. But a recompense of the loss which is considered in this, that he does not gain from the money, he cannot bring into an agreement: because he ought not to sell that which he does not yet have, and which can be hindered in many ways from being had.*

III. Sylvius, after other Thomists, objects from 2-2, question 62, article 4, this text of St. Thomas: *It must be said that whosoever damnifies another seems to take from him that in which he damnifies him. For loss is so called from this, that a man has less than he ought to have … and therefore a man is bound to restitution in that in which he damnified another. But a man is damnified in two ways. In one way, because there is taken from him that which he had in act: such a loss is always to be restored according to an equal recompense: as if a man damnify another by pulling down his house, he is bound to as much as the house is worth. In another way, if a man damnify another by hindering him from obtaining that which he was in the way of having: such a loss need not be recompensed on an equal footing: because to have something virtually is less than to have it in act; but he who is in the way of obtaining something has it only according to virtue or power, and therefore, if it be made that he should not have it, restitution is made in this in a lesser degree … which is not of necessity of restitution. He is nevertheless bound to make some compensation according to the condition of persons and of affairs.*

IV. It is familiar to all those who strive to entangle and obscure the doctrine of the saints to catch at something said altogether outside the controversy, that they may cast a mist over the clearest

testimonies. In the place cited by me St. Thomas expressly and of set purpose speaks of ceasing gain; and so openly and plainly does he deny that anything can be perceived above the principal from it, that they can bring forward nothing solid against it. Therefore for another question they appeal to a cause altogether foreign. But so far is it from favouring them, that there also he overthrows their doctrine. For it is manifest that there the holy Doctor speaks of a true loss which a creditor unwillingly suffers, inflicted by a tardy debtor. And this is the more evidently established from the second argument which he there objects to himself, saying: *He who holds a creditor's money beyond the fixed time seems to damnify him in this, that he hinders him from gaining what he could have gained; and yet he himself takes nothing from him. Therefore it seems that a man is not bound to restore what he did not take away.* To which objection he thus answers: *He who has money does not yet have gain in act, but only in virtue; and it can be hindered in many ways.* A tardy debtor therefore, of whom he here certainly speaks, is not bound to compensate the whole loss which the creditor suffers from the want of money, because the gain of money can be hindered in many ways. A lender is to be distinguished, says the Angelic, who spontaneously deprives himself of the gain of his money, from a tardy debtor who does violence to the lender when at the predetermined time he does not restore the money. In the first case the title of ceasing gain cannot be alleged, since the lender spontaneously and freely renounces this title when he freely gives a loan. Otherwise let him abstain from the loan, if he wishes to gain from his money. In the second case gain is lawful, because the lender unwillingly sustains the violence done him by the debtor. He ought nevertheless, says the Angelic, not to recompense the whole loss, because the gain of money can be hindered in many ways. That this is the mind of St. Thomas Cajetan himself confesses, who in the pursuing of the Angelic's mind far excels Sylvius and the other interpreters. There is added an extrinsic reason. In the time of St. Thomas no one of the theologians maintained the title of ceasing gain. Further, St. Thomas never departed from the common doctrine of the theologians of his time. Futile and inept is what is wont to be obtruded, that the Angelic contradicts himself unless it be admitted that a voluntary lender can exact gain by reason of ceasing gain. For in the place alleged by us he speaks of a voluntary lender, but in the place objected by our adversaries he speaks of a tardy debtor. Where then is even a shadow of contradiction? And moreover sound doctrine stands.

V. QUESTION II. *Whether a voluntary lender can exact something by reason of ceasing gain?* ANSWER. Those very theologians who defend the title of ceasing gain demand, among other things, two conditions: first, that the money to be delivered on loan be truly and in fact destined to trade; second, that the lender should prefer to gain from trade rather than from a loan. Therefore they must necessarily confess that a voluntary lender cannot bargain concerning ceasing gain. Wherefore false is the doctrine of Bonacina, who *On Contracts,* disputation 3, question 3, point 4, no. 11, says: *And this holds good even if the lender offer himself to lend, as many of the Doctors say against Conrad, question 30, in Emmanuel Sa.*

VI. QUESTION III. *What conditions do the defenders of ceasing gain assign, that it may be brought into an agreement?* ANSWER. Conrad Summenhart, who according to Soto was the first who reputed ceasing gain a title sufficient for exacting something above the principal, requires eight conditions. First, that this gain truly and not feignedly cease. Second, the accession exacted above the principal ought not to exceed that gain. Third, it is necessary that the lender prefer gain from trade to gain from the loan. Fourth, the gain ought to cease precisely by reason of the loan. Fifth, when the loan falls under the precept of charity, no gain can be exacted, but only when it is of mere counsel. Sixth, scandal both

active and passive ought to be absent. Seventh, the exaction of gain cannot be made before, but only after the time at which the lender would have obtained the gain. Eighth, the whole gain cannot be exacted, but is to be diminished according to the expenses, dangers, labours, and other things which were necessary for the obtaining of the gain.

VII. Later authors have reduced these conditions to four. First, that the loan be truly an impediment to the ceasing gain. Second, that the lender have no other idle money. Third, that the gain from trade be probably future. Fourth, that the lender warn the borrower before the contract, and bargain with him.

VIII. As soon as some opinion favouring cupidity has been brought in, it becomes laxer with the passage of time. Summenhart requires that the gain truly and in fact cease; the most recent of the younger authors require only that the gain be probably future. But that gain ought to be morally certainly future at least in general, and doubtful only as to the greater or lesser quantity. For that which is only probably future is at the same time probably not future, that is, it is indifferent to being future and not being future. But this indifference cannot be sold.

IX. With a full pen in Vol. VII, Book 3, dissertation 3, chapter 15, I explained these conditions in several sections, and combated the lax opinions of many, especially of Bonacina, Lessius, Tamburini, and others. To that place, that I be not long, I refer the reader. Here in few words I will touch upon my opinion, which I explained there from the foundations.

Section, the Only One — The author's counsel

I. *First consideration.* I entreat you, reader, that, casuistical comments being for a little while dismissed, you recall to mind the evangelical law. Meditate seriously, I pray, upon that: *It is easier for a camel,* and so forth. And again that other: *Woe to you that are rich,* and so forth. And again that: *They that will become rich fall into temptation, and into the snare of the devil,* and so forth. According to this law, not according to the opinings of the casuists, will you be judged. Of emerging loss the ancient Fathers speak; concerning ceasing gain there is among them a profound silence. Avaricious men today have found nothing for the disguising of usuries which was not opposed by the ancient avaricious to Basil, Gregory, Ambrose, Jerome, and Augustine. They saw the necessity of commerce and of trade; nor did they boil less than the younger theologians with a desire for the eternal salvation of men. But they did not therefore soften the severity of the evangelical law, nor did they approve the title of ceasing gain; but the more acute men were in devising cloaks and masks for usury, the more vehemently did they themselves inveigh against interest. To what end would they have condemned usuries so ardently, if by one word or another, a colour being added, usuries would fall to nothing?

II. *Second consideration.* If the opinions which the younger moralists have devised were established — of which I have indicated some, and recounted very many in Vol. VII, in the place cited — almost all usury would go into exile from the world. Only those usurers would stand who were ignorant of such opinions. Calvin, Molinaeus, Salmasius, Budé, and the rest of the younger heretics, departing in this from Luther himself, maintain moderate trading usuries exacted from the rich, but not from the poor and needy. Certain moralists, otherwise honest and learned Catholics, who condemn all usuries, hold as heretics those who defend them, whether biting or moderate or small; and yet they have devised so many titles for making honourable the gain from a loan, that as regards practice they have taken almost all interest out of the midst; and to the Lutherans themselves the doctrine of certain of our

moralists concerning usury to be exacted from anyone by reason of some title, feigned by themselves, seems laxer than their own opinion concerning moderate trading usury to be demanded from the rich alone. Wherefore Franciscus Budaeus the Lutheran in his *Institutions of Moral Theology,* part 1, chapter 5, section 3, § 17, barking against the Catholics, thus rages: *But here the moralists of the papists basely traduce themselves, who, while they keenly contend that all usuries are unlawful, so that it be a heresy if interest be said to be able to lack sin, nevertheless by most witty comments and by other things, names being imposed, in the highest degree grant room to the most iniquitous usury.* The Lutheran does an injury when he traduces the papist moralists indiscriminately, because some of them went astray and, deceived by a pious intention, disguised usuries. Their opinions the Catholic Church has for the most part condemned; others she tolerates but does not approve. Nay, the graver theologians of the Catholic Church refute and overthrow their lax opinions. But these things being dismissed, I come to the point.

III. *My counsel I set forth in few words.* Recompense of emerging loss, according to the rules handed down above, I approve with the ancient Fathers and theologians. The title of ceasing gain on account of the culpable delay of a debtor I admit. As regards mere ceasing gain, which namely ceases to a free lender, I shall scarcely be an author to anyone that he should gain anything by this title. Whether a case can sometimes occur in which that gain is lawful, I know not. One thing I know: that in practice scarcely all those conditions occur which even our adversaries themselves require for a just gain. And yet if even one be lacking, the rest remaining, the gain is usurious. Let lenders be questioned who continually deliver loans, whether they hold these conditions in memory. They will receive the question with a laugh. Men gape after gain, and are carried away by cupidity for money. Concupiscence of the flesh and cupidity of riches are the two rocks upon which men commonly strike and suffer eternal shipwreck. With the paint of piety and beneficence they encrust usuries. What of it? If the precept of charity urges, the loan is to be delivered gratis. When counsel persuades, you can without crime abstain from the loan. Why then do you deliver a loan? That you may succour a friend asking a loan? But you neglect to help a friend, and you are free from sin and from the danger of sinning. Therefore you are manifestly foolish, who for the danger of perishing eternally are willing to put away your money, when without sin you can keep your money in your chest. But in truth you are not foolish, but a manifest usurer: because not with a mind of succouring a friend, but with a cupidity of gaining from the loan, do you deliver money on loan. Wherefore, as regards practice, according to the patrons themselves of ceasing gain, lenders are commonly usurious: because scarcely one out of a hundred observes the conditions which those same men prescribe. Commonly they keep many moneys to be delivered on loan, because they gain more safely and with less trouble from a loan than from other contracts; and therefore, these contracts being dismissed, they lend and take interest. They say indeed that they can enter upon other contracts, but in fact they will not, because by this way they more easily indulge their avarice.

IV. For the rest, if anyone, kindled with a true zeal of charity toward the needy, with a Christian mind of succouring them, every cupidity of gaining from the loan being excluded, should omit to buy estates and wares ready and at hand, that by means of a loan he might succour the needy, and should exact a compensation proportioned to the gain which he spontaneously omits, that he may exercise the office of beneficence toward the needy — neither would I myself dare to disapprove it. But because in practice this scarcely happens, and it is hidden from me whether lenders do this from a zeal of helping the needy or from a cupidity of gaining from the loan, therefore I would counsel no one to exact by reason of ceasing gain an accession above the principal delivered on loan. The opinion

of others in this cause I neither approve nor disapprove. But I counsel the doctrine which in the time of Innocent III was common, and which frees from sin and from the danger of sinning. If you desire more, read Vol. VII, Book 3, dissertation 3, chapter 15.

Chapter VII — On mental usury, and on agreements added to a loan

I. He who delivers a loan with the intention and hope of obtaining gain as owed to him, although no agreement, whether tacit or express, intervene, commits the sin of usury.

II. Mental usury is twofold. The one which stops within the mind, every exterior action being excluded, when namely a man, although with the hope of an accession above the principal, gives a loan, and yet, being disappointed, receives nothing beyond the principal. This never brings in the burden of restitution. The other, which has an exterior act conjoined, namely when a man, without an express agreement, according to his hope receives an accession: this brings the debt of restitution. This is distinguished from real usury, because real usury besides the real acceptance adds an agreement, that is, real usury receives an accession above the principal from an agreement either tacit or express. On the contrary, mental usury hopes for and receives an accession, every exterior agreement being removed.

III. QUESTION I. *Is it lawful to hope for anything from a loan?* ANSWER. It is lawful for anyone to hope for benevolence and friendship. But to hope for gain is in no way lawful, as is plain from the evangelical text, nor even as owed out of benevolence. Therefore Innocent XI condemned this thesis: *It is not usury when something beyond the principal is exacted as owed out of benevolence and gratitude, but only if it be exacted as owed out of justice.* To exact therefore, or to hope for, anything as owed out of benevolence and gratitude is usury. Cajetan, Serra, Prado, whom many of the younger authors follow, teach that it is not only lawful to hope in a loan for gain out of benevolence and gratitude, but moreover that you can manifest this intention, saying that you hope that the offices of a friend and the benefit of the loan will be requited, provided that by an agreement no obligation be imposed. The Salmanticenses say that this is not to be set forth before the avaricious. If it is false, as it is, it is to be proposed neither before the avaricious nor before others. Tamburini, Book VIII, chapter 8, § 2, no. 6, teaches that *it is lawful per se and speculatively for a lender, even before he lends, to ask or to stir up the borrower, nay even to bargain with him, that something above the principal be imparted out of mere liberality and truly voluntarily, because nothing is expected by force of the loan.* So Molina. Cloaks of usury are proposed speculatively; the rest reduce them to practice, and usurers clothe themselves in them.

IV. *Lend, hoping for nothing thereby,* says Christ. Let a lender deliver a loan absolutely gratis, so prepared that, every remuneration ceasing, he would deliver the loan. If some hope of a gratuitous remuneration should accompany this absolute will, he would not be to be condemned of mental usury, as St. Thomas teaches. For the rest, if the hope of gain were the chief cause, he would not be free from usury. Nevertheless borrowers also are to be disapproved who neglect to exhibit the offices of liberality and of a grateful mind. On account of the avarice of lenders, and the faithlessness and ingratitude of debtors receiving a loan, the offices of charity are in exile from very many Christians.

V. QUESTION II. *He who has celebrated a usurious contract in good faith, can he retain the gain, the usury being known, when he could have entered upon another lawful contract?* ANSWER. Some affirm it; but this opinion is to me false. The conditions which are wont to be added, although they temper the laxity, do not

nevertheless — as I at least judge — make the opinion probable. Since indeed the lender in fact consents to a usurious contract. His habitual disposition to celebrate another lawful contract does not take away that here and now he consents to what they call material usury. That he receives the gain in good faith does not hinder that, the usury of the gain being known, he ought to restore it. He who in good faith sells above the just price is, the error being known, liable to restitution. Good faith excuses from sin, but not from the burden of restitution. See Vol. VII, Book 3, dissertation 3, chapter 17.

VI. QUESTION III. *Whose are the fruits of a pledge delivered to a lender for the assurance of the principal?* ANSWER. They are the borrower's, because with him the dominion of the pledge remains. But any thing brings forth fruits for its own lord.

VII. QUESTION IV. *Is the agreement of the lex commissoria lawful in the delivery of pledges?* ANSWER. This agreement is wrongly called a *law*. For it is a mere convention, that the pledge be the lender's when at the fixed time the principal is not redeemed. That this agreement is unlawful the laws have decreed, and all affirm it: since a pledge commonly exceeds the price of the principal lent.

VIII. QUESTION V. *What is to be said of pupillary and dotal usuries?* ANSWER. They call pupillary those usuries which some contend that guardians and curators ought to pay on account of fraud in administering the money of wards: as when guardians turn the ward's money to their own advantage; or because they kept the aforesaid money idle; or because they did not succour the wards in a time of necessity. In these and like cases the civil law decreed that usuries are owed to wards. But this civil law has been abrogated by natural, divine, and canon law. For there is not one Gospel for wards and widows and another for Christians. Unless therefore another just title be present, nothing is owed for money to wards.

