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On Buying and Selling (1605)

Leonardus Lessius, S.J.
Translation by Wim Decock
Introduction by Wim Decock

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Introduction¹

The intimate connection between business and ethics can hardly be expressed any better than by the following, late medieval image of the spiritual journey to God:

We are like a merchant on his way to the market, carrying with him a bag full of gold money for which to buy splendid and expensive goods. Yet, out of the blue, a thief turns up and snatches away his purse. The merchant is left desperate. The human condition is the same. The money with which God has endowed us are the virtues: They enable us to buy eternal life. But then, all of a sudden, the devil appears. He tears apart our heart and the precious coin of virtue is stolen away. We are left outside from paradise.²

¹ The author wishes to express his gratitude to the Acton Institute for granting him a *Centesimus Annus Fellowship* that enabled him to carry out the research necessary for this publication. He currently is a Marie Curie EST Fellow of the European Commission, staying at the Istituto Italiano di Scienze Umane (Firenze/Roma). Any comments to this text are very welcome to wim.decock@inbox.com.

² This is a free adaptation of the metaphor developed by Thomas de Chobham (ca. 1160–ca. 1236) in his *Summa de arte praedicandi*, 6, 2, 373–82. Compare O. I. Langholm, *The Merchant in the Confessional: Trade and Price in the Pre-Reformation Penitential Handbooks*, *Studies in Medieval and Reformation Thought*, 93 (Leiden, 2003), 4–5.

Next to pointing out the analogy between the risks of entrepreneurship and the perils threatening people who strive to gain eternal life, this metaphor throws light on the enterprise many scholars in sixteenth- and seventeenth-century scholasticism undertook to discuss the high-tides of commercial capitalism from the perspective of the virtue of justice and on the flourishing production of treatises *On Justice and Right* (*De iustitia et iure*) that ensued from it.³ A highly esteemed and influential masterpiece of this literary genre was delivered in 1605 by Leonardus Lessius (1554–1623), a Jesuit moral theologian living in the Spanish-ruled southern Netherlands. Taking the said traditional view that in commercial relationships on the earthly way through to paradise man should behave in accordance with the virtue of justice in order not to go astray, Lessius meticulously analyzed the market and tried to solve the qualms of conscience that merchants faced in it by analyzing their duties and rights in view of the principle of justice.

The current interest of Leonardus Lessius' elaborations on the morality of the market will become tangible through the translation of some illustrative cases taken from his discussion of the sale-purchase contract in chapter 21 of the second book of his treatise *On Justice and Right*. However, in order not to lose touch with the peculiarities of Lessius' thought, a few introductory paragraphs will prove to be indispensable. First, on the life and times of Lessius himself. Second, on the techniques used by the early modern scholastic movement to solve moral questions arising in the marketplace. Third, on Lessius' view of just pricing and business in general. The introduction will be completed by a reflection on the way Lessius can still be a source of inspiration for today. It needs to be stressed that we have attempted to make a translation as faithful as possible to the original Latin text of *De iustitia et iure*, book 2 (*On Justice*), chapter 21 ("On Buying and Selling"), for which we have used the only existing edition, namely Decock 2005.⁴ We decided to leave out some dubitationes that might be

³ A useful overview of treatises *On Justice and Right* is contained in A. Folgado, *Evolución histórica del concepto del derecho subjetivo. Estudio especial en los teólogos-juristas españoles del siglo XVI*, Pax juris. Escorialensium utriusque studiorum scripta, 4 (Madrid, 1960), 29–35.

⁴ The first edition of Lessius' *De iustitia et iure* was published in 1605 by Ioannes Masius in Leuven. This translation has been done from the critical edition of Lessius' chapter prepared by Wim Decock, "Breaking the limits. De 'homo oeconomicus'"

of less interest to the readership of the *Journal of Markets & Morality* because of their predominantly juridical nature.⁵

Leonardus Lessius: Life and Works

Ever since Joseph A. Schumpeter's favorable account of Lessius in his *History of Economic Analysis*, historians of economic thought have endeavored to unearth the hidden treasures of pre-Smithean economic analysis in his treatise *On Justice*

ontketend in Lessius' denken over markt en prijs? Editie, vertaling en studie van *De iustitia et iure*, lib. 2, cap. 21" (Leuven 2005) [unpublished master's thesis] for chapter 21, *De emptione et venditione*, pp. 81–137. The textual basis of Decock's editorial work was the 1621 edition published by Plantin-Moretus in Antwerp. This is the last edition of Lessius' *De iustitia et iure* that appeared during his lifetime.

This unpublished master's thesis also contains a Dutch translation of the chapters selected for the present publication in the *Journal of Markets & Morality*. It should be noted further that an excellent paraphrasing summary in German of a miscellany of passages in Lessius' *De iustitia et iure* dealing with economic problems ranging from bills of exchange to tax policy was provided by Toon Van Houdt in B. Schefold, ed., *Leonardus Lessius' De iustitia et iure. Vademecum zu einem Klassiker der spätscholastischen Wirtschaftsanalyse*, *Klassiker der Nationalökonomie* (Düsseldorf: Handelsblatt, 1999), 103–42.

⁵ *De iustitia et iure*, lib. 2, cap. 21, dubit. 1 (Quid emptio, venditio, negotiatio et haec quibus prohibita), num. 1b–3 and 4b–6; dubit. 10 (Utrum si sciam occulte debitorem meum non esse solvendo, possim iis qui id nesciunt vendere illud debitum pretio ordinario); dubit. 12 (Utrum si res vendita pereat vel deterior fiat, pereat emptori an venditori); dubit. 13 (Utrum venditor possit percipere fructus vel utilitates rei a se venditae donec solvatur pretium); dubit. 14 (Utrum licita sit emptio et venditio cum pacto retrovenditionis, vel redemptionis); dubit. 15 (Ad quem pertinent fructus medii temporis, quando venditionis contractus dissolvitur); dubit. 17 (Utrum is qui vendidit rem alienam possit retinere pretium); dubit. 18 (Utrum licitum sit aliquando rem alienam emere et emptam retinere); dubit. 19 (Utrum is cui aliquid traditum est vendendum possit sibi aliquid ex pretio retinere si plures vendiderit quam ei est praescriptum); dubit. 20 (Quando res in solidum ex intervallo duobus fuit vendita, utri debeat).

and Right—a job that turned out to be quite fruitful indeed.⁶ Eminent scholars such as John T. Noonan, Raymond de Roover, Barry Gordon, and Louis Baeck agree, for example, that his elaborations on “lack of money” as a just title to demand interest clearly prefigure the modern principle of “liquidity preference.”⁷ Yet, while Lessius has been adorned with the epithet “master of economic analysis” in some biographical portraits of recent decades, in the early twentieth century, attempts have been made to start a canonization process and make him look like a saint detached from the material world.⁸ The mainstream and hybrid picture we retain, then, for the moment, is that of Lessius as an economist and a saint, but let us turn to the facts first.⁹

Born in Brecht near Antwerp in 1554, during the heyday of the commercial revolution in the Spanish-ruled southern Netherlands following, among others, the discovery of the Americas, Lenaert Leys (or latinized: Leonardus Lessius) looked destined to become a successful businessman. At least, that was the project his guardian and uncle Huibrecht Leys originally had in mind before his tutelar

⁶ J. A. Schumpeter, *History of Economic Analysis*, edited by Elizabeth Boody Schumpeter (1954; repr., London, 1972), 99. This father of historians of economic thought was introduced to Lessius by his student B. W. Dempsey, who had included a substantial contribution on Lessius in his *Interest and Usury* (Washington, D.C., 1943), 144–229.

⁷ J. T. Noonan, *The Scholastic Analysis of Usury* (Cambridge, Mass., 1957), 351–52; R. De Roover, *Leonardus Lessius als economist: de economische leerstellingen van de latere scholastiek in de Zuidelijke Nederlanden*, Mededelingen van de Koninklijke Vlaamse Academie voor Wetenschappen, Letteren en Schone Kunsten van België 31 (Brussels, 1969), 21; B. Gordon, *Economic Analysis before Adam Smith: Hesiod to Lessius* (London, 1975), 250; L. Baeck, *The Mediterranean Tradition in Economic Thought*, Routledge History of Economic Thought Series (London-New York, 1994), 190.

⁸ A cult especially promoted by C. Van Sull in his hagiographic *Léonard Lessius de la Compagnie de Jésus (1554–1623)*, Museum Lessianum, Section Théologique 21 (Louvain-Paris-Bruxelles, 1930). A meritorious effort to unlock the economist in Lessius is R. Beutels, *Leonardus Lessius (1554–1623): Portret van een Zuidnederlandse laat-scholastieke econoom. Een bio-bibliografisch essay* (Wommelgem, 1987).

⁹ For which we rely on Toon Van Houdt’s contribution in *Nationaal Biografisch Woordenboek*, vol. 14 (Brussels, 1992), cols. 416–24.

son received a scholarship in 1567 to go on and study arts at the University of Leuven. Upon graduating as *primus* in 1572, Lenaert dazzled the hopes of his family and friends for a second time by entering into the freshly grounded and still highly controversial Jesuit order that sent him to Sint-Omaars (Saint-Omer) for two years of noviciate training. At the age of twenty, he was appointed lecturer in Aristotelian philosophy at the Jesuit Collège d'Anchin in Dowai (Douai), where he remained for eight years and acquainted himself also with ancient languages, biblicism, classical literature, and Romano-canon law. He moved to Luik (Liège) in 1582 to begin theological studies, which, importantly, would lead him to spend one year in Rome at the *Collegio Romano*.

His stay in Rome from May 1583 until April 1584 would prove to be vital for the development of his thought. At the *Collegio Romano*, he would take lessons with Franciscus Suarez (1548–1627) and Robertus Bellarminus (1542–1621), to name but two of the revered professors of the central Jesuit University, and meet Maffeo Barberini (1568–1644), the future pope Urbanus VIII, among many others. He turned back to Luik, however, to prepare a course on scholastic theology that he would lecture on at the Jesuit College of Leuven for the next fifteen years.¹⁰ Crucially, Lessius took Thomas Aquinas' *Summa Theologiae* and the *Enchiridion sive manuale confessariorum et poenitentium* of Martinus de Azpilcueta (also known as Dr. Navarrus) as a starting point for his teaching activities, which turned out to be a competitive advantage in attracting students from the Leuven University to take lessons with him—a point of friction that added up to the already serious doctrinal tensions with the university due to Lessius' quarrel with Michael Baius (1513–1589) on grace and free will.¹¹ Lessius was accused of falling prey to semi-Pelagian tendencies in fanatically adhering to

¹⁰ Lessius was not a professor, then, at the University of Leuven. The unfortunate title “S. Theologiae in Academia Lovaniensi professor” added to his name on the front page of his *De iustitia et iure* has erroneously led many a scholar to hold the opposite.

¹¹ Lessius' lasting conflict on grace and free will with established theological authority is documented in E. J. Van Eijl, “La controverse louvaniste autour de la grâce et du libre arbitre à la fin du 16^{ième} siècle,” in: M. Lamberigts (ed.), *L'augustinisme à l'ancienne faculté de théologie de Louvain*, Bibliotheca Ephemeridum Theologicarum Lovaniensium 111 (Leuven, 1994), 207–82, and X.-M. Le Bachelet, *Prédestination et grâce efficace: Controverses dans la Compagnie de Jésus au temps d'Aquaviva* (1610–1615), Museum Lessianum. Section théologique 25–26 (Louvain, 1931).

the molinistic doctrine on grace and free will of his colleague Ludovicus Molina (1535–1600). In contrast to the Augustinian and rather pessimistic view of human nature formulated by Baius, who might be seen as a proto-Jansenist, molinism implied a highly optimistic view of the role and capacities of the human will and intellect in gaining salvation.