IX. A son-in-law can take the fruits of a dotal pledge, just as the fruits of a dowry, as Innocent III decreed, chapter *Salubriter, On Usuries*. A dowry is given for the sustaining of the burdens of matrimony. Therefore so long as the son-in-law lacks the dowry, he by right perceives the fruits of the pledge, since the pledge was given in place of the dowry.

X. QUESTION VI. *Is he a usurer who gives a loan that he may obtain a benefice, or an office, or services of the tongue, of attendance, or of the hand?* ANSWER. If it be brought into an agreement, say some, that a benefice or office be conferred upon the lender out of mere liberality and, as they say, out of a requiting gratitude and friendship, there is by them no usury; but otherwise if an agreement be added that the remuneration be made out of justice. This distinction seems to be a mask and cloak of usury. The addition of an agreement is a burden which makes the loan onerous and not gratuitous, as St. Thomas teaches, opusculum 13, and 2-2, question 78, article 2, reply 3. The aforesaid services of the tongue, of attendance, and of the hand are appraisable at a price. Wherefore to bring the same into an agreement, whether express or tacit, is usury.

XI. QUESTION VII. *Is he a usurer who gives a loan with the agreement that the borrower resort to his mill, his shop, and the like?* ANSWER. Whatever burden is imposed beyond the restitution of the principal is usury. The aforesaid lender therefore, who obliges the borrower to buy wares in his shop, or to come to his mill to grind his wheat, and the like, is a usurer. When two spontaneously deliver things to one another on loan, they commit no usury; but they exercise the mutual offices of charity or benevolence.

XII. QUESTION VIII. *Is it lawful to give a loan with an agreement that the other lend back in the future?* ANSWER. St. Thomas denies it in the place cited. All these agreements ought to be absent from a loan.

XIII. QUESTION IX. *Is he a usurer who obliges a borrower to render the same measure of wheat, wine, oil, and so forth, if the price be increased?* ANSWER. It is a lawful agreement to render the same measure when it is equally doubtful whether the price of the said things is to be diminished or increased: since then the advantage or disadvantage is equal. Similarly, when a loan is delivered in good faith, no regard being had to the increase or decrease of the price, the same measure is to be restored. I deliver to you on loan in the month of January three measures of wheat, to be rendered in the month of May, which I had destined to keep for the sustaining of my family. At the time of restitution the price is increased. The same measure altogether is to be rendered, of the same quantity and quality. Moralists dispute whether one who gives corn on loan, being about to keep it for a time of greater price, can exact this greater price. But this dispute is futile. For either the borrower restores before the fixed time, and you keep it until the time of greater price; or he restores at the time of greater price, and you sell it at this time; or finally the borrower is tardy, and then by reason of delay he is a debtor liable to the rules of compensation, according to what is said in chapter 5, no. 6 and following.

XIV. QUESTION X. *In the restitution of money lent, is the value or the species to be considered?* ANSWER. You delivered on loan a hundred gold pieces at a time when each was worth twenty *julii;* but at the time of restitution they are worth twenty-four, or eighteen. Innumerable are the subtleties which the jurisconsults have devised upon this question. But the true opinion is that in the restitution of money lent, not the species but the price is to be regarded: and consequently that not money of the same species, but the price at which it was worth at the time of delivery, is to be restored. For although in wares physically consumable by use just as much of the same species in number, weight, and measure is sometimes to be restored, according to what is said in the preceding number; nevertheless money is excepted, in which not its physical species is considered, but the extrinsic value, which depends upon the prince's law. The general rule is always to be held before the eyes, namely that any thing whatsoever increases or decreases to its lord. But the dominion of a thing lent is with the borrower.

XV. When a lender adds an agreement that the borrower restore money of the same species, the general rules are to be regarded. If the danger of increase and of decrease be equal, the agreement is lawful. If the danger be not equal, but greater in respect of the borrower, the agreement is usurious.

XVI. QUESTION XI. *Is the opinion probable that a borrower can choose as his surety the lender himself?* ANSWER. A borrower, says a certain man, can choose a third party as surety: therefore the lender himself; just as he can by right pay the price to a third party, so also to the lender. That you may perceive the falsity of this opinion, consider the difference between a surety and an assurer. An assurer takes upon himself the danger of the principal, and bargains for a price. If by theft, fire, shipwreck, or other chance the principal perishes, it perishes to the assurer himself. A surety takes upon himself only the danger which is with the borrower, inasmuch as, if the borrower either by impotence or by faithlessness do not restore the principal, the surety himself is bound to render it, and retains an action against the borrower, whom he can by right compel to compensate, if he be solvent. But an assurer retains no action against the debtor. In brief, an assurer takes upon himself the danger of right; a surety the danger of fact. These things being laid down, it is plain how fictitious

is the opinion related. For if the borrower himself were to go surety for himself with the lender, would he not betray himself as ridiculous and foolish? Therefore no less ridiculous and foolish is the suretyship which the lender himself undertakes for the borrower. Does this suretyship make the borrower more secure, more rich, more trusty? Therefore this suretyship of the lender is a pure and mere cloak of usury, disapproved by Gregory IX in the chapter *Naviganti.*

XVII. More witty is the suretyship which a certain man devised. *You will ask secondly,* he says, *whether there is usury in a feigned suretyship. For example: Peter asks a loan of you. You say: I will not lend to you, but to Paul, who afterwards will lend to you. Paul lends to Peter that which he received on loan from you, and wishes you to go surety for Peter. You go surety, and for the suretyship you exact a price from Peter, which now you gain beyond the principal. And this suretyship is here called feigned, because in truth you do not oblige yourself to pay Paul, though Peter do not pay, since Paul owes you just as much.*

XVIII. This loan we may call *circulatory.* These are the questions which the Fathers were ignorant of, and which, that I may use the words of Fr. Reginald, the Doctors of our times turn over. You wish to give a loan to Peter asking it; but that you may obtain gain without usury, this loan must come to the hands of Paul, then from the hands of Paul to the hands of Peter, that by this circuit the gain which you pant after may strip off the dregs of usury. He who contrived this concludes that no injustice or usury is found in this contract, if the suretyship for Peter be truly dangerous. This suretyship, which they call *feigned,* is worse than the preceding. For it is crafty and fraudulent. The whole machination here at last comes back to this, that Peter the borrower pay you gain above the principal delivered on loan. But usury of itself offers itself to be seen among these artifices. Nor in a manifest matter is there need to dwell longer.

XIX. QUESTION XII. *Is the opinion probable of those who grant gain to a lender at the same time receiving a pledge?* ANSWER. Fr. Paul Layman proposes this case to himself, tract 4, chapter 16, no. 2, in these words: "A citizen for the greater part of the year has money ready, out of which he can give a loan to needy craftsmen, especially weavers, a pledge being left him for the security of payment, for example a web. But when, the pledge being received, payment is to be made after half a year, an increment is to be added upon each florin given on loan — for example, one *batzen.* For it must be considered that that increment is not received by reason of the loan, but by reason of the obligation, burden, and care which that citizen takes upon himself for the sake of the weavers, that for nearly the whole year he may have money in readiness for them, that at whatever time they come to his house he may admit them, count out the money," and so forth: "which obligation is appraisable at a price."

XX. Fr. Patrick Sporer, tract 6, chapter 4, section 1, § 1, no. 39, adopts this opinion of Layman, and for the same cites Molina, and says that it is common. Tamburini also defends it. Layman's, Sporer's, Tamburini's, and others' opinion being admitted, no one is so immune from usury as manifest usurers. For these, not for half a year, not for nearly the whole year, but for many lustres and for a whole lifetime keep moneys ready, not for weavers only, but for all the needy. Nay, these are not wont to demand a pledge, but expose themselves to some danger. Willingly do they receive all *who come to their house, they count out the moneys,* and so forth. Why then shall they not be able to exact for each florin one *batzen,* for each crown two *batzen,* for each doubloon six *batzen*? Where then is usury in the world? German citizens receive the craftsmen's web in pledge, and at the same time exact an increment of *batzen*? If this is not usury, what will be? But they receive the increment, the kindly probabilists reply, not by force of the loan, but because they oblige themselves to deliver the loan,

and on account of the burden of receiving into their houses the borrowers who come, and of counting out the money, and of guarding the pledge of the web. Have there been from the founding of the world usurers who did not count out the moneys delivered on loan, who did not receive borrowers into their houses? Even the avaricious themselves suffer scandal when they hear that some usurers are so savage that with a pledge in hand they exact gain. The evasions by which Fr. Layman endeavours to disguise this wicked usury I have overthrown in Vol. VII, Book 3, dissertation 1, chapter 19. The good intention of pious theologians is to be excused. They saw in their own regions — Tamburini in Sicily, Layman and Sporer in Germany, Lessius in Flanders — trades of this and like kind brought in, strengthened by custom, fenced about by the multitude of the peoples. They did not dare to disapprove the customs of their countries, and to condemn contracts long obtaining in their houses. These men said: If we declare these contracts usurious, we take away good faith, no hope of amendment appears, and we thrust an infinite multitude of men into hell. A hundred times does Fr. Diana inculcate these reasonings to confessors. The pious intention of the younger theologians of saving all souls is to be praised, and their zeal to be commended. But if their opinions are false, the peoples commit usury; nor do the desires of the theologians, says St. Augustine, nor the error, because it is public, adds St. Cyprian, withdraw souls from hell.

Chapter VIII — On the *Monti di Pietà*

I. A few things concerning the *monti di pietà,* which by another name are called *monti di Cristo* or *apostolic deposits,* I shall touch upon. A *mons pietatis* is a sum of money gathered from the alms of pious faithful for the relief and support of the poor, that it may be delivered on loan to the needy, a pledge being deposited, and with a contribution of an accession by which the ministers are maintained.

II. The Lateran Council celebrated under Leo X approved these sacred *monti.* To the decree of the Council all the theologians subscribed, except Cajetan and Soto, who with too great daring indeed did not cease, even after the Council's decree, to accuse these *monti* of usury. And as regards this, although we are Dominicans, we disapprove their error, because we are not respecters of persons, nor do we take up arms against persons, of whatever institute they be, but against errors.

III. The Council declared that the accession above the principal is exacted for the expenses of the ministers alone, and for the conferring of the other things pertaining to the said *monti,* as is set forth, for their indemnity only, above the principal, without gain to the same *monti.* If the accession turned to the gain of the *monti,* it would be usurious.

IV. Three conditions are required. First, that the money be delivered to the poor within the limits of a fixed sum, to be restored within a determinate time. Second, that a pledge be exhibited by the debtors, which ought to be kept by the ministers themselves. If at the fixed time the money be not restored, the pledge is sold at auction, and, the price which is owed to the *mons* being retained, that which is over is restored to the lord of the pledge. Third, that a slight accession above the principal be exacted, for the wage of the ministers and the expenses of the *monti* which must be made for the renting of houses and other things. If anything be left over from the accessions, it is to be converted not to the increase of the *monti,* but either to the borrowers themselves in proportion, if it can be done, or to be redeemed, or into alms for the poor.

V. QUESTION I. *Do those who are not truly poor, nor receive money on loan from a sacred mons for the relieving of poverty, sin and are held to restitution?* ANSWER. Some, inflamed with avarice, allured by the slight accession to be paid to the sacred *mons,* receive moneys on loan from the same, either that they may apply the same to trade, or that they may deliver them on loan to others with a greater accession. All these are guilty of theft and of avarice. For with a fraudulent mind they deceive the *mons,* and filch money destined for the relieving of the needs of the poor, that they may indulge their own avarice. They are bound at once to restore the money to the *mons,* and to compensate the loss, if any befall.

VI. QUESTION II. *Can those who place moneys in these monti lawfully receive an accession, no title being present?* ANSWER. Fr. Pasqualigo, decision 504, contends that gain can be perceived from money conferred to the *monti di pietà,* apart from the title of emerging loss or ceasing gain. In some *monti di pietà,* which they call *mixed,* they seek out moneys that they may relieve the poor. To the contributors of the moneys they pay a pension beyond the principal. It has begun to be disputed whether this accession be lawful. All theologians and canonists have condemned it as usury. Fr. Pasqualigo strove to purge the same from usury, whom Bassaeus and Pignatelli followed. That he may establish his opinion, Fr. Pasqualigo obtrudes letters of Paul III by which this is granted to the *mons* of Ferrara. But Fr. Peter Ballerini in his opusculum *On These Monti,* § 3, proves by unanswerable arguments that these letters are apocryphal and supposititious.

VII. Paul III in letters given for the *mons* of Modena in the year 1541, Julius III for the *mons* of Vicenza in 1550, Pius IV for the *mons* of Verona in 1563, grant that an accession be paid to none others save to those who, *led by a zeal of charity, and for the relief of the poor, not with a mind of taking interest, deposit moneys at that time when they would have wares ready and estates ready for buying, from whose revenue they could perceive four and more per hundred.* Wherefore false to me is Fr. Pasqualigo's opinion, which asserts an accession of this kind to be lawful, every title being removed.

VIII. What is to be said of those who place moneys in those *monti,* not from a zeal of relieving the poor, but from a cupidity of gaining? Lest they should have them idle at home, that they may gain, they lay them up in the *monti di pietà,* to be demanded back at once as soon as an occasion of buying estates or rent-charges, or of exercising trade, shall have offered itself. All these are manifest usurers.

IX. What is to be said of the ministers of those sacred *monti*? These *monti,* as I have said, are called apostolic deposits, and the patrimony of the poor. Their ministers are ministers of the poor, and hired at the poor's wage, and are fed at the poor's stipend. And yet it not rarely happens that these ministers are splendidly clothed and richly nourished. These not rarely absorb a great portion of the accessions, and are fattened with the blood of the poor. In respect of them, these *monti* are not of piety but of impiety. Corruptions of this kind were the cause why Cajetan and Soto inveighed against those *monti.* But in this they erred, that they did not distinguish the abuses and vices of men from the thing itself, which is honourable and pious. But assuredly they err no less who under the paint of human kindness make honourable such enormous abuses.

Chapter IX — On the triple contract, and other contracts

I. QUESTION I. *What is the triple contract?* ANSWER. It is called *triple* because it consists of a threefold contract: first of *partnership,* second of *assurance,* third of *sale.* The contract of partnership is a convention of two or more concerning the contributing of something appraisable at a price into a

common stock, and concerning the gain and loss in proportion. By the consent of all this contract is lawful. It demands four conditions. First, he who puts in the stake ought to undergo the danger. Second, the trade or art in which the stake is to be placed must be honourable. Third, let equity be preserved. Fourth, the stake or capital is to be delivered to an industrious man — money to a merchant, animals to husbandmen, and so forth. In this first contract Caius puts in the money, Maevius the trader his industry, and both are partakers of the gain and loss in proportion. The second contract is called of the *assurance of the capital*. Caius, who contributed the money, bargains with Maevius that he restore his capital immune from every danger; and for this assurance he remits a part of the gain. He gave 100. The gain to be perceived from the trade is, as is presumed, twelve. He remits four for the security of the capital to be furnished by Maevius. The third is of the *sale of a greater uncertain gain for a lesser certain gain*. The uncertain gain hoped for is thereabouts twelve in 100, as has been said. This Caius sells for a certain gain of four. And so Caius from his assured capital receives four or five, more or less, in the hundred, all trouble, labour, and danger being removed.

II. The simple and clear exposition alone of the question thrusts the usury into your eyes. If Caius should say in simple speech to Maevius: *I give you, Maevius, a hundred on loan, that you may pay me four or five every year,* he is a usurer. If he use the aforesaid crafty wrapping of words and circumlocution, he has declined the usury.

III. The invention of this triple contract Fr. Tamburini, Book IX, chapter 5, § 3, nos. 1 and 2, attributes to the acumen of the younger casuists, writing thus: "That by force of the contract of partnership alone the whole danger cannot be thrown back upon a partner is too clearly plain. … But INGENIOUS THEOLOGIANS, perhaps admonished by the merchants themselves, whose interest it is, have found a way of thus throwing back the whole danger upon one of the partners WITHOUT INJUSTICE."