From 1600 until his death, Lessius could almost entirely devote himself to the publication of his theological oeuvre ranging from dogmatic over political and moral theological treatises to ascetic and mystical literature. The only didactic activity he obviously still had to take charge of in view of his reputation as “The oracle of the Netherlands” were the weekly debates on controversial ethical issues (*casus conscientiae*). Lessius claimed these disputations to be the hallmark of the Jesuit order and a crucial part in the practical training of future priests. It is worth mentioning that an anthology of moral questions settled by Lessius himself as a regular consultant of merchants and political leaders was added under the title *Auctarium complectens variorum casuum conscientiae resolutiones* to his posthumously published lectures on the first and third book of Thomas Aquinas’ *Summa Theologiae*, the *Praelectiones theologicae de beatitudine et actibus humanis* (1645). The theoretical, foremost juridical principles that should underlie the solution of any case of conscience are described in his monumental and well-known treatise on the cardinal virtues: *De iustitia et iure ceterisque virtutibus cardinalibus*, which in principle is a commentary on the *Secunda secundae* of Thomas’ *Summa Theologiae*. Though dwelling on the virtues of prudence, fortitude, and temperance too, the better part of the treatise includes a systematic treatment of the virtue of justice and, particularly, of property, torts, and contract law. Hence, the treatise is commonly known under its abbreviated title as *De iustitia et iure*. First published in 1605 by Ioannes Masius, numerous reprints and slightly altered editions followed at the Plantin-Moretus press in Antwerp and at other printing houses all over Europe until the nineteenth century.¹²

Lessius’ obstinate defense of an extreme kind of molinism is reflected in the feverish persistence with which he clung onto his views regardless of the difficulties he met with, even within his own order. Although he had finished it by 1602,

¹² For an overview of the different editions, see T. Van Houdt, *Leonardus Lessius over lening, intrest en woeker. De iustitia et iure, lib. 2, cap. 20. Editie, vertaling en commentaar*, Verhandelingen van de Koninklijke Academie voor Wetenschappen, Letteren en Schone Kunsten van België, Klasse der Letteren, 162 (Brussel, 1998), xviii–xxv.

his treatise *De gratia efficaci, decretis divinis, libertate arbitrii et praescientia Dei condicionata* could only be edited in 1610 after internal censorship had radically refused to accept it in its original form. Even the final, published version stirred controversy and was rejected by his friend and colleague Robertus Bellarminus, who had still defended him some years before in his controversy with the Leuven faculty of theology. Nevertheless, Lessius stuck to his point and repeated his optimistic belief in human nature ten years later in the mystical work *De perfectionibus moribusque divinis*—once again followed by fierce condemnation. After all, Lessius was used to controversy. In many other apologetic works, he had been forced to combat the Protestant heresy, new Machiavellis, and atheist ideologies with utmost doggedness in defense of the pope and the one true Catholic faith.¹³ It might well be however, that, in the end, some fatigue led him to dedicate his mind to genres more readily accepted by the Roman censors. Among the flood of spiritual literature that flew from his pen,¹⁴ one stands out: the *Hygiasticon*. Published in 1613, and followed by several translations in modern languages throughout the centuries, this book contains health tips and diets that will enable man to grow old without losing his mind and by conserving full vitality. In 1623, tormented by a chronic disease, Lessius died anyway.

¹³ See *Quae fides et religio sit capessanda consultatio* (1609); *De Antichristo et eius praecursoribus disputatio* (1611), with an appendix *De Calvino*; *Defensio potestatis Summi Pontificis* (1611); *Discussio decreti Magni Concilii Lateranensis* (1613); *De providentia Numinis et animi immortalitate* (1613).

¹⁴ *Disputatio de statu vitae deligendo et religionis ingressu* (1613); *De bono statu eorum qui vovent et colunt castitatem in saeculo* (1615); *De summo bono et aeterna beatitudine hominis* (1616); *De perfectionibus moribusque divinis* (1620). A summary of Lessius' mysticism posthumously appeared under the title *Quinquaginta nomina Dei seu divinarum perfectionum compendiarum expositio* (1640). Lessius made a translation of Dionysius Areopagiticus, too, and wrote an account of the Dutch mystical movement around Johannes Ruusbroeck, the *Apologia pro scriptoribus mysticae theologiae*, both of which are lost to us.

Foundations of Moral Problem Solving in Early Modern Scholasticism¹⁵

Lessius' prolific and colorful record as an author urges us to reconsider the traditional, monochromatic picture of him either as a proto-economist isolated from any theological background or a saint too pious to engage in worldly affairs. Of late, an attempt has been made to overcome this artificial dichotomy by depicting Lessius simply as the model mediator between heaven and earth that he had become through fully internalizing the spirituality of Ignatius of Loyola, which he had solemnly vowed to follow as a young man.¹⁶ In their pursuit to find God in all things, to bring his message to all corners and cultures of the world, and to bridge the gap between the active and the contemplative life, the Jesuits developed a sharp eye for real world experiences and for the need of guiding the laity in their quest for a devout Christian life in their daily, down-to-earth occupations.¹⁷ It is not a coincidence that in 1600 the first autonomous treatise of moral theology, *Institutiones Morales* was written by Ioannes Azorius, S.J., nor that the moral-juridical genre *De iustitia et iure* was brought to perfection in the hands of the famous Jesuit trio of Ludovicus Molina, Leonardus Lessius, and Ioannes de Lugo (1583–1660). In their universities and colleges across Europe, the future economic, political, and scientific elite was educated, and many a merchant or prince allowed himself a private Jesuit counsellor and confessor.

¹⁵ This chapter is based on a more detailed study in W. Decock, *De homo oeconomicus ontketend*, 54–78. With respect to Lessius, we prefer using the term *early modern scholasticism* rather than *late scholasticism* because of the caesura brought about in late scholastic moral reasoning at the end of the sixteenth century; cf. *infra*. Moreover, as to economic ethics, the Jesuit trio of Molina, Lessius, and Lugo seems to occupy a special place. It is precisely on the basis of their writings that H. M. Robertson defended the case for a Catholic rather than a Protestant birthplace of the spirit of capitalism in his *Aspects of the Rise of Economic Individualism: A Criticism of Max Weber and His School*, Cambridge Studies in Economic History, 1 (Cambridge, 1933).

¹⁶ See the biographical account in T. Van Houdt-W. Decock, *Leonardus Lessius: traditie en vernieuwing* (Antwerp, 2005), 11–54.

¹⁷ J. W. O'Malley, *The First Jesuits* (Cambridge Mass.-London, 1993) reads itself as an illustration of this thesis.

Lessius, in particular, served as an adviser of Albert and Isabel, the Hapsburg archdukes governing the southern Netherlands during the last twenty years of his lifetime.

In drawing up a theoretical framework for dealing with the qualms of conscience that their clients faced, the Jesuits adopted much of the wisdom developed earlier on in the sixteenth century by Dominican friars such as Franciscus de Vitoria (1483/1492–1546) and Dominicus de Soto (1495–1560) at the University of Salamanca and professors such as Ioannes de Medina (1490–1546) in Alcalá de Henares.¹⁸ In all parts of Europe, Thomas' *Summa Theologiae* was taken as the reference work par excellence to deal with moral problems effectively, though the *Summa* primarily served as a useful tool, given its systematic and juridical bias, more than as an authority studied for the sake of its own.¹⁹ Accordingly, the revived Thomism both in Iberian scholasticism and early modern Jesuit ethics was distinctly hybrid, blended as it was with Romano-canon, humanist, and nominalist influences. The importance of Roman and Canon law for the Catholic moral theologians in the early modern period can scarcely be underestimated; it provided them with the necessary juridical categories and technical vocabulary to come to grips with moral reality.²⁰ As such, all commercial behavior was categorized

¹⁸ We deliberately do not reduce the Iberian influences to a so-called School of Salamanca. Though it is beyond doubt that the University of Salamanca, which can boast itself on scholars such as Franciscus de Vitoria and Dominicus de Soto, has played a vital role in the innovation of Iberian scholasticism. The Thomistic drive that underlies it had already been started off at other intellectual centers in Spain before, and we should not forget the contributions of other universities such as Coïmbra and Alcalá de Henares. A monumental study dedicated to the School of Salamanca and clarifying some of the myths surrounding it is J. Belda Plans, *La escuela de Salamanca y la renovación de la teología en el siglo XVI*, Biblioteca de Autores Cristianos Maior, 63 (Madrid, 2000).

¹⁹ A decisive moment in the Thomistic revival was Pieter Crockaert's (ca. 1450–1514) decision to replace Petrus Lombardus' (1095–1160) *Libri Sententiarum* with Thomas' *Summa Theologiae* as a handbook for theological studies at the University of Paris in 1509. Soon afterward, a flood of commentaries on Thomas' *Summa* were spawned, of which Cardinal Cajetan's (1469–1536) stands out as one of the most influential.

²⁰ See R. Savelli, "Modèles juridiques et culture marchande entre 16e et 17e siècles," in *Cultures et formations négociantes dans l'Europe moderne*, ed. F. Argiolini-D. Roche, Civilisations et Sociétés, 91 (Paris, 1995), and B. Clavero, *La grâce du don*.

under property and contract law, with specific transactions being reduced to their corresponding contractual forms.²¹ The humanist influence in Jesuit thought, both on their belief of man and on their use of an elegant Latin language, is obvious from the eminent place the classics occupied in their educational program. Consequently, it would make no sense to indict the Jesuit scholastics of linguistic barbarism or unworldliness, connotations all too frequently evoked by the term *scholastic*.²² As for the nominalist influence, it brings us to the heart of early modern problem solving in the Jesuit order: casuistry and probabilism.²³

Anthropologie catholique de l'économie moderne, avec un préface de Jacques Le Goff (Paris, 1996), 93–108. This might give us a clue, too, as to why Lombardus' *Sententiae*, void of juridical tools, were replaced by Thomas' *Summa Theologiae*, which is pervaded by Romano-canon law, thus B. Löber, *Das spanische Gesellschaftsrecht im 16. Jahrhundert* (Freiburg im Breisgau, 1965), 8–9.

- ²¹ The eminent legal historian James Gordley goes even so far as to detect the roots of modern property, contracts, and tort law in the treatises *On Justice and Right* of scholars such as Soto, Molina, and Lessius. See his compelling *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (Oxford, 2006), and *The Philosophical Origins of Modern Contract Doctrine*, Clarendon Law Series (Oxford, 1991).
- ²² As to the humanist-Ciceronian flavor of the language used by the late scholastic authors in general, see J. IJsewijn-D. Sacré, *Companion to Neo-Latin Studies: Part II, Literary, Linguistic, Philological and Editorial Questions*, 2d entirely rewritten ed., *Supplementa Humanistica Lovaniensia*, 14 (Leuven, 1998), 289–90. J. Mahoney rightly points to the Jesuit spirit of Renaissance and humanist optimism as the main ground for their Pelagianistic and probabilistic ethics; see *The Making of Moral Theology* (Oxford, 1987), 299.
- ²³ A selection of specialized literature on which the account on casuistry and probabilism in the next paragraphs is based, includes A. Jonsen-S. Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning* (Berkeley-Los Angeles-London, 1988); Véreecke, L., “Le probabilisme,” *Le Supplément. Revue d'Éthique et Théologie Morale*, 177 (1991): 7–22; Ph. Schmitz, “Kasuistik. Ein wiederentdecktes Kapitel der Jesuitenmoral,” *Theologie und Philosophie* 67 (1992): 29–55; E. Leites (ed.), *Conscience and Casuistry in Early Modern Europe*, *Ideas in Context* (1998; repr., Cambridge, 2002); M. W. F. Stone, “Scrupulosity, Probabilism, and Conscience: The Origins of the Debate in Early Modern Scholasticism,” in *Contexts of Conscience in Early Modern Europe, 1500–1700*, ed. H. Braun-E. Vallance (London, 2004),

How, then, is Lessius going to decide the licitness or immorality of a particular business practice? First, he is going to see to the natural-law precept that in commercial relationships commutative justice (*iustitia commutativa*) should prevail, implying that in any exchange equality (*aequalitas*) between what is given and received is to be preserved. Commutative justice aims at establishing an equivalent relationship between the goods exchanged in the business transaction, without taking into account any personal conditions of the parties to the contract.²⁴ In buying and selling, maintaining equality will amount to demanding the just or equal price (*pretium iustum seu aequale*) established either legally by a decree of the authorities or in the market itself by the common estimation of prudent businessmen. In any case, the just price needs to reflect a series of market factors, such as the abundance and scarcity of the good in question, the number of buyers and sellers, the particular mode or type of selling, and the overall money supply.²⁵ Yet, while this scheme surely provides us with a robust standard by which to judge particular business transactions, it might turn out to be too generalistic and rough. For example, take the following case. A buyer requests me to sell my good on the spot, whereas in fact I intended to sell it not until ten months later, being pretty sure that by that time its price would have doubled.²⁶ Am I obliged to sell at the current market price, or would it be allowed for me to demand a surplus, given that I am giving up a realistic profit in the future? Alternatively, is it licit for me to deviate from the current just price by virtue of the particular circumstances constituting my specific case?

It is licit indeed, according to Lessius and other sixteenth- through seventeenth-century moral theologians, to deviate from the just price in circumstances such as these. To understand why, we need to consider the casuistical trait of early modern problem solving. Under influence of the nominalist tendency to value

1–16; and M. W. F. Stone-T. Van Houdt, “Probabilism and Its Methods: Leonardus Lessius and His Contribution to the Development of Jesuit Casuistry,” *Ephemerides Theologicae Lovanienses*, 75 (1999): 359–94. For an accessible discussion of nominalism and its persistence in sixteenth-century moral theology, see S. Pinckaers, *Les sources de la morale chrétienne: Sa méthode, son contenu, son histoire*, Études d’Éthique Chrétienne (Studien zur theologischen Ethik), 14 (Fribourg, 1985).

²⁴ *De iustitia et iure* 2, 1, 2, 9.

²⁵ *De iustitia et iure* 2, 21, 1 and 2, 21, 3.

²⁶ Compare *De iustitia et iure* 2, 21, 4, 28.

singular and concrete experiences, the early modern scholastics made a distinction between solving a moral dilemma from a merely theoretical point of view on the one hand, and deciding it in practice, on the other. Although on a dogmatic level any dictate of natural law is absolutely not to be broken, by considering the empirical field of application of the law, right reason (*recta ratio*) might come to the conclusion that the transaction under scrutiny actually belongs to a specific class of paradigmatic cases that through their singularity are removed from the field of application of the natural-law precept.²⁷ To come back on the merchant who gives up a future profit by selling in advance, his situation can be classified as an instance of the paradigmatic case in which a businessman rightly deviates from the just price by virtue of the extrinsic title cessant gain (*lucrum cessans*). The gradual but steady expansion of these so-called extrinsic titles enabled the scholastics to account for new developments in business practice and escape the merciless rigidity of a general normative framework. Strictly speaking, any deviation from the equality principle, namely, the just price in buying and selling would be illicit, but by virtue of typical circumstances, extrinsic to the contract itself, this deviation may become entirely licit, not to say imperative.

Nominalism introduced a significant empirical element into Jesuit moral reasoning, enabling them to bridge the gap between theory and practice. Challenging the traditional idea that human reason is capable of discerning a certain and indisputable moral order, nominalism forced the early modern scholastics above all to approach natural law within a context of fundamental doubt and uncertainty.²⁸ From its practical analysis of natural law, fallible right reason cannot derive absolute certainties nor indisputable moral precepts. Man can merely formulate frail opinions about the existence and extent of a natural-law imperative and persuade himself of the respective probability of these opinions. In addition, nominalism took the view that morality is a matter of conflict, more specifically

²⁷ The natural-law precept itself, then, is not being abolished according to Lessius, cf. T. Van Houdt, "Tradition and Renewal in Late Scholastic Economic Thought: The Case of Leonardus Lessius (1554–1623)," *Journal of Medieval and Early Modern Studies* 28, no. 1 (1998): 64–65.

²⁸ F. Gómez Camacho, "Later Scholastics: Spanish Economic Thought in the Sixteenth and Seventeenth Centuries," in *Ancient and Medieval Economic Ideas and Concepts of Social Justice*, ed. S. Todd Lowry-B. Gordon (Leiden-New York-Köln, 1998), 506.

between an individual human being born in liberty to do as he pleases, and his powerful Creator, who is always able to restrict the liberty of man by a dictate of his sovereign will. Consequently, any moral agent is constantly haunted by doubts and fears, both on a speculative and a practical level, about the existence of a natural law that infringes on his freedom. Recognizing that it is impossible to settle all moral questions once and for all in theory, moral theologians such as Lessius set out to dam the flood of scruples by providing confessants at least with a minimal degree of practical certainty. To this end, Lessius made a careful distinction between probable and improbable opinions concerning the licitness of certain actions, making it clear that any deed deemed probable could be followed in practice, even though on a speculative level its licitness remained doubtful.²⁹

Now it is crucial, of course, to grasp the exact meaning of probable (*probabilis*), to know how this expert culture of theologian-advisers functioned, and, last but not least, to qualify some of our statements in light of the historic development of the probabilistic method. What happens when the opinion of an expert about a moral act is deemed probable? Contrary to what its delusive translation in modern languages might suggest, *probabilitas* is not directly connected to mathematical-statistical certainty. In point of fact, to invoke the concept of probability in the Aristotelian tradition means to label a certain opinion as supported either by authority or by good rational argument.³⁰ Therefore, an opinion is probable if it is endorsed by one or more authoritative scholars or if it is the likely conclusion of sound and tight reasoning. It might be significant of his rational bias, that the appeal to authority often loses out to logical argumentation in Lessius' dialectic solution of cases of conscience. Yet, in any event, authority and experts are central to the probabilistic moral problem-solving method. Let us picture what happened when an agent, doubting the licitness of an act, went to consult a moral theologian

²⁹ Lessius, *De beatitudine, de actibus humanis, de incarnatione Verbi, de sacramentis et censuris praelectiones theologicae posthumae: Accesserunt eiusdem variorum casuum conscientiae resolutiones* (Lovanii, 1645), quaest. 19, art. 6, dubit. 7, num. 45.

³⁰ The Aristotelian framework of the doctrine on *probabilitas* is sketched in M. W. F. Stone, "The Origins of Probabilism in Late Scholastic Moral Thought. A Prolegomenon to Further Study," *Recherches de Théologie et Philosophie Médiévales* (Forschungen zur Theologie und Philosophie des Mittelalters) 67, no. 1 (2000): 118–23.

such as Lessius. This professional problem solver, much like a lawyer before the external court, informed his client about the different probable and improbable opinions with respect to his question and about the chances of violating moral precepts. At the end, within the boundaries of the set of probable opinions, the client could choose to follow the probable authority or good argument he thought was most plausible—the moral agent enjoyed plenty of freedom, then, with the expert adviser merely guiding him through the tricky moral universe and forcing him to respect some minimal standards.

Although this picture could have been taken in the office of a Jesuit consultant of Lessius' ilk, it certainly does not suit the practice of advisers such as Sotus. For the view that it is licit to follow any opinion deemed probable (*probabilis*), i.e., even if other opinions credited with a higher degree of probability exist, holds true only for probabilism in the narrow sense of the word. The rupture in moral problem solving brought about through its first formulation in 1577 by the Dominican Bartholomaeus Medina (1528–1580) radically separates the more liberal business ethics embraced by a younger generation of predominantly Jesuit scholars from the rather cautious advice given by earlier sixteenth-century theologians. The latter stuck to a tutioristic or probabiliaristic position in solving moral problems, implying that in case of doubt, man has the obligation always to follow the most probable opinion (*probabilior*) because that is the safer path (*tutior*) to salvation. The probabilists, on the contrary, maintained that a moral exigency to follow the most probable opinion did not exist, given that in moral matters such an obligation could not be imposed on man by necessity. To follow a probable opinion is simply good enough and adequately safe. Otherwise, any merchant would be forced to skip business, and, instead, imitate the life of Christ, no doubt the safest way of behaving—said Lessius.³¹

This is not to say, of course, that our Jesuit would not have fancied a world in which people strive at more lofty ideals. Yet, however paradoxical it may sound, he entertained the strong conviction that this goal would rather be attained by imposing only minimal moral standards on individuals, than by burdening the conscience of man with endless and highly specified precepts.³² The former approach would create the free mental space necessary for any human being to do acts of supererogation out of his own liberal choice, whereas the latter

³¹ Lessius, *De beatitudine*, quaest. 19, art. 6, dubit. 7, num. 44.

³² Lessius, *De beatitudine*, quaest. 19, art. 6, dubit. 7, num. 44.

attitude would end up being counterproductive by fueling a depressing inflation of scrupulosity and stifling all spontaneous creativity to do good deeds. As such, in his practice as a moral consultant, the theoretical foundations of which are laid down in his treatise *On Justice and Right*, Lessius contented himself with describing the minimal rules of conduct (*praecepta*) that a merchant had to observe. Yet, in preaching from the pulpit and writing his spiritual oeuvre, he definitely kept alive the dream that Christian businessmen obey more noble counsels (*consilia*).³³

Lessius' Concept of Usury, Just Pricing, and the Market

To sum up, then, we submit that the interdependence of Christian economic thought and the idea of human freedom—cleverly identified by Alejandro A. Chafuen as a general characteristic of Iberian scholasticism—was even deepened by the probabilistic attitude of the Jesuits at the turn of the seventeenth century.³⁴ What is more, because of his sharp eye for existing economic reality, and in view of his commitment to stimulate prudent merchants in their wealth-creating business, Lessius refined the very legal device to come to grips with the singularity of real-life cases of conscience: the theory of the extrinsic titles or legal grounds, deriving from specific circumstances exterior to the contract itself, which allow a deviation from the equality principle in economic exchange. As has been demonstrated by Toon Van Houdt, in broadening the field of application of extrinsic titles already recognized in the scholastic tradition (e.g., cessant

³³ On the “double” morality of the Jesuits, see T. Van Houdt, “De economische ethiek van de Zuid-Nederlandse jezùiet Leonardus Lessius (1554–1623): een geval van jezùitisme?” *De zeventiende eeuw* 14, no. 1 (1998): 27–37.

³⁴ See *Christians for Freedom: Late-Scholastic Economics*, with a foreword by Michael Novak (San Francisco, 1986), recently republished in a slightly modified version as *Faith and Liberty: The Economic Thought of the Late Scholastics*, Studies in Ethics and Economics (Lanham-Boulder-New York-Oxford, 2003). Along with F. Gómez Camacho’s *Economía y filosofía moral: la formación del pensamiento económico europeo en la Escolástica española*, *Historia del pensamiento económico* 1 (Madrid, 1998), these works constitute the main general introductions to late scholastic economic thought.

gain) and, at the same time, formulating a new one (lack of money), Lessius almost entirely approved of the general market practice of claiming nonexcessive interest in lending money.³⁵ Thus, Michael Novak's statement that, although they felt bound to treat interest-taking more warily than did later capitalist thinkers, Iberian scholastics still discerned many legitimate forms of interest holds all the more true in the case of Lessius.³⁶ Given that the usury problem pervaded the entire economic thought of the scholastics, as other contracts were constantly suspected of being artificial devices to conceal a money loan, it will be useful now to analyze its phantom form in Lessius' *De iustitia et iure*.

As with any other contract, a loan must be concluded according to the principles of commutative justice, requiring that equality in exchange should be preserved. Because time was not thought to have a value-creating function of its own, this implied that the borrower was obliged to return exactly the same quantity of money that he had received. Any surplus stemming immediately from the loan contract itself (*ex vi mutui*) was deemed to be a usurious profit. The casuistical turn of the late scholastics, however, urged them to modify this general scheme. They acknowledged that there could be extrinsic reasons to make it licit for the money-lender to indemnify himself by charging interest on top of the principal, namely "damage incurred," "cessant gain," and "capital risk." Damage incurred (*damnum emergens*) concerned the damage the lender suffered from parting with his money during the term of the loan: If his house collapsed, for instance, he would be forced to borrow money at a cost.³⁷ In addition, money offers the possibility of making profits through investments. As a merchant abandons these lucrative opportunities in lending out his money, he is entitled to indemnification under the title cessant gain (*lucrum cessans*), which represents a sort of modern opportunity cost.³⁸ Third, because the debtor might become insolvent by the time

³⁵ T. Van Houdt, *Leonardus Lessius over lening, intrest en woeker*. Our sketch of Lessius' usury doctrine in the next paragraph is largely based on Van Houdt's analysis, p. 231–50 [English summary on pages 251–55]. For an excellent introduction in English, see T. Van Houdt, "Money, Time and Labour: Leonardus Lessius and the Ethics of Lending and Interest Taking," *Ethical Perspectives* 2, no. 1 (1995): 11–27.

³⁶ Foreword to A. A. Chafuen, *Christians for Freedom*, 10.

³⁷ *De iustitia et iure* 2, 20, 10.

³⁸ *De iustitia et iure* 2, 20, 11 and 12.

of repayment, the lender is allowed to demand compensation for the uncertainty he exposes himself to (*periculum sortis*).³⁹ By the time Lessius edited his treatise *On Justice and Right*, damage incurred and cessant gain were widely accepted titles by the moral theologians. Yet, it is only with him that the title capital risk starts to gain solid ground.