IV. *Ingenious theologians,* he says, *admonished by the merchants themselves, have found a way of gaining from a loan without usury.* But that way lay hidden from the Fathers and the theologians, who learned theology not from merchants but from the evangelical law and the sacred canons. But Fr. Joseph Gibalinus, a most keen champion of the triple contract, Book 6 *On Usuries,* chapter 8, article 2, page 383, no. 5, replies with this admonition: "I would only admonish for the present that very many opinions, when first they were brought into the schools against received and common opinions, were brought forward by their authors only very timidly, lest they should offend the vulgar of the Doctors. … But when opinions of this kind have been for some time weighed and examined, and the cloud being dispelled, by the light of truth at last poured upon them, they are received with great consent — opinions which when newly born scarcely dared to betray their parent. … The same thing happens in our case. For since partnership constitutes an equality among partners, these obligations of a certain gain, though a lesser one, and of the security of the principal to be furnished by the other partner, seemed rightly to wise men to fight with the nature of partnership. But when they observed that these burdens are not imposed upon the partner by force of the contract of partnership, but by new agreements," and so forth.

V. Marvellous is the force of that new manner of opining. Formerly the countenance of the Doctors — namely of the holy Fathers, of Sts. Thomas, Raymond, Bonaventure, Antoninus, Bernardine, and their disciples — was offended at the novelty of the triple contract. At the outset the new opiners were afraid, and scarcely dared to bring forth the parents of such a contract. But afterwards, the cloud

being dispelled under which the most holy Fathers were in darkness, the light of truth appeared to the younger authors. And their opinions *are received with great consent,* because they favour cupidity.

VI. This contract Sixtus V condemned in clear words by the peculiar constitution *Detestabilis avaritia* in the year 1586, from which I cull the following. "Many, weaving the specious and honourable name of partnership before their usurious contracts, under this colour and paint bargain in diverse manners with merchants, craftsmen, and traders upon this condition, that the principal itself, or the capital, both of moneys and of animals and of things, always remain safe and entire for him who contributes not industry or labour, but moneys, animals, or things of this kind into the partnership, so that every danger and loss be sustained by the other partner receiving, against the equality and justice of partnership; and lastly, that they bind by an agreement and obligation those partners with whom they contract, who are for the most part poor and needy and living by their own labour and industry, whatever chance and outcome of things may follow, and at the same time also prescribe and appoint beforehand a fixed and definite quantity of gain, so much for every hundred, to be paid every year, or every month, by the other partner, during the partnership. … Wherefore we … desiring to remove, so far as with God's favour we can, the contagion of this disease before it creep to the common ruin of the faithful, of the fullness of the apostolic power attributed to us, by this our constitution to be valid in perpetuity, condemn and reprobate all and singular contracts, conventions, and agreements hereafter to be entered upon, by which or in which it shall be provided for persons delivering moneys, animals, or any other things whatsoever under the name of partnership, that even if any loss or amission whatsoever should chance to follow by fortuitous accident, the principal itself, or the capital, always remain safe and entire, and be restored by the partner; or that a certain sum, or a definite quantity, be answered for either yearly or monthly during the partnership: and we determine that contracts, conventions, and agreements of this kind are henceforth to be reckoned usurious and unlawful; and that it is not lawful hereafter for those who deliver money, or animals, or other things into partnership, to bargain and agree among themselves concerning a certain gain, as aforesaid, to be received; nor, even if they have agreed upon either a certain or an uncertain gain, to oblige the partners who receive them, by any agreement or promise, to the principal or capital safe and entire, when it shall have perished by fortuitous accident or been lost. And lest for the future partnerships be entered upon under agreements and conditions of this kind, which savour of usurious depravity, we directly interdict and prohibit."

VII. The most holy Pontiff BENEDICT XIV, Book VII *On the Synod,* chapter 1, declares that Sixtus V condemned the triple contract as usurious, in these words: "This moreover is that triple contract which the discord arisen between Dominic Soto and Martin Navarrus made celebrated. Navarrus thought, namely, that the three aforesaid contracts could be entered upon at once and with the same person with a safe conscience, and immune from usurious depravity, for the reasons which he adduces in his *Manual,* chapter 17, no. 254 and following. Soto on the contrary asserted that the conjunction of those three contracts degenerates into a usurious loan, and overturns the laws of partnership, which demand a community of gain and loss; and he maintained his own opinion with many arguments, which may be seen in his work *On Justice,* Book VI, question 6, article 2. … The cause was brought to Sixtus V, Supreme Pontiff, who, the question being diligently discussed, PRONOUNCED THE AGREEMENT OF A TWOFOLD SECURITY ATTACHED TO PARTNERSHIP USURIOUS, and FORBADE it thenceforth to be made, by his constitution 68 which begins *Detestabilis,* published in the year 1586, Vol. IV of the *Bullarium,* page 163."

VIII. Fr. Leonard Lessius undertook beyond the rest to render the Sixtine constitution void, and, it being promulgated, to defend the triple contract. Very many of his comments being passed over, he writes these things, Book II, chapter 25, doubt 3, no. 178: *Nor is it an objection that Sixtus V in the constitution published in the year 1586, on the twelfth of the Kalends of November, condemns and reprobates all contracts hereafter to be entered upon by which it shall be provided,* and so forth. … *For notwithstanding this constitution, in Italy especially this form of contracting has flourished and always flourished.*

IX. Is not this a charming manner of arguing! The Gospel having been promulgated, thefts, perjuries, frauds, and adulteries range abroad. Therefore these crimes are not contrary to the Gospel! After the pontifical constitutions against the Baian, Jansenist, and Quesnellian propositions, and the Chinese and Malabar superstitions, the Baian, Jansenist, and Quesnellian errors and the Chinese and Malabar superstitions flourish. What of it? Have the pontifical constitutions therefore grown obsolete?

X. Fr. Lessius replies in the same place that the Sixtine constitution was never received in Italy. *Much less,* he says, *was it received here in Belgium, where it was neither ever promulgated nor known. In a like manner Pius V in the year 1569 laid down many things concerning rent-charges, for example that they be constituted upon an immovable and fruit-bearing thing,* and so forth. … *Yet because here in Belgium that constitution is not received, no one makes a scruple for himself, even if he does not observe it.*

XI. What handle this manner of opining affords to the Jansenists for resisting pontifical constitutions, let wiser men than I judge. At last Fr. Lessius concludes in the same place: *These things I have pursued more fully than is my custom, because I see this contract still condemned by some on account of certain SHADOWS of usury, whose prohibition at this time I should not doubt would be with public loss.* Shadows therefore of usury, and not usuries themselves, did the pontifical constitutions condemn! Can this contract not be disapproved without public loss? Did the Sixtine constitution therefore bring in a public loss? For it so clearly rejects and condemns the triple contract as usurious, that even Fr. Lessius himself, a theologian otherwise celebrated and most learned, does not dare to deny this condemnation; and therefore he betakes himself to the non-acceptance of Italy and of Belgium: as if pontifical constitutions which interpret the evangelical law depended upon the acceptance of the peoples. In Vol. VII, Book 3, dissertation 3, chapter 21, I have transcribed the acceptances of bishops and of synods, and more fully in the volume *On the Usury of the Triple Contract*. By arguments the usury of the triple contract is proved.

XII. The triple contract, coalescing out of three contracts diverse in species and mutually fighting with one another, is a pure and mere figment conceived in the mind alone: which I thus prove. The nature and essence of a contract of partnership is that the partners be partakers of the loss and of the gain. The second contract, of assurance, undertakes the danger of another's thing, and excludes all that community of loss and gain necessary to a partnership. The essence of the third contract, of the selling and buying of a greater uncertain hoped-for gain, transfers the dominion of such gain from the seller to the buyer. But this dominion in a partnership must necessarily be common. Therefore that triple contract, coalescing out of three things mutually fighting, is a pure and mere figment; a figment, namely, that it may be a mask for usury.

XIII. Further, a partnership which throws all the dangers back upon one of the partners betrays an injustice. It is true, you say, unless the dangers be compensated by an agreed price. What price is that? The diminution of a future uncertain gain. But that gain is uncertain. And this uncertain gain, though greater, cannot equal a principal certainly to be restored and a price certainly to be paid. I

declare the monstrousness of the inequality by an example. Sempronius contributes a capital of a thousand crowns to be traded with by Caius a merchant, with whom he enters upon a partnership for ten years. Caius puts in his industry, which equals the principal. Together they bargain that Caius, the decade having elapsed, ought to render back the principal, and to pay each year four in the hundred as a certain price, deducting it from the uncertain gain of the trade. Caius, a year having elapsed, loses the principal either by shipwreck, or by theft, or by fire. What then? He must pay forty crowns every year, and the decade having elapsed he will have to restore the principal. Although the trade should succeed with a prosperous outcome, it cannot equal one of those cases which probably come about in trade.

XIV. Besides, that an agreement of security may be just, the price to be paid ought to be proportioned to the danger of the principal to be rendered. Further, the assurance which ingenious theologians have devised for the triple contract is so … … singular and outlandish that no law of trade approves it. The contract of assurance which the laws approve frees from this or that danger — say from the incursion of pirates, from shipwreck by tempest, or from fire. But the assurance attached to the triple contract guards against all possible dangers of land and sea, of the diminution of price, of difficult sale, of the corruption of wares, from the dangers of the faithlessness of servants or of buyers who become bankrupt. Where, I ask, is there a like spectre of assurance? Men most expert in mercantile affairs observe that a trade would have to yield forty in the hundred for that gain to equal the assurance of the triple contract. For one part of that gain is to be deducted for assuring the industry and labours of the merchant partner; another part of the gain is to be deducted for assuring the principal of the money. Lastly another portion is to be deducted for assuring the greater uncertain gain bought for a lesser uncertain one. These three heads alone absorb the whole gain of any trade whatsoever, even the most fruitful. And yet two portions would still have to remain over: one for paying the certain and lesser gain bought, four in the hundred; and at last another for assuring the partner trader. These things are obvious and fall under sense, says Cardinal de Luca, whose authority in this matter is certainly to be reckoned not small. He writes thus, *On Usury,* discourse 1, doubt 16: *But this seems impracticable in the drawing back of gain from money counted down. Since, that the effect may follow that the creditor or lender, assured both as to the principal and as to the gain, may obtain five per hundred, it would be necessary to give a gain of more than forty per hundred, since from the gain there must first be deducted a portion in some manner tenant-like, owed to the borrower himself as to a partner putting in his labours, by a congruous and proportioned remuneration. And then indeed, of that which would be left over for the creditor's advantage, as a species of the portion of right, a great and notable quantity is to be deducted, which would probably be the congruous price of the said twofold assurance, to be made even by any third trader — which seems impracticable.* This same thing two celebrated Sicilian theologians observe, Minutolo and Genatus.

XV. Finally, that contract of partnership hedged about with those two others falls back into a mere loan: since indeed money delivered into partnership, two other contracts acceding, passes into the dominion of the merchant, because it either stands or perishes to him. But any thing perishes to its lord. The examples of a thing lent for use, of depositaries, of hirers, which our adversaries oppose, are evidently false. For if it be granted that money can be let out just as a house, a field, and so forth, there is no usury in the world. If you desire to see the other sophisms overthrown, read Vol. VII, dissertation 3, chapter 16, § 8, and the other volume *On the Usury of the Triple Contract*.

XVI. QUESTION II. *Is the twofold contract of partnership lawful, in which either the capital or the gain is assured?* ANSWER. Many affirm it, even of those who assail the triple contract. Since, they say, although a partner assure the principal, he cannot nevertheless dispose of it at his pleasure, but ought to lay it out in trade. If he assure the gain, the principal not being assured, the matter is more evident.

XVII. This opinion is to me false as regards the first part, which regards the assurance of the principal, because a principal assured from every danger cannot be a gainful capital, neither by reason of industry nor by reason of danger. But these are the two titles alone by which money is rendered gainful in merchandise. There is added that in fact a price is never paid which equals all the dangers, both extrinsic and intrinsic. There is a danger, they say, of gaining nothing. But this danger is not that which renders money fruitful. That danger is truly redeemed by a price, and not feignedly, as in the triple contract. And I reply that this assurance in the twofold contract is no less feigned than in the triple contract. For who can constitute a just price for an assurance from every danger, to be paid? A price for assurance from this or that danger extrinsically occurring the usage of the marketplaces has introduced, and the laws approve it. But no law, no custom of the forum or of trade, has approved or prescribed a fixing of the price at which the principal may be assured from every danger, both of right and of fact: and it has been shown above from Cardinal de Luca and others that no trade, however abundant, at least in Europe, brings forth so great a gain that the principal could be assured from every possible danger of right and of fact, as it is in the triple and twofold contract.

XVIII. Concerning the second part, namely concerning the assurance of a certain gain, it can be disputed. The principal exposed to danger brings forth gain. This gain is uncertain. Why then cannot a contract be entered upon between the capitalist partner and the other concerning the quantity of this gain? That gain is now greater, now less: for the most part it is eight or ten in the hundred. This the capitalist, or he who puts in the principal, buys for four or five. Here, absolutely speaking, no injustice seems present: for the principal exposed to danger truly brings forth a gain now greater, now less. It is therefore a true contract of hazard, and indeed an equal one for both parties. But because Sixtus V absolutely forbids these agreements, therefore I abstain from approving it.

XIX. But, you will say, if that contract betrays no injustice, why ought it not to be entered upon? Because the Supreme Pontiff disapproves it. Because doctrine revealed by Christ Jesus, whether in the matter of faith or of morals, ought not to lie under the petty opinions of private men; but one must stand, and indeed with a simple heart, by the decisions of the Roman Pontiffs, who are judges constituted by God. Would not, if men were faithful and sincere, all deliver on loan to one another for gaining? Those who abounded in moneys but lacked industry and the art of trading would deliver the same to those who are destitute of money but are strong in industry and talent for making the same fruitful. And in truth this is the order of divine Providence. But because men are guileful, cunning, unjust, and fraudulent, therefore ingenious theologians cannot by exquisite interpretations elude, or bend, or soften the rigour of the evangelical law and the pontifical oracles, by filing away that these have not been received.

XX. QUESTION III. *What is to be said of a partnership of animals?* ANSWER. In this contract the animals bear the part of the stake or capital, and he who delivers them is called the capitalist, and he who receives the same is called the partner. The latter ought to pasture and guard them; and the fruits are to be divided. Sixtus V prescribes that the same conditions are to be observed in this contract as in

the contract of a partnership of money: namely, that the head of the animals perish to the lord, provided they perish without the fraud and negligence of the farmer partner. Wherefore those partnerships which are wont to be made in some places, and are called *a capo salvo* — namely, the capital being safe — are all unjust, as Sixtus V defined, and many provincial councils have declared, especially the First of Milan under St. Charles, in which it is said: *In a partnership let no agreement be made that the principal be safe, but let the fruits be divided in common.*

XXI. In this contract, as in the rest, equality is always to be preserved. Commonly the poorer partner succumbs to the greater burden, when the matter ought to stand the contrary way. The inconveniences, labours, pasturage, and industry of the partner are to be compared with the capital contributed by the rich man. If these two be equal, then both the fruits and the principal itself are to be divided in proportion: for the aforesaid things which the partner puts in obtain the place of the principal. But if the capitalist deliver together with the animals the pasturage also, then the division can be made at the judgment of prudent men: but then it is rather a letting than a partnership. A precise rule cannot be prescribed, and therefore equity is to be preserved according to the diversity of regions.