More important, Lessius took the view that cessant gain could be invoked without further qualification by any moneylender implicitly intending to enter into a just and licit contract.⁴⁰ Traditionally, an appeal made to cessant gain to demand interest had to be substantiated and stipulated separately before the loan contract was concluded. A merchant, then, needed to demonstrate that the money he was asked to lend out had actually been destined for another purpose. On top of this, the factual opportunity cost underlying the appeal to the extrinsic title had to be judged in retrospect by a wise man. However, referring to common business practice at the Antwerp exchange, Lessius made possible a general and unconditional appeal to cessant gain, even for professional lenders and bankers. It should also be noted that in a sale-purchase contract he would still require the parties to explicitly mention the extrinsic title by virtue of which they want to deviate from the just price. Otherwise, the other party could be mistaken about the real value of the merchandise or even prefer not to enter into the contract altogether.⁴¹ In any event, as concerns the traditional doctrine on interest and usury, Lessius undermined it even further by introducing a new extrinsic title: lack of money (*carentia pecuniae*).⁴² Determining the right amount of interest by virtue of an individually determined opportunity cost had lost its sense through the generalization of cessant gain. Therefore, the value of parting with one's money had to be established on a more general level too, i.e., in the abstract money market. As such, interest became the market price of money, ensuing from the economic fact, later theorized by Eugen von Böhm-Bawerk (1851–1914), that present money is worth more than absent money. Accordingly, money has

³⁹ *De iustitia et iure* 2, 20, 13.

⁴⁰ See Toon Van Houdt, "Implicit intention and the conceptual shift from *interesse* to interest. An underestimated chapter from the history of scholastic economic thought," *Lias* 33, no. 1 (2006): 37–58.

⁴¹ *De iustitia et iure* 2, 21, 4, 27.

⁴² *De iustitia et iure* 2, 20, 14, esp. the argument as developed in num. 123–25.

a time value fixed through common estimation in the market. Money becomes a commodity, like any other good, to be bought and sold at a just price in a depersonalized market.

In short, it is clear that Lessius' introduction, however careful it might have been, of the new title lack of money undermined the traditional usury doctrine. This innovative title carries with it the revolutionary potential of subsuming the theory of interest under the doctrine of just pricing and of rebaptizing usury as any interest exceeding the just price of money—which brings us to the second cornerstone of late scholastic economic thought. Lessius' doctrine of just pricing and the market stands out through the utmost consistency with which it is applied both to cases unmistakably to be interpreted as sale-purchase contracts and to cases involving other contracts, which then are reduced to a sale-purchase contract. In the latter way, our Jesuit expanded the scope of the just price doctrine so as to further block the doctrine of usury. For Lessius, there is no doubt about it that a mutually redeemable right on annual pensions (*census*), a bill of exchange (*cambium*), or an insurance contract (*assecuratio*) are to be ranged under the heading of sale-purchase.⁴³ Consequently, the phantom of usury, by definition bound up to a loan contract, should not too readily be seen to intervene in them. The same holds true for the public auctions where bills of debt or obligations (*chirographa*) are exchanged at prices lower than their intrinsic value. Lessius convincingly argues that these bills are to be considered as saleable goods fetching a normal market price and not as concealed, usurious money-loans.⁴⁴ In the case of credit sale and purchase with advance payment, he contents himself with formulating the common opinion that these contracts are to be interpreted as concealed money-loans but in the end tries to show how these modes of sale purchase are finally ruled by rational price mechanisms of their own that escape the dreary logic of

⁴³ *De iustitia et iure* 2, 23 [introductory note] and 2, 28, 4, 24 respectively.

⁴⁴ *De iustitia et iure* 2, 21, 8. In a completely unconvincing way, however, he suddenly returns to the traditional (and safe) argument of concealed usury to condemn the practice. A “deconstruction” of this maneuver is offered in W. Decock, *De homo oeconomicus ontketend*, 291–302, and idem, “L’usure face au marché: Lessius et le juste prix des lettres obligataires,” in *Actes des Journées Internationales de la Société d’Histoire du Droit (Université de Bourgogne, Dijon, 30 mai—1er juin 2007, Mémoires de la Société pour l’histoire du droit et des institutions des anciens pays bourguignons, comtois et romands (MSHDB) [Forthcoming, 2008].*

concealed usury.⁴⁵ Last but not least, he analyzes the bohatra-mohatra contract, a complex and artificial construction of sale and repurchase clearly devised to evade the interest prohibition, to constitute a real sale purchase.⁴⁶

How did Lessius conceive of the just price and the market? It is important to stress from the outset that just means “equal” or “equivalent” here (*pretium iustum seu aequale*).⁴⁷ A just price guarantees a balanced or equivalent relationship between the two constitutive elements of a sale-purchase contract, i.e., merchandise (*res*) and price (*pretium*). It is a moral-juridical concept, then, rather than the buttress of a mathematical model of economic reality gravitating toward a long-term equilibrium market price. Even so, the just price is not entirely void of the dismal science. The normative account given of what a just price should be clearly reveals an analytical insight into the functioning of what nowadays we would call the competitive market price. By definition, a just price—even if fixed by a decree of the public authorities⁴⁸—should reflect a number of market circumstances, such as the abundance and scarcity of goods; their objective and subjective utility; the number of buyers and sellers; the costs a businessman incurs in obtaining, transporting, and storing his merchandise; the money-supply; and the mode of selling. We have the strong impression that the latter factor, representing the insight that there are different types of markets functioning according to their own logic, is increasingly occupying a central role in Lessius’ moral evaluation of business practice.⁴⁹ By recognizing, for instance, that an auction is a singular mode of selling governed by its own

⁴⁵ *De iustitia et iure* 2, 21, 6 and 7.

⁴⁶ *De iustitia et iure* 2, 21, 16.

⁴⁷ Cf. *De iustitia et iure* 2, 21, 2 (title).

⁴⁸ If the public authorities are notably ignorant in adapting the legal price to changed market circumstances, the merchants have a right to disobey it; cf. *De iustitia et iure* 2, 21, 2, 14.

⁴⁹ In this respect, one could argue with Langholm that Lessius fulfilled a process of depersonalization or objectivization, starting with Cardinal Cajetan who thought it more important to look at the *modus vendendi* than to the *causa contractus* for a moral evaluation of business practices. See O. I. Langholm, *The Legacy of Scholasticism in Economic Thought: Antecedents of Choice and Power* (Cambridge, 1998), 99. We have further developed this idea in “Depersonalization of the Market and the

particular mechanisms, Lessius would approve of gross fluctuations in prices established in such a market, although in view of traditional doctrine it would have been doubtful to denote a price swinging so elastically as being just.⁵⁰ By the same token, Lessius indicated that it is extremely difficult to condemn sale credits at prices exceeding the normal just price, for there are certain mechanisms attached to the sale purchase of particular goods, such as a bulk of cacao imported from the American colonies, which naturally lead to the creation of a distinctive mode of selling inducing a higher price. In view of the public good, colonial wares like these are imported in massive quantities but logically cannot be sold to the wholesalers but on credit because they first have to retail them in order to get money. As a matter of market logic, allowing the first buyers to pay on credit attracts them in large numbers and boosts up the market price.⁵¹ In sum, it is very typical of Lessius' analytical genius first to discern the underlying economic mechanisms of a particular business practice and, subsequently, to integrate this insight into his normative judgment.⁵²

Still, we need to take into account Chafuen's reminder that one must exercise great care in jumping to the conclusion that in late scholasticism the just price always equalled the market price in conditions of perfect competition.⁵³ In the end, Lessius stressed that the estimation of the said market factors should be carried out by intelligent, experienced, and prudent businessmen. There remains a personal element, then, in Lessius' concept of the market, which does not allow

Breakdown of the Scholastic Paradigm in Economic Thought: The Case of Leonardus Lessius," *Journal of the History of Economic Thought* [Forthcoming, 2008].

⁵⁰ *De iustitia et iure* 2, 21, 4, 35.

⁵¹ *De iustitia et iure* 2, 21, 6, 56–57.

⁵² It should not come as a surprise, then, that the normative value of commercial praxis (*consuetudo seu usus mercatorum*) occupies pride of place in his ethics; see my "La valeur normative de *consuetudo* pour la résolution de quelques cas de conscience autour des contrats dans l'œuvre de Léonard Lessius (1554–1623)," in *Actas del Coloquio Internacional del Historia del Derecho (Miércoles 26 y Jueves 27 de Septiembre de 2007, Universidad Nacional de General Sarmiento, Buenos Aires)* [Forthcoming, 2008].

⁵³ Chafuen, *Faith and Liberty*, 83.

us to think of it as an impersonal, self-regulated mechanism unreservedly.⁵⁴ From his cautious approval of different kinds of monopoly exercised within the limits of the just price emerges another feature of his economic thought that would certainly look anomalous in a modern theory of competitive equilibrium.⁵⁵ Likewise, it would be a gross oversimplification to reduce his account of the price mechanism to either a cost of production theory of value or a theory of subjective utility. The former would barely square with Lessius' vision of entrepreneurship: A merchant is certainly entitled to a just reward for his work, but if he has incurred exceptionally high costs, not covered by the market price, this is not a valid excuse for him to raise his prices. It is simply a case of bad luck or imprudent behavior. Conversely, if he has encountered exceptionally low costs, he is not obliged to reduce prices, for it pertains to his good luck or to his commercial prowess.⁵⁶ On the other hand, Lessius maintained that it is not licit to let the price merely be determined by the subjective need or desire a buyer experiences for a certain good. A just price is certainly not any arbitrary price the seller can bargain to get for his good, even in the case of exotic merchandise or luxury goods.⁵⁷ Time and again, the scholastic maxim baptized by Odd Langholm as the "double rule of just pricing" turns up in *De iustitia et iure*: A seller may well be allowed to account for the affective and financial damage he suffers from parting with his goods; he is not to calculate the price of the buyer's affections, needs, and desires.⁵⁸ This definitely does not mean either that the late scholastics had in mind a kind of metaphysically or ontologically determined theory of value. Following Augustine, they unequivocally recognized that the natural and economic orders are to be distinguished from one another.⁵⁹

⁵⁴ *De iustitia et iure* 2, 21, 2, 7; 2, 21, 2, 9; 2, 21, 3, 16; etc.

⁵⁵ *De iustitia et iure* 2, 21, 21, 145 and 151.

⁵⁶ *De iustitia et iure* 2, 21, 4, 29.

⁵⁷ *De iustitia et iure* 2, 21, 3, 16. Hence, Lessius does not follow the traditional late scholastic division, going back to Vitoria, between necessary and luxury goods.

⁵⁸ O. I. Langholm, *Economics in the Medieval Schools: Wealth, Exchange, Value, Money and Usury according to the Paris Theological Tradition. 1200–1350*, Studien und Texte zur Geistesgeschichte des Mittelalters 29 (Leiden, 1992), 232–34. An excellent illustration of this rule is *De iustitia et iure* 2, 21, 4, 26 and 31.

⁵⁹ Augustine, *De civitate Dei*, 11, 16.

A pearl among the cases in Lessius' *De iustitia et iure* summing up his ideas on the morality of the market is "The merchant of Rhodes" in dubitatio 5.⁶⁰ The case concerns asymmetrically distributed information among market participants and the question corresponding to it of whether a seller is obliged to inform the other party about his knowledge of future changes in the market circumstances. Suppose, for example, that a grain dealer arriving in Rhodes, where the acute shortage of grain has led to towering prices, has come to know of other suppliers setting forth to the island. Should he tell the buyers about the future abundance of goods so that they can bargain a cheaper price? Making reference to the just-price doctrine, which states that a price should either be determined by the prince or by common estimation of relevant market factors, Lessius concludes that the seller has no duty at all to reveal his private knowledge. Morality in buying and selling amounts to demanding the just price, and the just price is determined by common, not by private estimation. Thus, even though the common estimation is based on error and ignorance, the just price ensuing from it still prevails. Though we cannot go into details here, Lessius' solution and further elaboration of this case reveals at least three distinctive features of his economic thought: (1) a consistent application of the general just price doctrine to all kinds of cases, (2) a restrictive interpretation of the vices of the will violating contractual consensualism, and (3) a concept of business as governed by rules of its own that should be recognized by an ethicist who boasts himself on stimulating virtuous and free-market behavior.