XXII. QUESTION IV. *Are usurers lords of the gain which they acquire by usuries?* ANSWER. Not a few affirm it. But St. Thomas denies it, II-II, q. 78, art. 3, to whom theologians more commonly subscribe. The reason is evident. A usurious contract is null by law both natural and divine. Therefore it is unequal to transferring dominion. Usurious goods, if they be fruit-bearing, increase to the borrowers, not to the usurer; but they perish to the usurer, because he is a possessor of bad faith. Hence it follows that a usurer cannot transfer to others the dominion of goods which he has obtained by interest. And those who receive the aforesaid goods from a usurer ought to restore the same, no otherwise than if they had bought them from robbers. For all theologians oblige usurers to restitution, whether they possess dominion or not. For those who grant them dominion teach at the same time that such dominion is burdened with the charge of restitution.

XXIII. If the goods which a usurer has acquired be barren, as money, corn, and the like, and which are consumed by use, and he trade with them and acquire other goods, he is not bound to restore these, because they are the fruits of his industry. If the goods are fruit-bearing, the fruits also are to be restored. Those who counsel usurious contracts are held to restitution. Those who deposit money with usurers to this end, that it may be lent at interest, sin, no otherwise than those who hold out to a thief the instruments for stealing. Therefore these are held to restitution. Rectors, judges, and advocates who by some statute are the cause that usuries are paid sin against justice, and are liable to restitution, the usurers not restoring. Ministers who in their masters' name perceive usuries sin, and are held, the masters failing, to restitution. Authors except ministers who exercise offices less proximate to the usuries, such as writing, counting the moneys, guarding them, and so forth. If you regard practice, these are commonly unequal to restitution. One thing is certain to me: that ministers of this kind are to be compelled to withdraw from the ministry. The other ministers who serve the usurious art more nearly, who enter upon usurious contracts, who compel borrowers to pay, sin and are subject to restitution, as even the younger authors themselves teach.

XXIV. QUESTION V. *Is it lawful to seek a loan from a usurer with usuries?* ANSWER. St. Thomas denies it, II-II, q. 78, art. 4, because it is not lawful to induce another to sin. Only that asking is lawful, as the Angelic there adds, by which you succour your own or another's necessity. Not therefore that you

may enlarge your trade, not that you may catch greater gains, but only on account of a true and grave necessity which cannot be repaired by another way, is it lawful to seek a loan: which action is by its own nature lawful, and the usurer out of his own depravity alone compels you to pay usury. For to give a loan is an office of charity, and it is lawful to ask it. But that the lender is unwilling to impart it without usury is his own wickedness. Wherefore you cannot offer usuries, but only ask a loan, and, being compelled, you can give, that you may provide for your necessity.

Dissertation V — On exchanges, rent-charges, letting, gaming, and wagering, promise, donation, and testaments

Chapter I — On exchange, and its division and conditions

I. QUESTION I. *What is exchange, and of how many kinds is it?* ANSWER. It is a contract of the commutation of moneys for moneys, with gain to the exchanger. He who gives the moneys is called the *exchanger;* he who seeks the exchange, the *exchangee;* and the art itself is called *exchanging*.

II. It is divided into *real* and *dry*. Dry exchange is a mask of usury, or a palliated loan, namely the delivery of money without distance of place. You are in need of money here at Rome, and here it is to be restored, but according to the value of the exchanges at Naples, Genoa, Milan, and so forth. Real exchange is that in which money is truly commuted for money, whether present for present of a diverse quality, or present for absent and distant. It is divided into *manual,* or small, in which gold money is commuted for silver, or silver for gold, or the contrary; and into *local,* or by letters, in which present money is exchanged for money distant in another place, or money distant in another place for present money.

III. QUESTION II. *By what title is manual exchange lawful?* ANSWER. First, it is an advantage to the commonwealth. Second, there is the labour and inconvenience of gathering moneys of every kind, of preserving and distributing the same; for the performing of all which there are required ministers, houses, and no light expenses. Third, according to some, there is the intrinsic diversity of the coins themselves. The fixing of the gain is defined by common and public consent in the marketplaces. It is not lawful for the servants of exchangers to commute coins to their own advantage and gain: because, since they have let out their labours and industry to their masters, they cannot gain from their masters' moneys, whatever some may say to the contrary.

IV. QUESTION III. *By what title is local exchange with gain lawful?* ANSWER. All affirm that that exchange is lawful by which money is delivered in one place and paid elsewhere, or the contrary: because a just title of gaining is the carrying of moneys, exceedingly necessary to the commonwealth, and because it frees from the dangers of robbers, from labour, and from many other inconveniences, all of which are appraisable at a price.

V. QUESTION IV. *What is to be thought of exchange with re-exchange?* ANSWER. Exchange with re-exchange, commonly *con la ricorsa,* is a trading paradox involved in so many turns and circumlocutions that, lest I seem to jest and to mock my readers, I shall set it forth in the words of Fr. Tamburini, who in Book IX *On Contracts,* chapter 5, § 2, no. 1, thus sets forth that exchange: "The practice of this exchange (which is called *Besançon* or *Piacenza* in Lessius, Book II, chapter 23, no. 39) is in our age most frequent, and is of this kind. Titius an exchanger here at Palermo, for example, gives to Caius a hundred gold pieces, to be paid by that same Caius at the next fairs to be celebrated at Piacenza, or in some other place of Italy or of Sicily. But because Caius has no one at Piacenza, or in those other places, who may pay in his name what Caius himself owes, therefore Titius offers to the same Caius his own correspondent named Seius residing in those places. He offers him, I say, that, just as he is the correspondent of Titius with every power granted to Seius himself by the same Titius, so in this

business also he may be the correspondent of Caius, and may pay the exchange, that is, the said hundred gold pieces with the gain there wont to be determined among the merchants, or in the market. Let this gain now be, for example, five gold pieces. The offer being accepted, Titius writes to Seius in the name of each — namely of Titius himself and of the said Caius — that Seius accept the credit of Titius and the debt of Caius, and, as now the correspondent of Caius, pay the exchange and its gain, that is, a hundred and five gold pieces; and, as the correspondent of Titius, receive those gold pieces, and thus the exchange be extinguished. But because Seius as the correspondent of Caius has no money, therefore the same Seius, as the correspondent of Titius, or in the name of Titius, offers and gives that money to himself as the correspondent or procurator of the aforesaid Caius: he gives it, I say, at an exchange which certainly will be a second exchange, or (as we speak) a *re-exchange,* to be paid by Caius at Palermo. With this money therefore Seius, as the correspondent of Caius, extinguishes or pays, as has been said, the aforesaid first exchange celebrated at Palermo, so that Caius owes nothing at all more for the said first exchange. Read Lessius, who rightly notes that if the said Seius should flee or become bankrupt, the exchanger Titius could not act in his own name against the exchangee Caius: for that Caius has already paid the exchange to the exchanger Titius himself. Second: but because the said second exchange ought to bring forth its own gain, which will be, for example, another five gold pieces, which are to be paid by Caius at Palermo, therefore Caius will have to pay at Palermo to Titius a hundred and ten gold pieces, that is, a hundred from the first capital, five from the gain of the first exchange extinguished at Piacenza with the money had from the procurator of Titius, and five from the gain of the exchange to be extinguished at Palermo by the same Caius. Third: I suppose, for the justice of the second exchange, that Caius or his procurator is not compelled to the said second exchange. For Caius, or his procurator, could extinguish the first exchange with present money, without the necessity of taking a re-exchange; or certainly he could take a re-exchange from another than the correspondent of Titius. Fourth: but it is wont to occur that Caius has not even at Palermo ready that sum which he owes to Titius, whence again he binds himself to pay that same whole sum, as if he had again received it from Titius at exchange, with its gain, again at Piacenza or elsewhere, where again will be done what we have just said in no. 1: and thus exchanges and re-exchanges are continued sometimes through many years, until Caius pays Titius the capital itself in truth with money counted down, together with all the intervening gains. For therefore the merchants call this also *exchange with recurrence.* For it recurs whence it had begun. And observe above all that the whole business, except the first delivery of those hundred gold pieces counted out and given to Caius by Titius, and except this last payment which at last will have to be made counted down, is transacted and despatched by mere written obligations, or by acceptances and givings of credit and debt, which are written down in the books of the giving and receiving."

VI. *Observe above all,* says Fr. Tamburini, that this whole business, except the first delivery and the last restitution, is despatched by mere written obligations and by given and accepted credits, through that intermediary Seius, who counts out and pays the exchange to himself. Hence the same Fr. Tamburini in the place cited, § 3, testifies that many rightly disapprove this exchange, which otherwise, he says, is most frequent. *Many nevertheless* (he adds) *— as Navarrus — report that a certain most learned man of the Society of Jesus, Boninsegni, so thought. But Sá, Diana, Lessius, de Lugo, and others, whom I follow, teach that this exchange is probably lawful, with the explanation to be given in § 4. It is proved. Because if Caius the exchangee had at Piacenza some friend who should there pay the exchange contracted at Palermo, it would be a just exchange, as we have seen. Therefore also,* and so forth.

VII. The argumentation of those who make this exchange lawful comes back, unless I am mistaken, to this. If the exchange were real, it would be lawful. Therefore it will also be lawful, even though it be feigned. Since, they say, although money be not really and truly present at Piacenza, it is nevertheless present virtually and equivalently. Most happy would debtors be if they could pay their debts with this virtual money! That stone would be more precious than any philosopher's stone.

VIII. That you may perceive the iniquity of the usury: Caius, compelled by necessity, asks of Titius a hundred gold pieces, thinking nothing at all of exchange. Crafty Titius sees that he betrays himself as a usurer if he deliver the gold pieces with an accession above the principal; therefore, that he may feign to decline usury, he suggests to him the Piacenza exchange. *And how can this be done?* replies Caius. *Most easily,* replies crafty Titius. *I have there my procurator Seius, who will transact all those things which have been narrated.* Who does not touch with his hands the crafty circumlocution devised for palliating usury? Since indeed, the circumlocutions being removed, Titius in fact intends nothing else save gain from the loan which he delivers to Caius. And Caius intends nothing else save to receive money to be restored to Titius in that place where he receives it. All the rest are figments. How can Caius want an exchange, if he has no need of one, but has need of moneys there where he must restore the same?

IX. St. Pius V in the year 1571 published a constitution by which he condemned all such disguised exchanges, whose beginning is *In eam pro,* and so forth. Read it entire in our Vol. VII, Book 3, dissertation 4, chapter 5. They answer that the Pian constitution has been received in few places, almost nowhere. And so it must be seen what natural law prescribes. But who are the interpreters of that natural law? Are they not the Pontiffs? Did St. Pius V not see, did the theologians by whose study that usage stands not see, what the law of nature prescribes? Do the bulls of the Pontiffs oblige in matters of faith and not so in the precepts of morals? But why has the Pian constitution not been received in usage? Because it is not observed by very many merchants. Is not this an excellent reason! Many other things which St. Pius V condemns in this constitution are explained in the place cited.

X. QUESTION V. *What is to be said of exchange at the fairs?* ANSWER. Merchants celebrate fairs in certain places or cities three or four times in the year, where debts are paid. They count out money there, to be restored at the second or fourth fairs with so much the greater gain as the longer time flows between. Lessius, Layman, and others assert that this exchange is lawful, but nevertheless that it is not to be persuaded. Other graver theologians disapprove it as usurious, because gain is exacted on account of the delay of time alone. There are wont to be alleged the titles of ceasing gain and emerging loss; but, as Genet observes, merchants scarcely ever suffer loss from such an exchange. Because they scarcely exchange, payment being deferred, save when they abound in idle money; therefore this exchange, he says, is always usurious.

XI. QUESTION VI. *What is to be said of civic exchange at Rome?* ANSWER. Caius has need of a hundred gold pieces, which he asks of Titius an exchanger, to be restored in that same place with gain at a term — namely at the first, or second, or third fairs. There is no one who does not condemn that exchange as feigned and usurious. Since indeed the exchangee has money neither at Rome nor elsewhere to be exchanged. They are wont to disguise that exchange in this manner. Caius at Rome testifies to the exchanger that he receives the coins either for exercising exchange at Naples, Lyons, Milan, and so forth, or for entering upon other trading contracts. And this, if need be, he confirms by oath. All these things nevertheless are false. For Caius receives money at Rome to be spent either

upon settling his daughter or upon relieving his own necessities. Titius refuses to entrust money to Caius unless either a pledge or a surety be accepted. And Caius must pay gain to the surety and at the same time to the exchanger. How many interests in one crime! Exchangers and brokers commonly have all these fictions thoroughly known. They answer: is there not some title governing this usury? Some say: since either Caius trades with the money received from Titius, or not. If the first, the exchange is real. If the second, it is through Caius's fault that the money does not become gainful. Further, Titius ought not to bear the loss from Caius's fault. But all these are mere figments, since the titles of contracts must be real, not feigned.

XII. By another agreement they are wont to exercise this exchange, which they call *obligation*. Sempronius the borrower says to Caius the lender: *Do you deliver to me on loan a thousand gold pieces: I will destine an equal sum of money to trade, or will deliver it at exchange for your advantage and utility; and I will pay you every year as much as I shall gain from the trade or from the exchange, until I shall have restored the sum received.* All these are chimerical, as Benedict XIV, Supreme Pontiff, declared, Book 7, chapter 48, no. 9, *On the Synod,* saying: *For what more absurd, what more incredible, can be feigned than that Titius, in need of the thousand gold pieces which he receives on loan from Caius, should have just as many ready at once to be remitted to the fairs, and to be laid out in active exchanges, for the utility of Caius the lender?*

XIII. This circumlocution is so puerile and inept that it needs no confutation. Nor does it matter that the decisions of the Rota are adduced in confirmation. Since in a tribunal the parties prove by lies and circumlocutions that a feigned exchange was real. For the rest, if in the forum it appeared that the exchange was a mere figment, the judges would never approve it. And in this sense is Cardinal de Luca to be understood, who *On Exchanges,* Book 5, title *Exchange,* says: *No one seems to approve the exchange described.* For no one master of his reason can approve such an exchange, if it be feigned, as in truth it is and is everywhere reduced to practice. If you desire more concerning exchanges, read Vol. VII, Book 3, dissertation 4.

Chapter II — On rent-charges real and personal, and their division

I. SOLE QUESTION. *What is a rent-charge, and of how many kinds is it?* ANSWER. It is *the right of exacting a pension from another's fruit-bearing thing.* The younger authors add another particle, *or from a person,* that they may include in the common definition of a rent-charge the personal rent-charge. But since that rent-charge is to me fictitious, and a mask of usury, therefore I exclude it from the definition of a rent-charge.

II. A rent-charge is distributed into *reservative* and *consignative.* When a man delivers his thing to another with this burden added, that he who receives the thing pay yearly a prescribed pension, he constitutes a reservative rent-charge. A consignative rent-charge is that in which, the dominion of your thing — an estate, a house, and so forth — being retained, you sell to another the right of perceiving a pension every year.

III. The consignative is again divided: first, on the part of the thing in which it is founded, into *real, personal,* and *mixed;* second, on the part of the pension, into *pecuniary* and *fruit-bearing;* third, on the part of time, into *temporal* and *perpetual;* fourth, on the part of the manner in which it is celebrated, into *redeemable* and *irredeemable.*

IV. A *real* rent-charge is constituted upon a field, a house, or some fruit-bearing land. If it be alienated and pass to several lords, the burden of that rent-charge passes also, until it be redeemed. If the thing perish, the rent-charge perishes. A *personal* rent-charge is constituted immediately upon a person, who is obliged to pay the pension from his industry, labour, and works, and also from his goods, if he have them. That rent-charge immediately affects and accompanies the person, not the thing. Wherefore if the goods perish and not the person, the rent-charge stands. And although a hypothec be delivered for assurance, it does not therefore pass into a real one, because the hypothec does not remain immediately obligated, but only in default of the person. A *mixed* one is constituted both upon a thing and upon a person. And therefore if the thing perish and not the person, the latter must pay; if on the contrary the person perish and not the thing, the pension is exacted from the latter. A pecuniary one is paid in money, a fruit-bearing one in fruits. A temporal one has a fixed time. A perpetual one lasts always. A *life* rent-charge is bound to an uncertain time, namely to a person. A *redeemable* one can be redeemed at the discretion of the rent-buyer, or of the rent-payer, or of both. An *irredeemable* one can never be redeemed. He who buys the rent-charge is called the *censualist;* he who pays it, the *censuary.*

V. The real rent-charge Martin V, Callixtus III, and St. Pius V in the constitution *Cum onus,* and so forth, in the year 1568, approved. That contract is lawful and just. Both parties consent. The price is just. Since although all the pensions taken together exceed the price of the thing, yet received successively they are worth less.