Commerce (*negotiatio*), or the art of making money by buying goods and selling them unchanged, is a salutary art contributing to the prosperity of the community and reinforcing the cohesion of people across the globe—thus, the general view in late-scholastic economics.⁶¹ It should be licit, then, for a merchant to reap the fruits of this labor. He should do this by playing the game of the market, that is by playing on the fundamental licitness of exploiting the latitude of the just price. As Lessius clarified, a just price may swing in different places and at

⁶⁰ An elaborate discussion of this case is included in my "Depersonalization of the Market and the Breakdown of the Scholastic Paradigm in Economic Thought: The Case of Leonardus Lessius" [forthcoming], and idem, "Leonardus Lessius en *De koopman van Rhodos*. Een schakelpunt in het denken over economie en ethiek," *De zeventiende eeuw* 22, no. 2 (2006): 247–61.

⁶¹ *De iustitia et iure* 2, 21, 1, 4.

different times between the highest (*summum seu rigorosum*), middle (*medium*), and lowest (*infimum seu pium*) just price.⁶² Making just profits amounts to buying a good, for example, at the lowest just price at a place or time *A* and selling it at the highest just price at a place or time *B*. Now, Lessius fully recognized that making profits in this way largely depends on painfully mounting a web of intelligencers who can keep you informed about market developments around the world. Not allowing a businessman who has obtained information about the future market situation to capitalize on that is tantamount to punishing prudent and industrious commercial behavior. From his insight into the market, Lessius could not possibly expect a merchant to reveal his information—an insight commonly recognized in our age but certainly not as widespread in earlier times. Cicero and Ioannes Medina, for instance, would have made the prudent businessman look a fool by requiring him to tell about his private knowledge. Acknowledging the need to stimulate prudent businessmen to draw on their experience, intelligence, and insight into the laws of the market to anticipate opportunities, Lessius could not give way to the argument that the other party had a right to nullify the contract by reason of involuntary consent due to ignorance. What is more, Lessius would explicitly state that everyone can deceive themselves through imprudent behavior: The professional buyer should blame the ignorance on himself because he has not been virtuous enough to inform himself about the market in which he is taking part.⁶³ Regularly repeating that, among professionals, the marketplace is not a realm of charity and donation but of commutative justice and inner economic logic, Lessius was not prepared to take on a paternalistic attitude in his moral judgments.⁶⁴

⁶² *De iustitia et iure* 2, 21, 2, 11.

⁶³ *De iustitia et iure* 2, 17, 5, 27; 33; 34.

⁶⁴ For example, *De iustitia et iure* 2, 21, 4, 37 and 2, 21, 11, 84.

Epilogue: What We Can Learn from Lessius Today⁶⁵

In the early decades of the twentieth century, Leonardus Lessius was revived at the Catholic University of Leuven by enthusiastic members of the neo-Thomist movement who considered him to be a source of eternal truths of natural law, which through slight adaptation to the altered social and economic reality could still serve as a clue for solving contemporary problems.⁶⁶ It will be obvious from the biographical and moral-theological contextualization of Lessius' economic thought above that such an attempt was bound to fail: The market as well as the technical tools implemented to solve moral problems in the market have changed so much that the present in some way raises a barrier beyond which history cannot project its creativity any more. Nevertheless, we are convinced that with due respect for its peculiarities, Lessius' business ethics can still be a source of inspiration for today. We should, however, not concentrate so much on the answers but rather direct our attention to the questions themselves, which Lessius raises, and the fundamental principles he honors in tackling them.

First of all, Lessius gives us an excellent example of the way in which religious beliefs and involvement in the real world can be made to enter into a dialogue. He is not, as has happened so often in history and is repeating itself in parts of the globe today, taking the easy way out of this tension by creating a dichotomy in between evangelical ideals and worldly practices. On the contrary, by taking a distinctly positive view of the human person and his earthly occupations, Lessius empowers the faithful to engage themselves in just and prudent commercial activities. Second, Lessius stimulates entrepreneurship by recognizing that industrious merchants should be allowed to profit from their insight in the rules

⁶⁵ It goes without saying that much of the argument developed in this afterword also applies to other late-scholastic authors. In the second number of the first volume of the *Journal of Markets & Morality* (1998), Rev. Robert A. Sirico pointed out the lasting and praiseworthy reliance of modern Catholic economic thought on late scholasticism: "Both place enterprise, human initiative, the price system, exchange, private property, the division of labor, and the liberty of contract at the center of economic life" (p. 122).

⁶⁶ For example, V. Brants, "Les théories politiques dans les écrits de L. Lessius (1554–1623)," *Revue Néo-Scholastique de Philosophie*, 19 (1912): 42–85.

of the business game. As such, a merchant can licitly reap the fruits of painstakingly obtained knowledge and information to exploit price differences across the markets. Rewarding prudent behavior—a cardinal virtue implying intelligent analysis of the present, careful consideration of past experiences, and providence as to the future—is at the heart of Lessius’ economic ethics. Third, Lessius urges the professional merchant to drop his assertive commercial behavior as soon as he leaves the increasingly depersonalized market of professional businessmen. The power of the strong is limited by the personal dignity of the poor and weak who would be streamrolled in a world based on mere commutative justice. Charity should complement the narrow principle of justice from time to time. Lessius, then, refuses both religious and economic fundamentalism.

Last but not least, our Jesuit has two important messages for anyone priding himself in being a sound business ethicist. The liberty of the human person forbids any totalitarian attempt to prescribe in abstract and pedantic details what a person should be allowed to do or not to do. An ethicist should limit himself to pointing out the minimal standards of conduct, so that the individual is able to set free his own creative potential for striving at more lofty ideals. On top of this, Lessius gives us a vital example in showing that any sound judgment about the morality of the market presupposes an analytical moment in which the mechanisms themselves of the market are scrutinized. It is small wonder, then, that Lessius’ *De iustitia et iure* is met with increased interest in the contemporary world of academic and professional business ethics. The translation at hand may be a further tool in exploring its riches.

On Buying and Selling (1605)¹

Leonardus Lessius, S.J.

Dubitatio 1: Definition of Buying, Selling, and Business

Sale-Purchase

[1] Answer: *A purchase* can be defined as *an agreement under which a price is given in exchange for a commodity*, whereas a *sale* is *an agreement under which a commodity is given in exchange for a price*.² Three elements are required as to the form or substance of this contract: a commodity, a price, and mutual consensus.

A Commodity

A commodity is anything that is a possible object of a sale: all goods movable and immovable, claims and titles, which are usually estimated and compared in money; likewise, all present and future goods taken as a whole, because the latter can be sold through one act, even if they cannot be donated.³ The free faculty to make a will is not hampered by such a sale contract because it is possible to make

¹ Thomas Aquinas, *Summa Theologiae*, 2, 2, quaest. 77.

² Dig. 18, 1, 1.

³ Dig. 45, 1, 61.

a will about a price, yet, it is hampered indeed by a gratuitous donation. In the same way, a vacant inheritance is a commodity and a possible object of a sale. An inheritance, however, which has not yet been declared vacant, is not saleable; for example, when the testator is still alive. Such a sale is invalid because it is at variance with moral decency.⁴

Price

A price consists of money, which was invented to be the measure and price of all things that come under human contracts, as Aristotle teaches.⁵ Money cannot be a commodity in itself, nor can it be sold as a commodity, except on the basis of its material or a circumstance extrinsic to its nature. Thus, money can be sold because it is old or beautiful, or convenient to transfer, or absent, or difficult to be claimed back, and so forth. Before money was introduced, sale-purchase as such did not exist, but merely barter.⁶ Money was invented, however, because barter was inconvenient.

Agreement

It is an agreement because this is the more general class to which sale and purchase belong as specific types of agreement. That is to say, sale and purchase are part of a single and uniform agreement, which in itself is a specific type of agreement understood in its most general concept. Out of sale and purchase a uniform agreement emerges that essentially includes the conformity of both. However distinct those parts may be, they are so inextricably bound up with each other, that it would be impossible to understand one part without understanding the other, as happens with all things so closely correlated to each other.

Concluded by Consensus

The sale-purchase contract consists of a naked agreement or arrangement between the parties involved. A conveyance of the commodity or the price is not required as to its substance because the contract is concluded by the sole

⁴ Dig. 18, 4, 7.

⁵ *Ethica Nicomachea*, lib. 5, cap. 5.

⁶ Dig. 18, 1, 1.

consensus of the parties.⁷ Therefore, it is possible for absent people to contract, or to contract by means of a messenger, or by correspondence.⁸ However, for the ownership to be transferred, a conveyance is required.⁹ Consequently, unless conveyance on both sides has followed, the contract is still held to be invalid, for, although the contract is concluded as to its substance, the final complement at which the parties intend to arrive still lacks. Hence, whenever a punishment is imposed in buying and selling, this is always to be understood as concerning the acts concluded by either of the parties' conveyance, unless the legislator holds an expressly different intention. Similarly, a stipulation is not required because we are dealing with a contract of good faith, and neither is a written document, unless the parties wish to draw up one before or after making the contract for the sake of greater security. In the latter case, the parties are held to suspend their ultimate consensus until the arrangement is sealed by script and reread.¹⁰

A Reciprocal Contract

The phrases *a price in exchange for a commodity* and *a commodity in exchange for a price* clearly indicate that this contract is reciprocal and that it requires a counterpromise or mutual consent.

Differences with Other Contracts

These sentences make clear, too, that sale-purchase differs from donation and liberal promise as well as from all other contracts in which an interchange of things other than commodities and prices takes place, for example, in exchange, loan, and all innominate contracts. Similarly, lease and hire are different because the thing that is said to be let or hired is not given in return for a price but only conceded for use, even though it might seem as if the use itself is sold in a certain sense because it is conceded in return for a price. Properly speaking, however, it is not said to be sold; it is the thing that can be used rather than the use itself, which is the subject of the contract....

⁷ See higher, lib. 2, cap. 17, dubit. 2, and Dig. 18, 1, 1 toward the end.

⁸ See, again, Dig. 18, 1, 1.

⁹ This is clear from the above said in cap. 3, dubit. 3.

¹⁰ See the teachings of Gomesius, *Commentaria variaeque resolutiones iuris civilis, communis, et regii*, tom. 2, cap. 2, num. 17.

[4] Business

Business is the activity through which a man acquires goods with the intention of making profits by selling them in a completely unaltered state. This is the definition maintained by Chrysostomus and the canonists.¹¹ They conceive of *selling* in a very wide sense, so as to include even *barter*, given that for the barbarians business consisted in barter, and that money-exchangers are doing business by bartering money. Business is not illicit as such, but rather indifferent because it can be directed toward a good, bad, or indifferent goal, as St. Thomas Aquinas demonstrates.¹²

Against Thomas, you might object along with Chrysostomus that *by evicting the sellers and buyers from the temple, the Lord has made it clear that a merchant can never please God and hence that no Christian should be a merchant.* However, St. Thomas replies that what Chrysostomus has in mind is a man for whom profit constitutes the highest goal, a man who is prepared to commit mortal sin to make a profit (what most businessmen do) or, put differently, a man who is doing business by having recourse to fraud and perjury....

Dubitatio 2: The Equal or Just Price of Saleable Goods

[7] 1. The Just Price

The just price is held to be that price that is determined either by the public authorities in consideration of the common good or by the common estimation of people. A price, then, is imposed in one of two ways.

2. Two Ways of Imposing the Just Price

2.1. By the Prince

In the first case, the prince or magistrate fixes the price at which a particular good is to be sold by considering all the circumstances on which the estimation of goods depends, lest the buyers be deceived or forced to give in to the sellers' whims. The doctors call this price the legal price, as though it were laid down by law. It is obvious that this price is to be held just (except maybe for the case

¹¹ Chrysostomus, *Hom. 38 in Matthaem* 21, and Grat. D. 1, 88, 11.

¹² *Summa Theologiae*, II, II, quaest. 77, art. 4.

in which the price certainly came about through bribery, discrimination of the sellers, or gross ignorance). Whatever the public authorities decide by virtue of their office cannot be called into question by the subjects, which is exactly the case with the legal price. Just as in other circumstances it pertains to the public authorities to promote the common good; likewise, in business, they should prevent fraud and the exploitation of the poor.