VI. The assailants of rent-charges, the defenders of usury, object: A rent-charge is a pure and mere loan. I deliver to you 100, that every year you render me five. Ten years having elapsed, the principal has been rendered. And nevertheless I shall receive five every year in perpetuity. What is this but a perpetual loan?

VII. The various answers which authors afford show that the objection is of no light moment. The only true answer seems to me this. An accession above the principal in a loan is disapproved, because money by its own nature is barren and is consumed by civil use. It becomes fruitful by the industry of the borrower, not of the lender. On the contrary, the estates of rent-charges are by their own nature fruit-bearing, in which the usufruct is distinguished from the dominion. If these two are in fact distinct, one can be sold without the other. Nor is this asserted gratuitously. For if the field, the house, the estate in which the rent-charge is founded perish by alluvion, fire, or another way, it perishes to the censualist himself and by no means to the censuary. On the contrary in a loan it perishes to the borrower, not to the lender. The difference therefore is true and real. The matter comes back to this, that rent-charges be celebrated according to the apostolic constitutions: that there truly intervene a real contract of selling and buying of the right of perceiving pensions; and that the estate of the rent-charge be in fact fruit-bearing, free, and corresponding to the principal. Most frequently those rent-charges are fictitious, because the conditions prescribed by the pontifical constitutions are not observed. Those authors who neglect the conditions prescribed by the Holy See expose the pontifical bulls to the calumnies of heretics. If you are eager to know more of the difference between a rent-charge and money lent, read our commentary on the Encyclical of Benedict XIV, dissertation 3, chapter 4, § 5.

Chapter III — On the personal rent-charge, a wonderful cloak of usury

I. If real rent-charges themselves, approved by pontifical authority, present a difficulty, and thence the patrons of usuries snatch a handle for making moderate usuries honourable, everyone sees what is to be said of personal rent-charges. The justice of real rent-charges is defended if the prescribed conditions be observed. These conditions are lacking to personal rent-charges. Therefore they are usurious.

II. Martin Navarrus, *On Usuries,* no. 80, testifies that *almost all theologians and canonists condemn the personal rent-charge.* Fr. Lessius cites Biel as a patron of the personal rent-charge. But Biel in Book 4, distinction 15, question 12, says: *This I say recitatively,* and so forth. Fr. Lessius answers, Book II, chapter 22, doubt 10, no. 56, that this is no objection, saying: *For we are wont to speak thus, for the deprecating of odium, when we bring forth from our own opinion something of nerve and adverse to a received opinion.* Have you understood? *We are wont to speak thus when we forge something new and adverse to received doctrine.* Is it lawful therefore in controversies of morals to forge new doctrines opposed to the received doctrine of the ancients? For the declining of odium ambiguous words are used. Either the doctrine is true or false. If true, is odium to be feared by the disciples of Jesus Christ? But it is disposed by divine providence that the doctrine which they themselves maintain should be called by the authors themselves new and opposed to ancient doctrine. For if it is new, and handed down neither by the Gospel, nor by the Fathers, nor by the Councils, it is assuredly false.

III. Fr. Paul Layman, Book 3, tract 4, chapter 18, writes: *A personal rent-charge redeemable on either side, settled upon present industry, is probably defended. Nevertheless it is not free from the danger of a usurious intention. So, against the common opinion, say the Doctors.* Do the Doctors defend probably against the common opinion? Who are these Doctors who set themselves against the doctrine of the Church of all ages?

IV. Fr. Patrick Sporer, the collector of Tamburini, Layman, Sánchez, and Diana, tract 6, chapter 1, no. 16, writes: *Most probably lawful also is the personal rent-charge … even redeemable on either side, even with an agreement of assurance added, regarding precisely the nature of the thing, although everywhere there underlie a danger of usurious intention: therefore it is deservedly prohibited by the bulls of the Pontiffs.* The personal rent-charge is lawful, and indeed most probably, and at the same time deservedly disapproved by the bulls of the Pontiffs? Are new casuists better interpreters of natural and evangelical law than the Supreme Pontiffs? If the rent-charge is deservedly disapproved by the bulls of the Pontiffs, let us, disputations being dismissed, with joined hands disapprove the same. But Fr. Viva resists, who in part 4, question 4, article 3, no. 6, teaches that *the Doctors most commonly deny that the personal rent-charge is usurious.*

V. Consider the rise, increase, and propagation of this opinion. Biel began *recitatively;* Fr. Lessius followed *speculatively;* Fr. Layman *probably;* Fr. Sporer *most probably;* Fr. Viva *most commonly.* Thus are new opinions propagated against the ancient doctrine of the holy Pontiffs.

VI. But if the pontifical bulls forbid the personal rent-charge, as our adversaries confess, by what reason can they maintain it? And that the pontifical bulls disapprove this contract, besides our adversaries, Benedict XIV testifies, Book 7, chapter 48, no. 5, *On the Synod,* where he says: *It is superfluous to assail with new arguments the personal rent-charge, which St. Pius V has already proscribed in the praised constitution* Cum onus, *where among the other conditions for the honesty of a rent-charge he requires this*

also: that the rent-charge be constituted in a fruit-bearing thing, not of any kind whatsoever, but immovable, certain, and expressly designated.

VII. Fr. Paul Comitolus, a most learned Jesuit and antiprobabilist, Book 3, *Moral Answers,* question 27, cries out: *Who could think that all the provinces and kingdoms of the Christian empire are not bound by this law? … But to me it is by no means doubtful that the constitution has force in all kingdoms and provinces: which those words of the same constitution declare not obscurely: But we will,* and so forth. … *There is added this most firm reason: The Pontiff could by a necessary law remedy pernicious rent-charges; he ought, he could, and he willed to remedy them in all places. Wherefore it was necessary that this law be in the highest degree general: otherwise the Roman Pontiff would not very prudently have consulted the salvation of all Christian nations and likewise his own, since he would not have taken away that evil from all the provinces of the Christian world, which he could and ought to have taken away by an equitable sanction.*

VIII. But what argument of non-acceptance will someone bring forward? That it was not promulgated in every province? Imagine even this hypothesis. What province, what kingdom instituted an examination, the form of law being observed, whether the Pian Bull is to be accepted or not? None at all. Why then is it not accepted? Because avaricious and covetous men and usurers have continued these usurious rent-charges and usurious exchanges. Who would dare to assert this? For no other cause therefore can it be said not accepted, save because some theologians, seeing the peoples for the greater part celebrating personal rent-charges, dry exchanges, and triple contracts no otherwise after the Bull than before, with a pious intention, as it becomes us to think, of preserving them from the crime of usury, began then to write: *The Bull is not received in usage.* And not a few after them continued to write that the Bull was not received in usage, although in these times Benedict XIV has alleged the same Bull against personal rent-charges. But let them hear and imitate the most celebrated Jesuit Fr. Comitolus, Book 3, question 27, no. 5, thus speaking: *For the arbiters of sacred confessions ask: what then shall we have to do with those who perceive fruits from rent-charges which are neither made nor celebrated according to the prescribed rule of the constitution? What likewise with the lords of the provinces? I would do this. The lords of the provinces, unless they were willing to accept the Pian Constitution, I would not absolve. As for the rest, if they have committed anything by fraud or guile in contracting a rent-charge after hearing the law of Pius V, I would pronounce void whatever they have done, that the contract was null, and that therefore they had no right of perceiving the pensions; and thus that they are liable to necessary restitution.*

IX. The champions of the personal rent-charge are divided into two ranks. Some defend the personal rent-charge only on the part of the seller, not on the part of the buyer, as Henry of St. Ignatius, whose work has been proscribed, and in the matter of usury is perhaps laxer than is equitable — which be said for the unskilled, who cite this author as if he always maintained sound doctrine. Others defend the same redeemable on either side, a hypothec also being added.

X. Thus do those authors argue. I can sell you the right of perceiving the fruit of my field. Therefore by the same reason I can sell you a part of the fruits of my industry. Either therefore the real rent-charge is to be disapproved, or the personal rent-charge approved.

XI. A futile and inept quibble. Land by its own nature brings forth fruits in perpetuity. A human person is changed by the day. Today fruitful, tomorrow barren. Today he contracts a personal rent-charge, tomorrow he falls into a long illness. Meanwhile the rent-charge runs every day. The law of nature therefore being regarded, to which the defenders appeal, that rent-charge is usurious, and as such the Pontiffs have condemned it, wiser interpreters of that law than others.

XII. The clause which prescribes that a fruit-bearing and immovable estate must underlie the rent-charge regards natural law and the very substance of the contract. This clause four Roman Pontiffs enjoin: Martin V, Nicholas V, Callixtus III, St. Pius V. It would never have been disputed among theologians before the Pian constitution whether the aforesaid clause were merely of human law, but whether it would be usurious, this clause being removed. They declared the rent-charge usurious, a fruit-bearing, immovable, and determinate estate being lacking. Therefore now also it is to be so held.

XIII. In few words I sum up everything. If reasons be compared with reasons, the reasons for the personal rent-charge were invented first *recitatively,* then *speculatively,* thence *probably,* again *most probably,* at last propagated *most commonly* among the younger authors. If the authority of the theologians and canonists be compared with the authors, even Fr. Lessius himself confesses that in his time our opinion was the common one. Imagine all the arguments of either side equal. The Supreme Pontiffs condemn the personal rent-charge. Imagine also — which I altogether deny — that the pontifical prohibition is of positive law. What then? Do laws which forbid some contract on account of the appearance of usury, on account of the most grave dangers of frauds, oppressions, and usuries, not oblige everywhere among the nations? Is the obligation of avoiding grave dangers and the scandal of heretics not of natural and divine law? Does it not bind all provinces? And in a matter so most grave as avarice and usury, are we to adhere to the interpretations of certain men, the sanctions of graver theologians and of the Supreme Pontiffs being neglected? Do you, Christian reader, sit as judge.

XIV. I hold it therefore certain and firm that the personal rent-charge, whether redeemable on either side, or irredeemable, or conceived in whatever manner, is usurious. The usury indeed betrays itself more evidently in the rent-charge redeemable on either side; but the opinion concerning this irredeemable rent-charge is not therefore probable. St. Pius V, as our adversaries confess, condemned the personal rent-charge. But an opinion condemned by the Holy See lacks all probability. For fourteen centuries the Christian commonwealth lived without rent-charges. The Roman Empire itself was ignorant of rent-charge contracts. As soon as they were brought in, four Roman Pontiffs by prescribed clauses purged the real ones from the stain of usury. If you desire more concerning real and personal rent-charges, read Vol. VII, Book 3, dissertation 4, chapter 12, where you will find many things which regard the history, and all the sophisms of our adversaries overthrown.

XV. QUESTION I. *The law of nature being regarded, is that agreement lawful by which a censuary is bound to redeem the rent-charge at the buyer's pleasure?* ANSWER. Some affirm it. But this opinion is to me false, the law of nature alone being regarded. As often as you deliver money with an agreement that just as much be restored, it is usury if you exact accessions beyond the principal. This happens in the present case. Since indeed you buy a rent-charge at the price of a thousand gold pieces; you perceive fifty every year; you compel the censuary that after a period of three or six years he redeem the rent-charge at the same price. What more is required for a true loan and usury? The matter stands contrariwise when the faculty of redeeming the rent-charge remains on the part of the seller alone. For this faculty does not take away the true character of buying and selling: because since the seller can never redeem the rent-charge, on his part a loan cannot be feared. Wherefore the buyer truly buys, since he cannot demand back the price given. This opinion the graver theologians defend. The

seller can be obliged to redeem the rent-charge in the same coin, provided the danger of increase and of decrease be equal.

XVI. QUESTION II. *The estate subject to the rent-charge perishing, does the rent-charge perish by natural law?* ANSWER. St. Pius V in his constitution affirms that, the estate subject to the rent-charge perishing either wholly or in part, the rent-charge also perishes. The Salmanticenses nevertheless defend the negative opinion, tract 14, chapter 4, point 2, § 4, because, they say, estates are not put under rent-charges that from them the pensions may be paid, but as a pledge and hypothec for the security of the rent-charge. This opinion is to me false. For it being admitted, rent-charges are a true loan with a pledge added.

XVII. QUESTION III. *Is a rent-charge lawful to which more estates are subjected, no part being designated and determined?* ANSWER. St. Pius V, for the taking away of frauds and usuries, enjoins that a determinate part of the estate be subjected to the rent-charge. Since if the part subject to the rent-charge perish, it ought to perish to the buyer of the rent-charge. Nor is it an objection that in every instrument of a rent-charge all the seller's goods are substituted for the assurance of the same. Since substitutions and hypothecs of this kind are made that the estate subject to the rent-charge may be rendered secure from eviction: namely, if the estate were burdened with another rent-charge, subjected to a trust, or laden with another debt, then the debtor's other goods would have to supply. But for the rest, if the estate perish, it ought to perish to the censualist: this is certain.

XVIII. QUESTION IV. *Is a life rent-charge lawful?* ANSWER. The common opinion affirms it. For it is a contract of hazard, in which the danger of both parties is equal. For the principal exposed to danger can become fruitful, when the danger is equal as much in respect of the seller as of the buyer. Because nevertheless that contract has the appearance of hazard, unless necessity urge, I should not approve it in respect of those who of set purpose celebrate life rent-charges solely that they may gain. To me in this matter the water sticks. Wherefore, necessity being removed, I persuade Christians to abstain from this rent-charge.

XIX. QUESTION V. *Is the contract commonly called a godere, for enjoying, lawful?* ANSWER. Diana says this contract is most frequent in Italy. It is celebrated by this agreement. Sempronius gives you his house or his field, and you give him money answering to the value of the house or the field, thus bargaining mutually: *You use my money, and I will use your field. When I shall wish, I will demand back the money, and you the field;* or: *For five years, or ten, use my money, and I will use your field.* Some of the younger authors with Diana contend to make this contract honourable under the mask of a sale with an agreement of resale. But it is an open and crafty circumlocution and a mask of a loan. A sale with an agreement of redemption in favour of the seller is indeed lawful. But that agreement in favour of the buyer is usurious, as I have said above. And let these things concerning usury and the cloaks of usury suffice. Read Vol. VII, Book 3, dissertation 4, and the volume *On the Usury of the Triple Contract,* and the commentary on the Encyclical.

Chapter IV — On gaming and wagering

I. QUESTION I. *Is a game undertaken principally for the sake of gain vicious?* ANSWER. Gabriel, Toletus, and others affirm it. But others deny it. It is no sin, says de Lugo, disputation 31, to ordain a means to an end which is useful, if the end be lawful. Gain is a lawful end. Therefore the game also. This

opinion, which I repute false, St. Thomas disapproves, II-II, q. 77, art. 4, where he lays down *that merchandise itself, which is for the sake of seeking gain, has a certain baseness, because it serves cupidity.* Public or private utility renders it lawful. A game by its own nature is instituted for the recreating of the mind. The end of a game is the solace of the mind, not gain. Therefore gain disturbs the order, and turns the game away from its end.

II. This gainful game the younger authors place among contracts, and define it: *a contract in which a thing exposed by either party is attributed to the victor of the contest*. They assign three conditions that it may be lawful. First, that the players have the free faculty of disposing of the thing which they expose in the game. Hence they say that those sin who play with a robber, a boy, a depositary, a fool, a son of a family, a prodigal, a cloistered religious. Second, that the game be lawful it is required that the one do not induce the other to the game by frauds, guiles, or reproaches. Third, that no frauds against the laws of the game intervene.

III. I reject this gainful game as never lawful, and as pernicious to families and to the commonwealth. The conditions which the younger authors prescribe can hinder a greater malice, but they cannot confer honesty upon a gainful game. The degree of malice I know not, although I know that a gainful game is vicious. Those who accidentally and against custom should lay out some money even principally for the sake of gain I would not condemn of grave fault. On the contrary, those who in the custom of playing were engaged principally for the sake of gain I would not free from grave fault, nor would I absolve them, unless they left off this custom. Since scarcely, and hardly even so, does it happen that grave absurdities do not follow such a custom. At first the game is undertaken for the sake of delighting the mind; but that in its progress and end it falls away into avarice and the ruin of families, experience teaches.

IV. QUESTION II. *Is a game of hazard or fortune lawful?* ANSWER. The civil laws themselves, *Digest, On the Use of Dice,* laws 1, 2, 3, severely forbid this game. There are added the peculiar laws of every kingdom, and canon law, chapter *Episcopus,* distinction 35, where laymen giving themselves to dice are deprived of communion, and upon clerics, deacons, and priests the penalty of deposition is imposed. The Council of Trent, session 22, chapter 1, renews the ancient canons against clerics giving themselves to dice.

V. And so a game of chance or hazard for the sake of gain is by its own nature vicious. Besides, games of cards which depend not upon industry but upon fortune, such as are the games commonly called *Bassetta, Faraone, Trissac,* and of dice, carry with them so many dangers that I would admit no one to the sacraments unless he first left off and said farewell to these games. Aristotle says that these gamesters and robbers are the same. Concerning the games of cloistered religious see what I have written in the *Apostolico-Monastic Discipline,* dissertation 6, chapter 4.

VI. Those who set out public tables for gaming, and receive players into their own house, sin mortally and are to be kept from the sacraments, as even the more kindly authors commonly affirm. Similarly St. Antoninus in his *Formula of Confession,* part 1, chapter 3, and part 2 of the *Summa,* title 1, chapter 23, § 13, teaches that makers of cards and of dice are not to be absolved. The opposite not a few teach. See what has been said concerning scandal.

VII. QUESTION III. *Are wagers, commonly called scommesse, lawful?* ANSWER. Sylvester, Gabriel, St. Antoninus, and others deny it. But the younger authors commonly affirm it. The discourse is not of

wagers which are wont to be made by accident for the sake of recreation, but of gainful wagers, which are commonly wont to be made upon the outcome of wars, upon the victory or loss of players. Wagers of this kind can scarcely be purged of vice.

VIII. Cardinal de Lugo, disputation 31, section 6, no. 74, teaches that a wager can lawfully be made which will come about with the loss of a neighbour: because, he says, *although occasion be given to the wagerer of wishing for Peter's death, this nevertheless is by accident*. And at no. 75 he adds: *It is inferred, secondly, that neither is it of its own nature unlawful to make a wager upon a sin to be committed by some third party. So Sánchez with others*. What is the object of that wager? A sin. Is it honourable? What is the end? Gain. Is it holy? *Holy,* says Augustine, *is that which we will*. But it is more often not holy but depraved and vicious. For the paradoxes of Fr. Caesar Callini concerning gainful games, see Vol. VII, Book 3, dissertation 4, chapter 15.

Chapter V — On assurance, pledge, composition, emphyteusis, loan for use, precarium, deposit, letting, hiring, promise, donation

I. QUESTION I. *What is assurance?* ANSWER. It is a contract by which for an agreed price a man takes upon himself another's danger, being about to compensate it either wholly or in part. The quantity of the price is fixed by the laws of the marketplaces. All grant that this contract is lawful. In the chapter *Naviganti* the assurance prohibited is in respect of a lender, on account of the danger of usury.

II. QUESTION II. *What is suretyship, pledge, hypothec, and composition?* ANSWER. Suretyship is the taking upon oneself of another's obligation, by which a man binds himself to fulfil it, the principal debtor failing. That contract is called *subsidiary* and *accessory,* because the surety is substituted for the principal debtor. He who constitutes himself a principal debtor for another is not properly a surety. Often nevertheless sureties constitute themselves principal debtors, who are called *mallevadori in principalità*. These can be directly compelled to payment, the first debtor being left aside.

III. Pledge and hypothec are wont to be taken for the same thing. Strictly taken, nevertheless, those contracts differ: for a pledge is of movables only, a hypothec of immovables. A pledge is defined *a contract by which a movable thing is delivered to a creditor for the security of a debt*. A hypothec is *a contract by which an immovable thing, by a bare convention, without delivery, is obligated to a creditor for the security of a debt,* so that if the other do not satisfy, satisfaction may thence be sought. A hypothec is twofold: one general, by which all goods are obligated; the other particular, by which a man obligates some determinate thing.

IV. *Composition* is an onerous convention by which doubtful and uncertain rights between parties are settled. This, lawfully constituted between the parties, has the same force as a judge's sentence. Wherefore, it being once carried out, restitution *in integrum* is not granted, unless an enormous injury appear. Would that this contract, useful to both parties, were more frequent, so many lawsuits pernicious even to the victors being dismissed.

V. QUESTION III. *What is emphyteusis?* ANSWER. It is a contract by which the useful dominion of an immovable thing is transferred for a long time, the direct being retained, with the burden imposed of an annual pension to be paid. The word *emphyteusis* is Greek, which in Latin signifies grafting or planting: because formerly untilled estates were delivered to be planted.

VI. If an emphyteuta for three years does not pay the agreed pension entire to a lay lord, and for two years to a church, by that very fact he falls under the penalty of forfeiture, and the proprietary lord can deprive him of the emphyteutic thing with all the improvements made.

VII. QUESTION IV. *What is a fief?* ANSWER. It is a contract by which the useful dominion of an immovable thing is transferred, the direct dominion being retained, under the burden of fidelity and of personal service. It differs from emphyteusis, because a feudatory or vassal does not pay the lord an annual pension, as an emphyteuta does, but only owes personal service of defence, aid, and fidelity, when required by the lord.

VIII. QUESTION V. *What is a loan for use?* ANSWER. It is the gratuitous granting of some thing as regards its use only for a fixed time. But *precarium* is the gratuitous granting of some thing as regards its use only, revocable at the pleasure of the grantor. Contracts of this kind are akin; they differ only in this, that a *precarium* can be demanded back at the pleasure of the grantor, but a loan for use only when the appointed time has elapsed.

IX. QUESTION VI. *What is a deposit?* ANSWER. It is a contract by which a thing is committed to another's trust for custody alone, that it may be rendered back entire. There is required the mutual consent of the depositor and of the depositary. A depositary cannot use the thing deposited without the depositor's consent. If nevertheless it be money which suffers loss from use, he can use it, provided he be always ready to render it at the depositor's pleasure. He ought to use diligence in the custody. If loss follow, he is held to recompense for grave fault only. Cloistered religious cannot undertake a deposit without the prelate's licence: the monastery is not held to compensation if the deposit perish with a private religious, or with the prelate, unless they had undertaken it with the chapter's consent. The rest, by reason of mind, are capable of receiving a deposit.

X. QUESTION VII. *What is letting?* ANSWER. It is an onerous contract by which the use, or the fruits, of a thing or of a person is sold for a price. Hiring is a contract by which the use of a thing or of a person is bought for a price.

XI. QUESTION VIII. *Do those sin who let houses for the exercising of usuries, for harlotry?* ANSWER. All the Fathers affirm it, as I have made plain elsewhere. Fr. Claude La Croix, Book 3, part 2, doubt 1, no. 1042, heaps up opposed opinions — probable, improbable, and lax — and after his manner subjects the same to the discretion of his readers, as if Pyrrhonism were Christian morality. He shows himself nevertheless to incline to the opinion teaching that such letting is lawful: because this, he says, tends proximately to the giving of a habitation, but remotely affords an occasion of sinning. This opinion, as it seems to me, is false. See what has been said where scandal was treated.

XII. QUESTION IX. *What is a promise, and what is its obligation?* ANSWER. It is the free and spontaneous giving of one's word concerning a thing lawful and possible. For there is required for a true promise an obligation of furnishing, out of the virtue of fidelity, that which is promised; nor does the mere will of doing suffice; and therefore it is called *a giving of one's word*. It is called free and spontaneous, because a promise is a gratuitous contract.

XIII. That a promise may bring in an obligation, it must be accepted by him to whom it is made. A promise confirmed by oath cannot be revoked before acceptance, because the promiser by the bond of religion binds himself not to revoke the promise, whatever some may say to the contrary. The gravity

of the obligation in a gratuitous promise depends upon the intention of the promiser, who as regards this is the lawgiver.

XIV. QUESTION X. *What is a donation?* ANSWER. It is the liberal delivery of some thing. One is *real,* set in the delivery of the thing; another *verbal,* by which a man gives an absent thing, which is an imperfect donation, and rather a promise. Again, a donation is distributed into *absolute,* which is perfect, and *conditional,* which has a condition annexed. Lastly, one donation is *between the living,* which continuously transfers dominion to the donee, even while the donor lives; another is a donation *by reason of death,* in which a man now gives a thing, but to be possessed after death. This is revocable, the former not, a few cases excepted.

XV. Those can give who possess absolute dominion of the thing to be given. Hence religious cannot give. The causes of revoking a donation are: first, the donee's ingratitude proved in court; second, offspring afterwards received; third, if the donation be undutiful, against paternal piety toward sons, as if it injure the lawful portion owed to sons; fourth, if anything be given for a cause, and the cause do not follow.

Chapter VI — On testaments

I. QUESTION I. *What is a testament, and of how many kinds is it?* ANSWER. It is *the just declaration of a last human will concerning that which a man wills to be done after his death, with the direct institution of an heir.* The true property of a testament, as distinguished from other last wills, is the institution of an heir, who represents the person of the deceased. A codicil is as it were the appendix of a testament, and is written for the changing of something of those things which have been disposed by testament, or for declaring or adding something. Only by privilege can an heir be instituted in a codicil. In some places a testament is valid without the institution of an heir.

II. A testament is twofold. One *written,* or closed and secured with seals. The other *nuncupative,* or open, which can be formed without writing by the mere naming of words. If a man makes several testaments, the last is to be stood by.

III. A legacy is a donation made by a testator, to be furnished by the heir, of some particular thing. A trust is a legacy or inheritance so committed to the trust of a legatee or heir that he cannot alienate it, but must deliver and restore it to him whom the testator prescribes. A trust is twofold: *general,* by which the whole inheritance is burdened; and *particular,* by which a determinate thing is committed to the trust of a legatee to be restored.

IV. QUESTION II. *What solemnities are required for a nuncupative testament?* ANSWER. By common law there are required seven witnesses, male, of full age, who have completed fourteen years, and who, free, invited, and asked, all hear the testator's will. For a written or closed testament it is required that the testator declare before seven witnesses that this is his testament. All the witnesses ought to subscribe. If any be ignorant of writing, let another write for him, and he ought to sign the testament with his own or a common seal. There are excluded from the number of witnesses the dumb, the deaf, the under-age, the heir's father, those who are under the testator's power, the blind, the demented, prodigals, and the infamous. These things by common law. For the rest, individual princedoms have their own peculiar laws, which are to be observed.

V. QUESTION III. *What solemnities does a testament for pious causes demand?* ANSWER. Testaments which destine an inheritance to the poor, to churches, monasteries, hospitals, maidens, or widows are called *for pious causes*. If a legacy be left in a testament to the aforesaid, the testament is not called *for pious causes*. As often as the testator's consent is established either from his private writing or from two witnesses, whether men or women, a testament for pious causes is valid, the solemnities prescribed by common law being removed.

VI. For the nuncupative testaments of the blind seven witnesses are required. Soldiers making a testament outside war are subject to the common law; but in war they ought to observe those things which are prescribed by the law of nature, namely that testaments be made before two witnesses, whether men or women. For peasants five witnesses are required. But the municipal laws are to be considered.

VII. QUESTION IV. *What is an imperfect testament?* ANSWER. A testament is called imperfect either because the solemnities prescribed by law are lacking, or because the testator, stricken by death, could not perfect it. This by common law is null. When it is doubted whether a testament be valid or not, authors commonly assert it to be valid. And if it be for pious causes, it is valid in each forum, as also are pious legacies. If a testator assert in his testament that he has given a signed schedule to his confessor or to another person, and that he wills all things contained in it to be valid, they are to be fulfilled no otherwise than a testament.

VIII. If a testator lacks full liberty, if he has been deceived by guile, enticements, or frauds, the testament made by him is null. Those who deceive a testator sin against justice, and are held to restitution. The same is to be said of those who craftily hinder a testament from being drawn up.

IX. QUESTION V. *Who can draw up a testament?* ANSWER. All endowed with the use of reason can make a testament concerning their own goods, unless some law stand in the way, as it stands in the way of religious by force of the vow of poverty, and of bishops as regards the revenues of the Church. Male minors before fourteen and female before twelve years cannot make a testament. Sons of a family can make a testament concerning castrensian and quasi-castrensian goods.

X. The crimes proved by a judge's sentence which forbid testament-making are: first, the hostile striking of cardinals, their imprisonment, or cooperation in these crimes; second, heresy, or favouring heretics, and harbouring them; third, condemnation for a libellous pamphlet; fourth, public usurers; fifth, those condemned to death, and those to whom water and fire are interdicted, are unfit to make a testament.

XI. QUESTION VI. *Who cannot be instituted heirs?* ANSWER. First, heretics and apostates if within a year they have not done penance. Second, those who cannot make a testament on account of a delict. Third, strikers of cardinals after the judge's sentence. Fourth, enemy cities. Fifth, those who kill a testator. Sixth, those who forbid a testament to be drawn up, or one drawn up to be revoked. Seventh, if an heir has gone in to the testator's wife, he is judged unworthy of the inheritance. Eighth, if the testator was a captive and the heir neglected to free him, he deserves to be deprived of the inheritance. But all these things here pertain to the civil forum.

XII. QUESTION VII. *How do spurious and natural sons succeed a father?* ANSWER. A natural son by common law succeeds in two ounces to a parent not having lawful sons. Two ounces comprehend the sixth part of the goods. This nevertheless in some places is limited, if the father have no wife. A

spurious son can by right receive nothing beyond maintenance, whether by testament or *ab intestato,* even if the father lack lawful sons. Natural sons succeed a mother no otherwise than lawful ones. Various nevertheless are the laws of regions, by which one must stand.

Chapter VII — On necessary heirs, and their substitution

I. There is a threefold kind of heirs. Some are *necessary,* who without lawful cause cannot be deprived of the inheritance. If a testator pass these over unnamed, the testament by common law is null. Others are heirs *ab intestato,* who succeed a deceased person without a testament. In the third place are *extraneous* heirs, who are freely instituted heirs by the testator.

II. QUESTION I. *How do sons succeed parents, and parents sons?* ANSWER. Lawful sons succeed necessarily to their parents in the lawful portion, which comprehends a third part of the goods, if the sons be four or fewer. If more than four, the lawful portion includes the half of the goods. Of the remaining goods the father can freely dispose. In this also various laws of nations obtain.