[8] Circumstances to Be Considered in Determining the Just Price

In addition, superiors are better informed about all the circumstances causing the estimation of the goods to rise or fall. Some of these circumstances relate to the commodities themselves: their scarcity or abundance, the common need for them and their subjective utility. Next, there are circumstances pertaining to the seller: his labor, the expenses, the risks, and the damages he incurs in obtaining, transporting, and storing the goods. Furthermore, the mode of selling plays a role, namely whether the commodities are offered spontaneously or sold on demand. A final factor concerns the buyers, whether they are few or many, and whether there is lack or abundance of money.

[9] 2.2. *By the Common Estimation of People*

In the other case, the price is imposed by the common estimation of knowledgeable people. Hence, some call it the common price. Others speak about the natural price, as though it were constituted by natural prudence. It applies to those goods that have not received a price by the public authorities. From Dig. 35, 2, 63, it is obvious that this price is just. There it states that *the prices of goods are defined neither by affection nor by private advantage but rather in common*. The reason thereof is that private judgment is fallible and easily perverted by love of gain, whereas a common judgment is less subject to error. Because this rule is the most reliable guideline available, we should observe it. The common estimation, then, is realized by taking into account all the circumstances mentioned above.¹³

¹³ Compare Martinus Azpilcueta (Doctor Navarrus), *Enchiridion sive manuale confessoriorum et poenitentium*, cap. 23, num. 78 seqq.; Ioannes Medina, *De poenitentia, restitutione, et contractibus*, tom. 2, cap. *De rebus restituendis* [italics], quaest. 31; Didacus Covarruvias a Leyva, *In tres variarum ex iure pontificio, regio et caesareo resolutionum libros*, lib. 2, cap. 3, princ.

[10] 3. Differences between the Legal and the Common Price

It should be noted that a clear distinction between these two kinds of prices exists in that the *legal price* is indivisible in its nature, whereas the *common price* admits of a certain latitude.¹⁴ The reason thereof is that the legal price is fixed by one or more people who reach unanimity, whereas the common price depends on the assessment of many people who do not judge perfectly in the same way. For example, what some estimate to be worth 9, others estimate 10, and still others 11.

[11] *The Common Price Is Threefold*

Hence, according to common doctrine, the *common price* is threefold: It consists of the lowest (also called pious), the middle, and the highest (alternatively called rigorous) price. For instance, with respect to a middle price of 10, the lowest is 9, and the highest is 11; with respect to a middle price of 100, the lowest is 95, and the highest is 105.¹⁵ Each one of these prices again admits of a certain latitude.

[12] As a consequence, in case the price is laid down by law, it is illicit to accept a price that exceeds the legal price. Otherwise, restitution should be made. If, on the other hand, the price depends on the common estimation, it is licit to demand either the lowest, the middle, or the highest price according to opportunity.

4. When Common and Legal Price Differ

You might ask what to do if the legal and the common price do not correspond with each other, say the legal price is 10, while the common price is 8 because of abundance or scarcity of buyers. Is it licit to sell for the legal price?

[13] 4.1 *The Legal Price Is the Higher One*

First, if the legal price exceeds the common price, normally it is illicit to demand the legal price. The reason thereof is that normally a price is fixed in

¹⁴ As is taught, among others, by Ioannes Duns Scotus, *In quattuor libros Sententiarum*, lib. 4, dist. 15, quaest. 2, art. 2.

¹⁵ Covarruvias, *Variarum resolutionum*, lib. 2, cap. 3, num. 1.

favor of the buyers to make sure that it is not exceeded. This does not mean, however, that the price cannot decrease if the circumstances change and common estimation falls.

I expressly said *normally* because sometimes a price is fixed in favor of the sellers to make sure that a good is not underpriced. This is the case with the selling of perpetual annuities, life annuities, and similar rights that are usually not sold unless one is forced to do so by want of money. In this situation, the seller is allowed to demand the entire legal price.

[14] 4.2 *The Legal Price Is the Lower One*

Second, if the legal price is lower than the common price, then it is illicit to demand the common price, and only licit to demand the legal price. The reason thereof is that the latter price is to be held the true price of the good, determined by the magistrate to make sure that it is not exceeded.

It should be remarked, however, that one can sell at the common price in case the circumstances of abundance, scarcity, and similar factors have changed, and the magistrate remains notably negligent in adjusting the legal price. In this case, the law is held to be inequitable.¹⁶ Yet, it is not up to private persons to judge such things, unless the matter is morally evident (superiors should always be given the benefit of the doubt), e.g., when it is certain that the magistrate has been bribed or is ill informed about the circumstances of the commodities or has fixed the price out of enmity toward the sellers or the buyers.

¹⁶ Medina, *De poenitentia, restitutione, et contractibus*, tom. 2, cap. *De rebus restituendis*, quaest. 36.

Dubitatio 3: Is It Allowed for the Owner of a Good That Does Not Have a Legal or Common Price (e.g., Certain Gems, Special Dogs or Falcons, Exotic Birds, Ancient Paintings, etc.) to Sell It at Any Price He Wants?

[15] 1. The Opinion of Some

Some answer this question in an affirmative way.¹⁷ This can be proven as follows. First of all, these goods are not necessary for leading a human life, so anyone willing to buy them should be considered to be paying out of free will any price the seller demands. Otherwise, one would not have bought at all because there is not any necessity that forces to buy. The seller, then, is allowed to accept the payment.

Second, two legal maxims can be adduced to support this thesis: *Everyone is the moderator and arbiter of his own goods*, and *a good is worth what it can be sold for*.¹⁸

[16] 2. The Contrary Opinion Is More True

2.1. Response

The contrary opinion is truer, namely that such goods should not be sold at the price arbitrarily determined by the will of the seller. Rather, they should be priced according to the common estimation of knowledgeable men or through the estimation of the seller himself, provided that, in good faith, he considers all the relevant circumstances mentioned above.¹⁹

¹⁷ Dominicus Sotus, *De iustitia et iure*, lib. 6, quaest. 2, art. 3; Petrus de Navarra, *De ablatorum restitutione in foro conscientiae*, lib. 3, cap. 2, num. 11.

¹⁸ C. 4, 35, 21, and Dig. 36, 1, 1 respectively.

¹⁹ Navarrus, *Manuale*, cap. 23, num. 78; Caietanus, *In Summam Theologiae Divi Thomae Aquinatis commentaria*, ad IIam.IIae, quaest. 77, art. 1.

2.2 Proof

2.2.1. The just price of these kinds of goods should be derived from the judgment of a knowledgeable merchant who considers the circumstances that affect the value of the good. At the same time, any good must be sold at its just price. Consequently, it is illicit to sell these kinds of goods for what they can be sold for. The major term of this syllogism is proven by the fact that the judgment of a knowledgeable man is the most certain guideline available in this context.

2.2.2. A good is not worth a certain price because it pleases the seller to sell it so dear, but rather because it is estimated so much by the judgment of prudent people after they have considered all relevant circumstances. The confirmation of this opinion is that the judgment underlying an estimation should always be prudent. Now, nobody can prudently judge a good to be worth a certain price, solely because a seller wants to sell it so dear.

2.2.3. If the former opinion were to be accepted, then a person could sell a good that in good faith he thinks to be worth 10, at 100 or 1,000 as soon as he notices that a prince interested in it wants to buy it.

[17] 2.3 Affections Can Be Estimated

It should be remarked, however, that if the seller himself feels very strongly about the good, he is allowed to estimate his personal affections, provided this estimation comes about in good faith.²⁰

[18] 3. Refutation of the Arguments Adduced in Favor of the Former Opinion

3.1. The buyer is not held to be freely donating the amount that exceeds the just price. It is not his intention to make a donation but to buy and pay the real price of the good. Because nothing in the good itself corresponds to the increase in the price, it follows that it is not allowed to retain the surplus as though it were really part of the price. It is of no significance that the buyer is not urged to buy by force or necessity. For if that were the crux of the matter, it would be allowed to demand usury from a person who is not forced to lend money by necessity, but rather asks for a loan in order to be able to spend money on games or similar entertainment.

²⁰ Navarrus, *Manuale*, cap. 23, num. 83.

You might raise the following objection: If the buyer does not intend to donate the surplus, why is it that in fact he does, though he knows that the good is not worth so much, and although he is not forced by anyone to buy?

I reply that the buyer is so fond of the good that he prefers making a loss by paying the surplus rather than having to miss out on the good. Similarly, a borrower promises to pay usury in order to get that liquidity that he needs for playing games.

3.2. The legal maxims quoted have been improperly understood. The first maxim does not apply to the estimation of goods. It simply means that, as opposed to a mandatory, a real owner can dispose of his goods according to his own arbitrary will, even to the detriment of himself. The second maxim, namely that *a good is worth what it can be sold for*, needs to be understood within the latitude of a just estimation, given that the justice of a price is not indivisible by its nature.

Dubitatio 4: Is It Licit in Some Cases to Sell a Good Dearer or Buy It Cheaper Than It Is Worth?²¹

[20] Preliminary Remarks

1. Deception Above or Under Half of the Just Price

It is to be noted first that in the external court no legal action is given to the offended if he has not been deceived for more than half of the just price. If, for instance, you sell a field currently worth 100 pounds at 70, 60, or only 50 pounds, you are unable to institute legal proceedings in order to get rescission of the sale or a supplementation of the price because you have not been deceived for more than half of the just price. The situation is different, however, should you have sold your field for 48, 49, or less pounds. Similarly, if you buy a field currently worth 100 pounds at 152 or more, you are able indeed to go to court and ask either for a restitution of the surplus you have paid or for a rescission of the purchase contract. Again, should you have bought the land at 140 or even 150 pounds, no legal action is available.²²

²¹ See Divine Thomas, *Summa Theologiae*, 2, 2, quaest. 77, art. 1.

²² This is clear from C. 4, 44, 2; C. 4, 44, 8; Decretal. 3, 17, 3 (Alexander III); Decretal. 3, 17, 6 (Innocentius III). See also Gomesius, *Commentaria variaeque resolutiones*

[21] 2. In the Internal Court One Is Obligated

It is to be noted second that a buyer or seller who commits fraud for less than half of the just price is not therefore released from the duty to make restitution of the amount above or under the just price.²³ The reason thereof is that the surplus is not considered to be donated liberally but only given inasmuch as it is due on grounds of a sale or purchase title. That is, the surplus is considered to be spent as though it were part of the just price, namely as a sum equivalent and due to the value offered. Consequently, if it is not due, because it exceeds equality, it cannot be retained unless it is made up for in a convenient way through a supplementation of the price or the mending of the good.²⁴

[22] 3. The Opinion of Gerson

From this, it is clear that Ioannes Gerson is wrong when he takes the view that someone who deceives his contracting partner for less than half of the just price is not obliged to make restitution, though he did commit a sin and is obliged to go to confession. He argues that an injury is not done to one who knows and wills it. Yet, I disagree with this viewpoint because the offended party does not consent to the injury absolutely voluntarily but rather in the way I explained above, namely, like a borrower paying usuriously high interest. Furthermore, Gerson's reasoning is self-defeating. If such fraud is a sin, it certainly is a sin against justice, and, accordingly, restitution is obligatory. Last but not least, positive law does not approve of these malpractices as though they were licit. Positive law merely tolerates them by making neither restitution nor rescission of the contract obligatory lest greater evil emerges.²⁵

iuris civilis, communis, et regii, tom. 2, cap. 2, num. 22, and Covarruvias, *Variarum resolutionum*, lib. 2, cap. 3, num. 2.

²³ Divine Thomas, *Summa Theologiae*, 2, 2, quaest. 77, art. 1; Divine Antoninus, *Summa Theologica*, part. 2, tit. 1, cap. 16, § 3; Ioannes Medina, *De poenitentia, restitutione et contractibus*, tom. 2, cap. *De rebus restituendis*, quaest. 32; Covarruvias and the authors quoted by him in *Variarum resolutionum* lib. 2, cap. 4, num. 11.

²⁴ Navarrus, *in cap. Novit., de iudiciis*, 6, num. 54.

²⁵ See the teachings of Thomas, *Summa Theologiae*, 2, 2, quaest. 77, art. 1, ad 1, and of Bartolus a Saxoferrato in his commentary on C. 4, 44, 2 and 8.

[23] The latter viewpoint is not contradicted by Dig. 4, 4, 16, which goes as follows: *Pomponius also says that as regards the price in purchase and sale, it is naturally licit for the contracting parties to overreach each other.* This kind of overreaching is to be understood within the limits of the just price,²⁶ and *naturally licit* actually means that it is tolerated according to the law of nations.