III. The order to be observed in succession is that the nearer succeed to the stock: therefore, sons being alive, grandsons do not succeed. Among sons the inheritance is divided by heads. A father has three sons, one of whom dies, leaving several sons. These sons succeed to the inheritance of the grandfather or grandmother not by heads, but by stock, because all together represent one father; and therefore they succeed to the portion which was owed to their father, to be divided among the brothers. Parents cannot deny the lawful portion owed. Similarly ascendants succeed to sons when these lack descendants, the order of nearness being preserved. Brothers and sisters, ascendants and descendants being removed, are not necessary heirs, and much less the other blood-relations.

IV. QUESTION II. *For what causes can sons be disinherited by parents, and parents by sons?* ANSWER. First, if a son lay impious hands upon his parents, a mortal fault intervening. Otherwise if he did it that he might defend himself or his country. Second, a grave contumely inflicted upon a father by words or deeds. Third, if a son accuse a parent of a crime for which the penalty of death is to be inflicted, heresy or the crime of treason or the betrayal of his country excepted. Fourth, if a son be a sorcerer, or a partner of sorceries. Fifth, if a son have plotted his father's death, even the effect not following. Sixth, if a son knowingly have known his father's wife or concubine. Seventh, if, his father being held in prison, the son were unwilling to go surety for him. Eighth, if a son hindered his father from drawing up a testament, or from revoking one drawn up. Ninth, if a daughter repudiated a dowry that she might live lasciviously. Tenth, if a daughter married a slave not free. Eleventh, if sons were unwilling to care for demented parents. Twelfth, if sons were unwilling to free captive parents. Thirteenth, if Catholic sons apostatized from religion. Similarly sons can disinherit ungrateful and wicked parents.

V. QUESTION III. *What is to be said of heirs ab intestato?* ANSWER. He is called an heir *ab intestato* who by reason of nearness of blood succeeds the deceased. And these are sons, grandsons, great-grandsons, and so forth. If they be sons, they succeed by heads; if grandsons, by stock. Descendants being removed, ascendants succeed, the order of nearness being always preserved. Ascendants and descendants being removed, collateral blood-relations succeed, whether they be agnates or cognates. If you desire more, see Vol. VII, Book 9, dissertation 5.

VI. QUESTION IV. *What is vulgar substitution, pupillary substitution, and so forth?* ANSWER. Vulgar substitution is that by which a man substitutes for an heir instituted by himself some other who is capable of testamentary succession. Pupillary substitution is that by which a father substitutes another heir for a son dying before puberty. Exemplary substitution imitates pupillary substitution, inasmuch as a father can draw up a testament for a demented son. Fiduciary substitution burdens the heir, who is called the *fiduciary,* that he render the inheritance either entire or in part to another person, who is called the *trustee.* Reciprocal substitution is that by which instituted heirs succeed one another. Compendious substitution is that which comprehends several substitutions as regards diverse times.

VII. QUESTION V. *How can valid testaments be revoked?* ANSWER. A testator can at his pleasure revoke his own testament. Some contend that a testator who has sworn that he will not revoke his testament can lawfully revoke it without the fault of perjury. But this opinion is false, as authors commonly teach. For an oath concerning a lawful thing is to be observed. Many nevertheless contend that the revocation of the testament is valid, because the perjury affects the testator himself, but by no means makes the revocation invalid. But the more probable opinion to me is that the revocation is invalid, because by means of the oath the testator took from himself the power of revoking the testament drawn up.

VIII. A second testament furnished with all the solemnities by that very fact revokes the first. When two together draw up a testament in a single writing, one being dead, the survivor can revoke the testament as regards that which touches his own part of the goods. Since although the writing be materially one, there are nevertheless two testators. When a lord grants a faculty to another — say a wife to her husband — that he draw up a testament for her, this testator being dead, the wife cannot revoke the testament, because a testament is confirmed by the testator's death; if nevertheless the testator drew up the testament in his own name, as lord. For if he draw it up as a minister or commissary, not in his own name but in his lord's, then the lord can revoke the testament. The faculty granted by the lord to the one drawing up the testament is therefore to be looked to in these cases.

IX. QUESTION VI. *What obligation have heirs?* ANSWER. They are bound to pay all the debts of the deceased testator, unless they accept the inheritance with the benefit of law, that is, of an inventory: whereby it comes about that the heir is not bound to pay beyond the strength of the inheritance. While the inventory is being drawn up, the creditors cannot vex the heir. But if the heir within the interval prescribed by law has not made an inventory, or has not repudiated the inheritance, he is bound to pay all the testator's debts, even if they exceed the inheritance. Real debts, which accompany the inheritance, the heir is bound to pay; not so personal ones, which attach to the person. Besides the real debts, the heir ought also to fulfil the legacies.

X. QUESTION VII. *What is the obligation of a testamentary executor?* ANSWER. Testamentary executors are some *universal,* others *particular.* Those are they who are chosen when in the testament no institution of an heir has been made, that they may pay the testator's debts and distribute all the goods. These are to execute the testament as valid.

Chapter VIII — On legacies, and their diversity

I. QUESTION I. *What is a legacy, and of how many kinds is it?* ANSWER. It is a certain donation which a testator leaves to be furnished by an heir, out of that which would be the heir's. One legacy is *pure,* when it is left with no condition and no appointed time; another *to a day,* in which a time is prescribed for rendering it; another *conditional,* which is burdened with some charge. A legacy lasts according to the testator's will. Wherefore Alexander VII condemned the opposite opinion, no. 45: *An annual legacy left for the soul does not last more than ten years.* If the heir has repudiated the inheritance, the legacies are by common law void. Legacies for pious causes the heir *ab intestato* must pay. Many particular laws nevertheless decree that any legacies whatsoever are to be paid, even the inheritance being repudiated. Pure legacies are to be paid continuously.

II. Some estate, whether immovable or movable, being bequeathed, all those things are reckoned bequeathed which follow the estate. Hence, a pleasure-garden being bequeathed, the plants are understood to be bequeathed; a garment being bequeathed, the ornaments also, whether golden or silver, are bequeathed. As for legacies for pious causes, if a testator choose such a poor person or such a pious place, these being removed, the legacy must be fulfilled, unless it were established that the legacy was left as the good of that poor person himself. A shameful or impossible condition is held as not added to a legacy. A condition added that the legatee marry this or that girl is valid, and makes the legacy null unless the legatee marry the designated girl. If she refuse, the legacy is valid. Invalid is the condition of never marrying, widows excepted, in respect of whom the added condition of not marrying is valid.

III. A legacy left for a determinate maiden about to marry can be delivered to her even if she wish to enter religion. If the legacy be indefinite for orphans, widows, and maidens about to marry, the legacy is to be given to them: for indeed legacies for maidens about to enter religion are left by another formula. If maidens willing to marry should be lacking, which rarely happens, then, unless it were expressly established of the testator's opposite mind, it could be delivered to maidens entering religion. A legacy left to girls willing to marry cannot be delivered to married women, even poor ones.

IV. QUESTION II. *Can a legacy destined for the girls of this city be delivered to strangers?* ANSWER. That it cannot is certain, because it would be openly against the testator's mind. If nevertheless strangers should fix their domicile there, then, a decade having passed, it could be delivered to them as to the other inhabitants. A legacy left for maidens about to marry cannot be delivered to the corrupt, if it be juridically established that they are such. If the corruption were secret, the legacy could be delivered.

V. QUESTION III. *Can anyone derogate from a testament?* ANSWER. A testator is the supreme lawgiver by the law of nations and by civil law. His express will, a just cause being removed, cannot be changed. If it be doubtful, there is room for the interpretation of his mind, not for its commutation. Commutation then has place when the testator's mind is clear but cannot be fulfilled. In this case, if the legacy be profane, it becomes void and passes to the heirs. If it were for pious causes, it can be commuted into a like pious use at the bishop's discretion.

VI. QUESTION IV. *When can the Falcidian portion be deducted from legacies?* ANSWER. Caius Falcidius in the time of Caesar Augustus proposed a law for heirs, granting them the faculty of deducting the fourth part of the testator's goods, that by this way he might allure them to accept the inheritance, or lest they should be heirs in name only. This fourth part is called *Falcidian* from its author Falcidius.

From the testator's goods, such as they are at the time of his death, this fourth part is to be deducted. But the common law concerning the Falcidian portion scarcely anywhere obtains today; but peculiar laws prevail, which prescribe what is to be done in the cases that occur.

Chapter IX — On the obligations of those who serve the courts

At the close of this book on justice and right it pleases me to touch upon certain things which regard men of the courts. In the *Christian Theology* I passed over this matter untouched, because there was not then time for adorning this province. At present I shall briefly illustrate the chief points. To the matter.

SECTION I — On the judge

I. QUESTION I. *What are the duties of a judge, that he may judge rightly?* ANSWER. First of all, knowledge is necessary to a judge of those things concerning which he must pass judgment. Terrible are the oracles by which the Holy Ghost, Wisdom 6, inveighs against sluggish and ignorant judges. *Wisdom is better than strength. … Hear therefore, ye kings, and understand … you that are judges of the ends of the earth … for a most severe judgment shall be for them that bear rule. … To you therefore, O kings, are these my words, that you may learn wisdom, and not fall away.* God addresses not only inferior judges, but kings themselves. Upon these he threatens a most terrible judgment if they have not learned the knowledge by which they may govern and detect the errors of inferior judges. They are held in a fatal blindness if they believe themselves free from learning the wisdom necessary to government; if they flatter themselves that it is enough to choose good judges and ministers, to whom they commit the whole burden. These are helpers and auxiliary forces. But for the rest, kings and princes themselves will have to render God an account, and indeed a most severe one, both of the judges and of the people. It is a most enormous error by which they believe they have fulfilled their part as often as they have chosen the best ministers. This is one thing which they ought to furnish; but the chief thing is assiduous vigilance and study, by which they ought to assist the people committed to them and to transact the affairs of their princedom. He who wills the splendour of dignity and its revenues must needs will the most grave burdens which follow upon dignity.

II. To all judges, besides knowledge, there is necessary for the forming of a right judgment fortitude and constancy, by which they may make little of the powerful and fear no person. God says, Ecclesiasticus 7: *Seek not to be made a judge, unless thou have strength enough to extirpate iniquities: lest thou fear the person of the powerful, and lay a stumblingblock for thy integrity.*

III. Hence they gravely sin who, destitute of knowledge, fortitude, and the other necessary endowments, undertake the office of judge: these cannot be absolved unless they abdicate the magistracy. For they are engaged with the greatest peril of eternal salvation: for if a judge, reckoning that he judges rightly, from mere unskilfulness bring forth a false sentence, he is stained with a grave sin of ignorance, as failing in those things which by his office he is bound to know, and is bound to the restitution of all the losses which come to the litigants.

IV. Besides the endowments recounted, a judge must be furnished with authority of judging, either ordinary, or delegated, or from the consent of the parties. He ought also to have moral certainty of the cause which he decides. This moral certainty ought to be formed to the norm of the laws, and *according to what is alleged and proved.* For he cannot condemn him whom by private knowledge he

knows to be guilty, if he be not juridically proved guilty. Since he judges not as a private person, but as a public person.

V. QUESTION II. *How ought a judge to bear himself when the rights are doubtful?* ANSWER. Note the proposition which Innocent XI condemned, no. 2: *He probably judges that a judge can judge according to the less probable opinion.* A judge is therefore bound to judge according to the truly more probable opinion in questions whether of right or of fact, every respect of persons being excluded, as God commands, Deuteronomy 1: *Judge that which is just, whether he be one of your own country or a stranger. There shall be no difference of persons: you shall hear the little as well as the great: neither shall you respect any man's person, because it is the judgment of God.* Nor ought a judge to attend to what the vulgar or the multitude say, but he himself ought to search the laws, and according to them to pass sentence, as God commands, Exodus 23: *Neither shalt thou yield in judgment to the opinion of the most part, to stray from the truth.* If on both sides equally probable reasons press, then the thing, such as it stands, is to be divided between the parties, if it be possessed by no one. In criminal causes nevertheless, when the rights are equal, the judge ought to favour the accused.

VI. Judges ought to despatch causes or suits quickly. If they be negligent in this, they sin against justice, and are bound to compensate the injured party. If they know advocates who craftily protract suits, let them busy themselves to expel them at once from the court.

VII. Authors keenly dispute whether a judge ought to punish with death one whom he certainly knows to be innocent, when according to what is alleged and proved he evidently appears guilty. All affirm that the judge is bound to enter upon all ways and to use all arts, both by deferring judgment and by remitting the cause to a superior, and by acting rightly with him that he may free the innocent man. What if all these be useless? If I must bring forth what I think, I judge that it can scarcely happen that a judge cannot bring it about that the innocent man should appear such. For if this man is innocent, the witnesses are false. But falsehood can with the greatest difficulty pass hidden through a third examination, if the judge be awake. A judge indeed is bound as a public person to judge according to what is alleged and proved; but in a most rare case care must be taken that the innocent do not perish. And because I judge that the case can scarcely happen in practice — namely that the accused be innocent, that this innocence be evidently known to the judge alone, and that no way is at hand of catching the false witnesses in their speech — therefore I abstain from a longer discussion.

VIII. A judge sins who condemns an accused man upon a confession unjustly extorted. Since a confession unjustly extorted affords no right, nor can a judge use it, since it is not lawful to use an unjust means. But a judge unjustly extorts a confession if he attempt it without congruous indications, or preceding infamy, or half-full proof; if by guile or by promise of impunity he allure the accused; if against the order of law he torture him.

IX. QUESTION III. *Can a judge accept gifts from the parties?* ANSWER. A judge cannot accept gifts for a sentence to be brought forth, whether just or unjust. Hence Alexander VII proscribed the following thesis: *When litigants have on their side opinions equally probable, the judge may accept money for handing down sentence in favour of the one rather than the other.* Severely does God disapprove and detest so great a depravity in several places of holy Scripture. Deuteronomy 16 says: *Thou shalt not accept person nor gifts: for gifts blind the eyes of the wise, and change the words of the just. Thou shalt justly pursue that which is just.* Here both great and small gifts are excluded. That light little gifts are accepted for the avoiding of the

mark of discourtesy is an inept excuse. The peoples venerate judges when they see them reject such things, and receive them not as discourteous, but as strong men and upright administrators of justice.

X. QUESTION IV. *How ought inquisition to be made by a judge?* ANSWER. Inquisition is threefold. *General,* which inquires in general whether the laws are observed. Another *peculiar,* by which inquiry is made concerning a certain crime and a determinate person. The third *mixed,* by which inquiry is made in general concerning the person and singularly concerning the crime, or the contrary. General inquisition ought to be made by a judge with no occasion given. If the crime be public and the guilty man hidden, the judge ought to inquire in general. He cannot inquire against a determinate person unless there have gone before either infamy, or half-full proof, or grave indications. These same things are required for torturing an accused man. Torture was instituted for constituting by the accused's own confession a full proof, when most grave indications urge but do not suffice for pronouncing sentence. Once tortured, if he has confessed nothing, he cannot be tortured again for the same crime. If an accused man who confessed under torture retract the crime before the judge, he can be tortured again; if, having confessed a third time, he a third time retract before the judge, he is to be absolved, unless the indications be most vehement. But tribunals have their own prescribed rules as regards this.

XI. QUESTION V. *Does a judge's just sentence oblige in conscience?* ANSWER. All affirm it, because a lawful superior's precept is to be obeyed out of conscience. On the contrary, an evidently unjust sentence does not bind. Wherefore he who by force of an unjust sentence receives another's goods is bound to restore the same, when he recognizes the injustice of the sentence. If he receives the same in good faith, and before the time of lawful prescription detects the sentence to be unjust, he becomes a possessor of bad faith and liable to restitution. An unjust sentence nevertheless is to be observed by the injured litigant, for the avoiding of scandal and disturbance; nor is it lawful to act by force against the judge and his ministers; but for the public good a private evil is to be tolerated, and only, the order of law being observed, can an appeal be made or a review of the sentence be implored.

XII. A judge is bound to impose the penalties prescribed by law. Not rarely do judges at their discretion either remit or temper these penalties. When this can be done without detriment to the public good, I praise the kindness. But often judges, that they may be merciful toward the guilty, become savage and inhuman toward the innocent. Penalties of this kind are imposed not only for the punishment of offenders, but also for the terror of others. When wicked men see criminals unpunished, they snatch a handle for vexing the innocent. Therefore kindness toward the guilty opens a way to the oppression of the innocent.

SECTION II — On the accuser and the denouncer

I. QUESTION I. *Is anyone bound to accuse or to denounce?* ANSWER. This distinction between an accuser and a denouncer St. Thomas constitutes, II-II, q. 68, art. 1: that a denouncer intends a brother's amendment, an accuser the punishment of a crime. Those who by office are deputed to this duty, and who receive a stipend from the commonwealth, are bound in justice to accuse offenders inflicting public losses, such as are fiscal officers, watchmen, keepers of fields and woods, and so forth. If a crime turn to public loss, whether temporal or spiritual, even private persons are bound either to accuse or to denounce. Crimes which tend to public loss are the betrayal of one's country, the

adulteration of coins, poisonings, heresy, and so forth. Wherefore Alexander VII proscribed the following thesis: *Although it be evidently established that Peter is a heretic, one is not bound to denounce him, if one cannot prove it*. A denouncer is not bound to prove, but only an accuser. For those who cannot prove a crime are not bound to accuse.

II. QUESTION II. *If an offence be hidden and can be proved, ought an accusation to be made?* ANSWER. If hope of amendment be given, fraternal correction is to be preferred: because a neighbour's reputation stands, and amendment is obtained, when, as I have said, the offender's amendment is prudently hoped for. If nevertheless the crimes are against the public good, whether temporal or spiritual, amendment can with difficulty be presumed. And therefore, speaking of these crimes, St. Thomas teaches, in Book 4, distinction 18, question 2, article 3, reply 4, that such offenders can be accused without a secret admonition first sent. An accuser ought to abstain from accusation as often as he perceives the crime to be doubtful, or that he cannot prove it.

SECTION III — On the accused

I. QUESTION I. *Is an accused man bound to confess the truth?* ANSWER. An accused man is bound under grave fault to confess the truth to a judge juridically questioning him, as St. Thomas teaches, II-II, q. 69, art. 1, to whom theologians commonly subscribe. Since a judge in this case has a right of questioning and of exacting the truth for the public good of society. Therefore there is a debt in the accused of manifesting the truth. For the first cannot stand without the other. Besides, the accused cannot deny the truth without a lie, which is always unlawful. But to lie in judgment is a mortal sin, since it is in a grave matter, against justice, says St. Thomas, II-II, q. 69, art. 1, reply 3. *He who lies in judgment, excusing himself, acts against the love of God and against the love of his neighbour: both on the part of the judgment, to which he denies its debt, and on the part of the accuser, who is punished if he fail in the proof.* Moreover an oath is exacted from the accused concerning the truth to be manifested. Therefore he is a perjurer if he hide the truth. And thus the graver theologians commonly teach.

II. Authors dispute whether an accused man is bound to confess the truth after a capital sentence has been passed. Navarrus, Córdoba, Cabassutius, and others affirm it: because, says Navarrus, this is required for establishing the judge's reputation. You will reply that it is already well enough known that offenders are wont to deny the crimes committed by them. But it appears to me difficult that a Christian accused man is disposed for holily undergoing death who perseveres in the denial of the truth. Assuredly it is a lie: but as he publicly denied the truth, so publicly, as it seems to me, he ought to manifest it. All confess nevertheless that the accused is bound to confess the truth for the taking away of scandal, or of a neighbour's loss, or of the detriment of the public good which would threaten from the concealment of the truth.

III. An accused man is bound also to confess the truth when he is questioned by a judge concerning accomplices, because a superior lawfully commanding is to be obeyed. An accused man not juridically questioned is not bound to answer, yet he can never tell a lie. Mental reservations are inept for hindering a lie.

IV. An accused man who lays a false crime upon himself, for which he is to be punished with death, that he may decline torments, sins mortally: because he directly and positively flows into his own death, and is a defamer of himself. Wherefore he cannot be absolved unless he reveal the calumny laid upon himself, since he is not lord of his own life. It is lawful for the accused to appeal to a

superior judge, when he is persuaded of the injustice of the sentence, either because the order was not observed, or because the sentence is severer than is equitable. But the appeal is iniquitous when he knows the sentence to be just.

V. QUESTION II. *Is it lawful for an accused man to flee, that he may avoid the penalty?* ANSWER. An accused man condemned to death can go to the place of execution and submit his neck and fit his hands, when he cannot take to flight. And yet it is not lawful to inflict death upon himself, to take poison, to cast himself from a ladder, to pierce himself with a sword, or to hang himself with a noose: because these things must be done by the executioner.

VI. It is lawful for a guilty accused man to flee, that he may decline death, both before and after the judge's sentence, unless by a peculiar promise or oath he has bound himself to remain, as St. Thomas teaches, II-II, q. 69, art. 4, reply 2. If nevertheless the judge should command that he not flee, since the precept is absolutely just, the accused would have to obey. But since the observance of such a precept is difficult, since the preservation of life is innate from nature, therefore judges commonly abstain from such a precept: nor, as it seems to me, are they to be persuaded to impose it, on account of the difficulty of observance: since moreover flight can be hindered by a severer custody added.

VII. Hence authors commonly infer that it is lawful for an accused man, for the sake of avoiding death, to break his prison and the walls, that he may open a way of flight for himself. For if flight is lawful for him, it will also be lawful to carry out those things which are necessary for flight. But they dispute whether it be lawful for others to hold out to the accused instruments by which he may break the prison. Many deny it — Toletus, Navarrus, and others. But Cajetan, Salón, and others affirm it. Since, they say, if flight is lawful for him, why is it not lawful to afford the instruments by which the lawful end may be obtained? This matter is not of so great moment as to deserve severer discussion. All affirm that this is not lawful for keepers and ministers. Similarly all authors deny that it is lawful for others to help the accused by breaking the doors or walls of the prison. Because although this were lawful for the accused on account of the innate right of preserving life, it is not therefore permitted to others, who are not in the case of consulting their own life. If this were lawful, nothing would be firm and safe, and the supreme power would lack the means for preserving the public good.

VIII. To an accused man against whom a sentence of death has been passed it is not lawful to defend himself and to resist the judge, or the ministers and executors of the death. Similarly an innocent man condemned by a just sentence according to what is alleged and proved, but destitute of truth, is bound to bear with Christian patience the penalty inflicted, when by a lawful way and without public scandal he cannot avoid it; and he is bound to pay a pecuniary fine imposed by a lawful judge. Many contend that it is lawful to flee from the galleys, unless one's word has been given of remaining there, since the accused is condemned to be detained there, not to remain of his own accord. And indeed it seems difficult enough to determine that an accused man is bound in conscience to remain of his own accord in so exceedingly troublesome a prison.

SECTION IV — On witnesses

I. For the confirming of some fact and the constituting of a full proof in judgment, two witnesses are required, as St. Matthew, chapter 18, testifies: *That in the mouth of two or three witnesses every word may stand.* This same St. Thomas teaches, II-II, q. 70, art. 2. In facts of lighter moment one witness suffices, as the testimony of a public keeper is enough for punishing thieves of wood in the forests or

of fruits in the vineyards. One witness suffices for hindering a marriage. In testaments, as has been said, two witnesses absolutely do not suffice. It is required that the witnesses be of full age without any exception. By law some are excluded: first, women in criminal cases are excluded, in civil cases admitted; second, slaves; third, minors under twenty years are rejected in criminal cases, in civil cases the under-age; fourth, enemies; fifth, blood-relations and members of the household; sixth, the infamous; seventh, perjurers; eighth, accomplices in the crime; ninth, crimes of difficult proof excepted; tenth, the raving and the foolish.

II. QUESTION I. *When are men bound to bear witness?* ANSWER. St. Thomas turns over this question, II-II, q. 70, art. 1. When a grave evil, whether temporal or spiritual, whether public or private, threatens an innocent man, everyone is bound to bear witness, even if he be not required by a judge. For the charity of Christ urges us to free the innocent from unjust loss and from monstrous oppressions, as the Psalmist says: *Rescue the poor; and deliver the needy out of the hand of the sinner.* But in other matters no one is bound, unless required by a judge.

III. A witness is bound to bear witness to a judge lawfully questioning him. That a judge may lawfully question in respect of a witness, it is enough that an accusation, or a denunciation, or a complaint interposed have gone before. But these do not suffice that a judge may juridically question an accused man; but in respect of him it is necessary that there go before either infamy, or grave indications, or half-full proof, as has been said. More therefore is required that a man be bound to bear witness against himself than against a stranger.

IV. QUESTION II. *Who are free from the obligation of bearing witness?* ANSWER. Confessors, who know facts by force of sacramental confession. Likewise all those who know facts under a natural secret, or for the sake of giving counsel or aid, such as are advocates, physicians, midwives, surgeons, theologians, and so forth. Nor does the judge's intention regard this, that those things which are known by these ways be revealed. Because the observance of secrets is necessary to civil society and to the common good. All nevertheless except with St. Thomas testimony necessary for hindering a grave loss of the community. For then the secret is concerning an unlawful matter — the sacramental seal excepted, which in no case can be revealed. Those who saw an offence, and afterwards swore that they would not reveal it, ought to obey the precept of the superior, although it be not a question of a neighbour's loss to be averted, because that oath is against the right of the superior. As soon as a man knows a thing, there arises a right in the superior of questioning, and consequently that oath is concerning an unlawful matter in respect of the superior, although the sworn secret is to be kept in respect of others. Witnesses are immune from bearing witness when from the same a grave loss threatens themselves or their blood-relations, unless you are bound by the precept of charity to hinder either the public good or a neighbour's loss. For human laws absolutely, and certain cases excepted, do not oblige with a very grave detriment. A father, son, husband, wife, brothers, sisters, blood-relations, and connections of the offender, up to the second and according to many up to the fourth degree, are not bound to bear witness, that domestic concord may be preserved. There are always excepted the cases of heresy, of treason, of the betrayal of one's country, and so forth. In some places servants also are exempted from bearing testimony against their master.

V. QUESTION III. *When does a witness gravely sin, and is bound to restitution?* ANSWER. He sins: first, if he affirm as true what he did not certainly know; second, if he hide the truth known to him from one lawfully questioning; third, if he bear false witness, because, as is said in Proverbs 21, *a lying witness*

shall perish; fourth, those who write false instruments, or tear up true ones; fifth, those who adulterate some bond or writing. All these, besides the grave sin, are bound to compensate all the losses which thence follow. Sixth, he who in good faith uttered false testimony is bound to retract it. Let this at last be the general rule. Judges are the keepers and defenders of society and of the public good. All subjects are bound to obey their own superiors when they lawfully command. Nor can private persons judge when they lawfully command, but they ought to obey them. Wherefore, when they are cited even in general, they cannot hide themselves or take to flight, but ought to stand before the tribunal.

SECTION V — On the obligations of advocates and other ministers of the court

I. QUESTION I. *What are the obligations of advocates?* ANSWER. First of all it is necessary that advocates have the knowledge and skill by which they may be able to exercise their profession. A precise rule of that knowledge cannot be designated. Advocates must be awake, of keen talent, and endowed with force of eloquence. Those who are slow of talent and barren of tongue expose themselves to a most grave danger, no otherwise than those who, by nature weak, fearful, and timorous, undertake a war.

II. The client's cause being heard, the advocate ought to manifest its equity or its injustice, no regard being had to his own gain. Would that those who undertake the profession of advocate had whereon to live without the profession, lest, compelled by money, they should accept any causes whatsoever that they may procure food and sustenance. Often not a few recognize the injustice of a cause, but if they lay it open and dismiss their clients, they have not whereon to live. Hence, bound by want, they easily paint for themselves as probable a cause which is openly unjust.

III. An advocate ought to apply study and diligence according to the quality of the cause, that he may obtain the victory of the cause before the judge; and this he is bound to carry out by his office, since he is hired at a stipend.

IV. Advocates must be sincere and ingenuous: strangers to frauds, to revilings, to protractions, to false proofs, to injuries against the adverse party. They ought not to accept save a just stipend fixed either by law or by just custom. It is forbidden to an advocate to bargain with his client concerning some part of the thing in controversy if he win. For hence he would snatch a handle of obtaining victory by fair means or foul, every respect for justice being taken away.

V. QUESTION II. *Is it lawful for an advocate to defend a less probable cause?* ANSWER. Some affirm it. In few words I shall settle the matter. An advocate sins: first, if he defend a cause known to be unjust; second, if he defend a less probable cause. If the civil cause be equally probable, he can treat it before the judge; but he ought sincerely to warn his client of the danger of losing the suit. For when the rights appear equal, then each party has a right of proposing its own reasons. This nevertheless is true when the client is the possessor. For if the adversary be the possessor, an advocate cannot defend his client against the possessor. Since when the rights are equal, and consequently the cause doubtful, the condition of the possessor is the better. That an advocate may lawfully defend his client against a possessor, he must judge his own cause to be certainly and evidently the more probable, and such as will appear to the judge. But while it appears doubtful, he cannot judge it the more

probable, and indeed evidently. Advocates must beware lest greed and cupidity of gaining clothe an opinion which is to be defended with a degree of greater probability which it does not have.

VI. Hence advocates sin, and are held to restitution: first, if, unskilled and not sufficiently fit, they exercise such a profession; second, when they defend a cause known to be unjust; third, if they undertake causes indiscriminately to be defended, and without considering severely and maturely their justice; fourth, if in the progress of the suit, the injustice being known, they do not warn the client to desist from the suit; fifth, if they reveal the client's secret to the adverse party; sixth, if through their unskilfulness, negligence, or malice the client lose the cause, or make superfluous expenses; seventh, if they defer the despatch of the cause beyond what is just; eighth, if they do not clearly and plainly manifest to the client the danger of losing the suit, and much worse if they allure him by vain promises to bring the suit; ninth, if in defending the suit they use falsehood, fraud, false witnesses, or apocryphal or adulterated writings; tenth, if they undertake more causes than they can rightly despatch, and give to each the due study; eleventh, if they extend their writings beyond what is just, that they may receive a greater price; twelfth, if they lay false crimes upon the adverse party, or reveal true but hidden ones, or vex them with unjust cavils. Lastly they sin against charity if they do not defend gratis the causes of the poor labouring under grave or extreme necessity.

VII. The other procurators, scribes, notaries, and secretaries are all bound in justice to exercise their office diligently, since they receive a stipend. These also sin, according to the diversity of their office, if they persuade an unjust suit; if they multiply writings without necessity; if they violate the secrets of the parties; if they present false writings, or adulterate true ones.

VIII. I shall add a few things which regard physicians, apothecaries, and surgeons. Physicians and surgeons sin: first, if without opportune knowledge they exercise the art of healing; second, if they be negligent in curing diseases; third, if they undertake more sick persons to be cured than they are able opportunely to attend to; fourth, if they neglect to apply the safer, or at least the more probable, remedies; fifth, if they protract the care of a sick man, that they may multiply their fees; sixth, if they omit to cure the diseases of the poor; seventh, if they pass over warning those who lie gravely ill to receive the sacraments, since St. Pius V ordained that physicians should not visit a sick man after the third day unless it be established to them of his sacramental confession; eighth, if they publish the shameful and hidden diseases of the sick.

IX. What has been said of the professions recounted is to be applied to other craftsmen, proportion being preserved. For all apothecaries and the other craftsmen sin if, destitute of the necessary knowledge of their art, they exercise such an art; if they use frauds or guiles. For every art has its own peculiar frauds. Wherefore it will be the part of a skilled confessor severely to examine his penitents upon the right administration of their own art.