Against this background, I will now answer the question of this dubitatio.

1. Legal Grounds to Sell Dearer

First, there exist certain legal grounds that make it licit in some cases to sell a good for a higher price than it would actually be worth and sold for in other circumstances.

[24] 1.1. By Virtue of Office

The first legal ground is based on the specific office or job of doing business. Accordingly, merchants are allowed to demand a little higher price than people who are not selling by virtue of office, but just occasionally.²⁷ The reason thereof is that it is estimable in money that merchants constantly have to be solicitous and preoccupied about acquiring, storing, and supplying commodities, and by doing so are forced to omit many other opportunities of making profit. Therefore, a good is estimated more when sold by a merchant, who does so by virtue of his office, than when it is sold by a soldier or a craftsman because the latter coincidentally obtains and sells the same good.

Remarks

1.1.1. It is to be remarked, however, that this legal ground does not entail the permission to sell dearer than the legal or common price. In the determination of the price, the office of doing business has already been taken account of.

²⁶ Covarruvias, *Variarum resolutionum*, lib. 2, cap. 3, num. 2.

²⁷ Ioannes Medina, *De poenitentia, restitutione, et contractibus*, tom. 2, cap. *De rebus restituendis*, quaest. 31, § *Et procedit*; and Caietanus, *ad Ilam.IIae*, quaest. 77, art. 1.

[25] It Is Allowed to Sell at the Usual Price

1.1.2. If someone selling occasionally demands the same price as is usually demanded by the merchants, he is not wronging the buyer as long as the good is of equal quality. He can sell at the current price, even though he did incur neither the costs nor the solicitude of the merchant. Anyway, it is not a necessary precondition for demanding a certain estimation that you actually suffered the particular inconveniences that gave rise to the estimation. It is not a sufficient counterargument to maintain that the goods are estimated less in the hands of a nonprofessional, for merchandise is estimated less in the hands of a nonprofessional not because it really is of less worth in his hands (supposing that he has the intention of selling it at the right moment). Rather, goods get a lower price in their hands because that kind of people do not have the intention nor the knowledge to wait for an opportunity. Consequently, they throw their goods on the market themselves without having been asked by a buyer to do that.

[26] 1.2. *Potential Profits Foregone, Etc.*

Further legal grounds to sell a good dearer than it is worth out of itself are potential profits foregone, and damages incurred as a consequence of the alienation of the good. By the same token, a seller is allowed to take into account his affections toward the good and the pleasure he takes in it, all of which he is deprived through selling. The surplus should be determined according to the estimation of the profits foregone, the damages incurred, or the pleasure and the affections lost, respectively. If present, these circumstances are licit grounds to charge a surplus because a seller not only transfers the naked good in itself but also the convenience, pleasure, and affections he experiences on account of it. Consequently, it is allowed to demand their estimation, even though the good has got a legal price.²⁸

[27] Remarks

1.2.1. The seller should signal to the buyer the legal cause on the basis of which he demands the higher price, lest the buyer believes the good in itself

²⁸ As is rightly taught by Petrus De Navarra, *De ablatorum restitutione in foro conscientiae*, lib. 3, cap. 2, num. 21.

is worth more, for the buyer might not wish to buy off the inconvenience affecting the seller.

1.2.2. Affections

If a good is estimated more on account of the title *affections*, these affections have to rest on a just reason that makes it prudent to estimate the good so much. As is the case, for example, with a very unique gem or an ancient statue.

Now what to do if the affections do not rest on reason, and yet you do estimate the good to be as valuable as the price you demand for it on the basis of your affections? For example, you estimate a house worth 1,000 guilders at 2,000, because it is a family heirloom. Some admit of it, given that anybody is allowed to estimate the inconveniences he suffers. However, I do absolutely not approve of these practices because affections that lack reason need to be corrected. Such affections should not be bought off or made up for by a towering high price.

[28] 1.2.3. If You Wanted to Preserve the Good

The legal ground of “potential profits foregone” allows you to sell dearer if you had intended to preserve the good until it would be worth more, but now a buyer already presents himself. In that case, there are two ways of reaching an agreement.

Two Ways of Reaching an Agreement

1.2.3.1. An Agreement About a Fixed Price

If it is certain that the good will be worth, say 30 guilders, at the time you initially intended to sell it, then you are allowed to sell at that price after having deducted the estimated value of storage and risk of corruption or loss. Consequently, if you estimate the cost of storage and the risk to be only 2 guilders, you are allowed to sell at 28; if cost and risk amount only to 1, at 29.

If it is doubtful whether this good will be worth 30 guilders but certain that it will be worth between 24 and 30, then the seller is allowed to demand a price that lies between the lowest and the highest: The more certain he is, the higher the sum he can charge. This is the background against which Decretal. 5, 19, 6 (Alexander III) needs to be understood: This text deals with someone who initially intended to preserve his good until the future moment agreed on for payment and states that this person is now allowed to sell the good at the price it is deemed more or

less to be worth at that future moment. More or less, that is at the medium price in between the highest and lowest just price of that future moment.²⁹

1.2.3.2. An Agreement About an Undetermined Price

You can also make an agreement about an undetermined price. In that case, the seller asks the buyer to pay him what his merchandise will turn out to be worth commonly at the time he initially decided to sell his good, after having deducted the estimation of storage and risks. However, he is not allowed to demand the highest future price because he is not certain that he will obtain that price if he keeps his good until later. Put differently, you cannot rightly speak of profit foregone in this case. Therefore, the estimation of that certainty should be deducted, i.e., the price of being certain about the highest price.

[29] 1.3. Labor and Expenses

A third legal ground for selling dearer consists of the labor and expenses you have incurred in obtaining, transporting, and storing the goods. This is to be understood, however, for goods that did not yet have their price determined, for the first time a good is priced, the seller can take into account extraordinary expenses. Like in the case, for instance, of merchandise that needs to be protected against pillards by a military escort because it is transported through dangerous areas. However, I do not understand this to apply for expenses incurred through bad luck or imprudent behavior.

Another matter altogether is the case in which the goods have already received a price for which they are sold in different places because one is obliged either to sell at the current price or to retain his goods.³⁰ In the determination of that price, the merchant's labor and his ordinary costs have already been taken into account. If a merchant has incurred more labor and expenses than are covered by the current price, that is his bad luck, and the common price cannot be increased on that account, just as it need not be decreased even if he has not made any expenses at all. It pertains to the very basic condition of merchants that they can

²⁹ Covarruvias, *Variarum resolutionum*, lib. 2, cap. 3, num. 6.

³⁰ See Medina, *De poenitentia, restitutione et contractibus*, tom. 2, cap. *De rebus restituendis*, quaest. 31; Covarruvias, *Variarum resolutionum*, lib. 2, cap. 3, num. 3, and other doctors.

make profits if they have small expenses, just like they can suffer losses if they make large and extraordinary expenses.

[30] 1.4. Abundance of Buyers, Etc.

On the grounds of an abundance of buyers and money but a shortage of goods, prices are higher than under opposite circumstances, namely when there is a shortage of buyers and money but an abundance of goods. The reason thereof is that these factors make the common estimation of goods rise. A thing will be dear when it is asked for by many buyers and can be obtained very difficultly or only in small amounts. Conversely, a thing will be cheap if it is abundantly available and few people ask for it. This is the reason why it may suddenly happen that prices rocket when plenty of rich and avid buyers arrive on the market, whereas prices may collapse just as quickly when these people all move away. For example, when all of a sudden a prince accompanied by his court visits a city, or the Indian fleet moors, as is correctly explained by Ludovicus Molina.³¹

Is It Licit to Sell Dearer to Strangers?

Moreover, in the latter cases, Molina does not condemn the practice whereby strangers have to pay higher prices than the local people if the goods are sufficiently available. With respect to those strangers who have plenty of money and are willing to buy a lot, the goods are held to be dearer than with respect to the local people. However, if goods are not sufficiently available, then the price indiscriminately increases with respect to everybody. In that case, sellers should not be tolerated to sell dearer to the strangers in order to be able to demand a lower price from the locals.

Actually, one could say that in both cases the price raises with respect to everybody. No seller is obliged to sell cheaper to the locals than to the strangers. Nevertheless, it has become accepted through custom that the locals are given preferential treatment, given that the increase is sudden and transient. It is not illicit to sell dearer to strangers than to locals if the limits of the rigorous price are not exceeded in contracting with the foreigners.

³¹ *De iustitia et iure*, tom. 2, disput. 346, num. 2.

[31] 1.5. In Favor of the Buyer

It is allowed to raise the price of a good if you sell it only to do the buyer a favor and if otherwise you would not have sold your good. The reason thereof is that it is estimable in money that you sell a good that was not for sale. However, I would limit this ground to those cases in which you suffer a real inconvenience or detriment.

Utility

It is to be remarked, though, that it is not allowed to sell a good dearer on account of the subjective utility or necessity that drives one to buy your good (as is the depraved practice of many utterly immoral merchants).³² The reason thereof is that no one is allowed to sell to another precisely that which belongs to that other person. Now, the subjective utility is that which the good offers to the buyer, not to the seller. It comes forth from a circumstance of which the seller is not the cause.

2. Legal Grounds to Buy Cheaper

Second, there exist also certain legal grounds that in some cases allow a good to be bought cheaper than it would actually be worth in other circumstances.

[32] 2.1. The Good Is of Little Use to the Buyer

The first legal ground is that the good is of little use to the buyer and is bought to do the seller a favor,³³ for prices fall both on account of the fact that there are no buyers on the market and that the good is hardly convenient to them.

[33] 2.2. The Mode of Selling

Second, prices may fall on the grounds of the mode of selling: at a public auction, for instance, or when buyers are solicited to buy. As the maxim goes, according to Cajetan, *merchandise coming onto the market without being*

³² See Divine Thomas and the common opinion of the doctors.

³³ Medina, *De poenitentia, restitutione et contractibus*, tom. 2, cap. *De rebus restituendis*, quaest. 32; Navarrus, *Manuale*, cap. 23, num. 84, and other doctors.

*solicited becomes a third cheaper.*³⁴ The reason thereof is that this mode of selling betrays an abundance of goods and a lack of buyers who are willing to buy in the ordinary way, both factors of which make the price of the good fall. War booty, for example, sells cheap, just as a good that is of no use or is inconvenient to the seller.

Remarks

[34] 2.2.1. Annuities

First, if a good has a legal price fixed in favor of the sellers (as in the case of newly created annuities), the price should not be lowered on grounds of the mode of selling or abundance. After all, as long as the same legal order persists, a change in some of the market circumstances will not immediately bring about a change in that price. Otherwise, it would be licit to buy a newly constituted annuity worth 1 guilder for 12 guilders, if only the buyer were solicited. Now, this is false because it is at variance with prevailing law. The situation is different, however, with respect to old annuities because, for a variety of reasons, their legal price has been abolished through custom, especially in the Netherlands.

[35] 2.2.2. If the Price Is Higher at Auction

Second, it may happen at auctions that sometimes the common price is exceeded because the buyers are bidding against each other. It is probable that under these circumstances, a seller is not obliged to make restitution.³⁵ The reason thereof is that the price of goods offered for sale at an auction is fortuitous and uncertain. Though they are mostly sold cheaply because people have no appetite to buy them or buyers are not abundantly present, sometimes it may happen that prices rise due to the presence of a multitude of buyers with big buying appetites. It ultimately depends on good or bad luck. This opinion is to be confirmed because the just price of such a marketplace is the price that one is able to charge through

³⁴ Caietanus, *ad Ilam.Ilae*, quaest. 77, art. 1; Medina, *De poenitentia, restitutione, et contractibus*, tom. 2, cap. *De rebus restituendis*, quaest. 31, § *Similiter*; Covarruvias, *Variarum resolutionum*, lib. 2, cap. 3, num. 5; Navarrus, *Manuale*, cap. 23, num. 78; etc.

³⁵ This opinion is held by the merchant community and taught by Petrus de Navarra, *De ablatorum restitutione in foro conscientiae*, lib. 3, cap. 2, num. 36–37.

that mode of selling in the absence of fraud. Moreover, it is the common practice and use of learned and pious men in all places.

[36] 2.3. *Abundance of Goods*

A good can be bought cheaper if there are plenty of goods available and fewer buyers present, as is usually the case at the closing of the fair, particularly when a shortage of money comes on top of this. All these factors sharply decrease the common price of saleable goods. I deliberately speak about the *common* price; the *legal* price does not fluctuate so easily. For that reason, it is illicit to deviate from the legal price immediately.

[37] 2.4. *Donation*

A good can be bought cheaper than the common price also on the grounds of donation. For a seller may be held to condone an insufficiently high payment, just as he is allowed to sell dearer if the buyer is held to donate a surplus.³⁶ However, donation is never assumed to have taken place when either ignorance of the just price or necessity to enter into the sale-purchase contract are involved. It is strictly required that the contracting parties are informed about the prices of the good, and that they voluntarily enter into the contract in the absence of fraud and force. What is more, I believe that these requirements are not sufficient, unless the two parties are closely affiliated to each other by family bonds or ties of friendship. Donation is never to be assumed to have taken place under people who do not know each other, unless there are crystal clear signs of a willingness to make a gift.³⁷

[38] 2.5. *Buying a Huge Amount of Goods at Once*

If you buy plenty of goods at once, you are allowed to buy at a cheaper price than if you had bought only a small amount of goods. The reason thereof is that

³⁶ Conradus Summenhart, *Septipertitum opus de contractibus*, part. 3, quaest. 57, § *Prima conclusio* (immo *quinta conclusio*) and quaest. 58, § *Quarta conclusio* (immo *quinta conclusio*); Medina, *De poenitentia, restitutione et contractibus*, tom. 2, cap. *De rebus restituendis*, quaest. 32.

³⁷ Caietanus, *ad Ilam.IIae*, quaest. 77, art. 1, and Covarruvias, *Variarum resolutionum*, lib. 2, cap. 4, num. 9.

you save the seller from many a worry and concern he would otherwise have had. Moreover, you make it easier for him to acquire a new stock. Selling a huge amount at once, then, is quite a bit more profitable for the seller than trading his goods one by one at the ordinary price. Consequently, this mode of buying makes the seller bring down the price.

Dubitatio 5: Is It Allowed for Me to Sell at the Current Price Even Though I Know That the Price of the Good Is About to Fall?

1. Example

For example, I gathered by correspondence that a great bulk of goods will be imported, or that soon a stock of goods that had hitherto been suppressed will be brought to light. Is it allowed to conceal this knowledge and sell at the usual price?

[39] This question is debated by Antipater of Sidon and Diogenes of Babylon in the third book of Cicero's *On Duties*. Antipater has it that behaving like that would go against the duty of a virtuous man, whereas Diogenes takes the other view. Both of them do not clearly express, however, whether concealing information is at variance with the principles of justice. Cicero firmly holds it is.³⁸ The contrary is true. Therefore I answer the following:

[40] 2. Response: He Is Allowed to Sell at the Current Price

Even though the seller knows about a future dropping of the price, and the buyer is unaware of this, the former can sell his goods at the current price without committing any injustice.³⁹ The reason thereof is that a good can justly be sold at the common estimation as long as this estimation prevails, for the just

³⁸ Cicero is followed in his rejection by Johannes Medina and Conradus Summenhart: see Medina, *De poenitentia, restitutione et contractibus*, tom. 2, cap. *De rebus restituendis*, quaest. 35; Summenhart, *Septipertitum opus de contractibus*, part. 3, quaest. 62, § *Tertius modus*, and quaest. 63.

³⁹ Divine Thomas, *Ila.Ilae*, quaest. 77, art. 3, ad 4, and the commentary of Caietanus on this passage; Silvester Prierias, *Sylvestrina Summa*, part. 1, s.v. *Emptio*, quaest. 15; Dominicus Sotus, *De iustitia et iure*, lib. 6, quaest. 3, art. 2, ad 3; Covarruvias,

price is that price that is either fixed by a law of the prince or by the common estimation. This is confirmed by the fact that the private knowledge of an individual seller alters the sense and estimation of the community just as little as the private knowledge of a buyer does. Otherwise a buyer was not allowed to buy at the current price if he knew that prices would climb afterward. Genesis 41, however, proves this to be false because it depicts Joseph buying up the entire grain stocks of Egypt at the current price notwithstanding his knowledge of the impending grain shortage.

3. Objections

3.1. Following Medina you might object that this common estimation is not prudent because it has not come about through a consideration of all the circumstances determining the value of a good.

[41] However, I deny that this estimation was not prudent. It is sufficient that it came about through a consideration of the circumstances that are commonly known. Because the future cannot be foreseen by all people, it is not necessary that the estimation of a good be derived from those future events. Otherwise a good would inevitably be sold at an unfair price every time a major influx of goods is expected due to harvest, the arrival of a fleet, or any other circumstance of which none of the contracting parties knows.

3.2. You might object that goods that have been imported and are now fully present make the price fall because an abundance of goods lowers the price. Accordingly, goods that will shortly be present lower the price too, for what is only at a small distance does not seem to be at a distance at all: It is simply considered to be present.

[42] I reply that a present or imminent abundance makes the price fall indeed when people in different places know about it. This does not hold true, however, when nobody knows about the abundance. Consequently, even though there are plenty of goods at the harbor or in the city, the price does not fall as long as people ignore it. For that reason it is allowable to sell your goods at the price still prevailing.

Relectio in Reg. Peccatum, de regulis iuris in VI, part. 2, par. 4, num. 5–6; and other doctors.

[43] 4. It May Go Against Charity

I said that he can sell his goods at the current price *without committing any injustice* because sometimes it might happen that it goes against charity. For example, when you sell a bulk of goods to one single person who suffers serious damage from this contract so as to lose his rank and possessions. As a rule, however, it does not go against charity because you are allowed to stand up for yourself even though as a result your neighbor will suffer an equally serious damage. (This is clearly indicated by Thomas' statement that *a seller is endowed with ample virtue if he lowers the price or communicates his knowledge about the future times of plenty.*)⁴⁰

Nonetheless, the seller should beware of seducing people into buying by having recourse to fraud or lies. In that case he behaves unjustly, lies at the basis of the buyer's damage, and as a consequence is obliged to make restitution. For example, he calls in a straw man to convince the buyers that the price is soon going to rise.

Suppose, however, that the seller is asked if there is a fleet or abundance of goods to be expected in the future, and he feigns not to know. I would say the seller is not obliged to make restitution, because he is not obliged to speak the truth to his own serious detriment. What is more, some believe that he would not even be obliged to make restitution if he told there is not going to be a future abundance at all; this is held to be an officious lie told to avoid personal damage, comparable to the situation in which a beggar standing at the door of a rich man and expecting alms would tell another beggar passing by that the rich man has already performed the almsgiving. Of course, this does not apply when someone has no real interest in lying, given that the latter person would be held to have lied in order to damage his neighbor.⁴¹ Now, this opinion is probable if the seller is not to be deemed trustworthy. A buyer putting his trust in such a person anyway has only himself to blame if he suffers any inconvenience as a result.

⁴⁰ Divine Thomas, *Ila.Ilae*, quaest. 77, art. 3, ad 4.

⁴¹ Petrus Aragonensis, *De iustitia et iure*, quaest. 77, art. 3.

5. The Cases Discussed by Medina

5.1. General Solution

[44] Against this background we can now move to the cases put forward by Medina.

1. You know about a future siege of the city: Is it allowed quickly to get rid of the goods you have stored in the city without telling the buyers about the imminent threat?

2. Is it allowed to let your house at the usual price even though you know that rents are going to fall because the royal court moves?

3. Is it allowed to sell your grain at the current price even though you know that the magistrate has drawn up a lowering of the price that hitherto has not been promulgated? The last case can be extended to the exchange and alienation of money.

5.2. The Third Case

5.2.1. Objection

[45] As regards the third case, some believe you are not allowed to sell a bigger quantity of grain than you originally intended to sell, namely when you were still ignorant about the decree. They want the same to apply to any commodity that you know will soon diminish in price because of a decree issued by the magistrate. If nonetheless on the basis of your knowledge you sell more than you initially intended to, they believe you are obliged to make restitution.⁴² The reason thereof is that the magistrate who revealed the contents of a decree to a single person before promulgating it publicly is obliged to make restitution if the latter took advantage of this knowledge to enrich himself to the detriment of someone else. After all, it is the magistrate who was the cause of damage. Consequently, the seller who enriched himself as a result of it should also be obliged to make restitution, no matter how he gained the information.

[46] However, the opposite opinion seems to be more true. It does not go against justice to sell more goods as a result of your knowledge of that decree.⁴³ This can

⁴² See Molina and some jurists quoted in Petrus Aragonensis's *De iustitia et iure*, tom. 2, disput. 354, num. 7.

⁴³ As is expressly held by Covarruvias, *l.c.*

be proven as follows. Even though I know a decree concerning merchandise or money has been drawn up by the prince or his magistrate, as long as this decree is not promulgated, it does not have any obligating force. Consequently, the old price prevails. It is the same with laws in general: A newly drafted law meant to abrogate the preceding law remains without force until it is promulgated. For that reason I am still allowed to sell at the old price.

[47] 5.2.2. Objection

It might be allowed indeed for me to sell in good faith at the old price until the date of promulgation, just like other merchants who ignore the decree. Yet, it is not allowed to sell more goods at that price as a result of my knowledge of the decree than I would have sold otherwise. I am not allowed to avail myself personally and at the expense of others of a law that should be common to all people.

This objection is not convincing: First, no existing law forbids me to take advantage of my knowledge of that decree. Second, whether I have been induced to sell by my knowledge of that decree or on account of another reason is of no importance as to the equality or inequality that must be preserved in making a contract. If I sell a bushel of grain at the current price without knowing anything about the decree, the equality between price and good will be observed. The sale will be in accordance with justice, and I will not be obliged to make restitution, even though in the near future the price might be lowered pursuant to a decree. Consequently, equality will be observed, and the sale will be just too, although I have come to know of the decree. Third, the inner intention cannot cause an external act normally just to become unjust and requiring restitution.⁴⁴

[48] 5.2.3. Refutation of the Counterarguments

I do not accept the inference made by those who take the opposite view. It is true indeed that by virtue of his office a magistrate should try as hard as he can to prevent that the kind of decrees we discussed favor some and damage others. From this, it cannot be inferred, however, that someone who avails himself of knowledge of the kind be held, because he is not obliged by virtue of his office, to promote the interests of the citizens or to prevent them from suffering damage.

⁴⁴ See higher, cap. 12, num. 128.

Take the following example. Without reason, a magistrate excludes some sellers from the market. The price of your goods rocket. The magistrate is obliged to indemnify the citizens for the damage they suffered as a result of this price increase because, contrary to the duties of his office, he caused the prices to climb so high. You, on the other hand, are not obliged to make compensation; under these circumstances your goods were simply worth the price for which you sold them.

[49] However, if you are the real cause behind the injustice committed by the magistrate, that is to exclude other merchants from the market, then you are responsible for the damage that ensued both to the excluded sellers and to the state community. The main reason thereof is that for the sake of your advantage you enticed the magistrate to inequitable practices.

The same seems to apply if you bribed the magistrate so that he informs you about the decree before its promulgation, on account of which you were able to sell your goods dear to the serious detriment of others.

I am not sure if the second part of this reasoning is sufficiently strong. After all, the magistrate's disclosure does not seem to be at the basis of damage caused in an unjust way. Granted, it does go against his office, and, as a consequence, he may be punished on that account, just as he may be punished for having violated other secrets. I doubt whether this is at the basis of damage caused in an unjust way, as the merchant sold his goods at the just price. Therefore, even the person who disclosed the secret information does not seem to be obliged to make restitution or compensation until he is really sentenced to do that.

A similar case would be the following. In times of acute grain shortage, the government is informed about the arrival of supplies within the coming week. Despite a prohibition agreed to by all magistrates, one of them lets his friend know about the future events so that he can sell his entire stock in the meantime. The magistrate who disclosed this information does not seem to be obliged to make any compensation.

Dubitatio 6: Is the Seller Allowed to Charge a Higher Price If He Is Selling on Credit?

[50] 1. Credit Sale

Within the limits of the just price, it is licit to sell a good dearer on the basis of extension of payment. For example, should you have charged the lowest or medium price in case of payment with ready money, then you are allowed to charge the highest just price when selling on credit, for all these prices lie within the latitude of the just price.

[51] 2. Above the Highest Just Price

It is illicit to demand a price exceeding the highest just price that the good could have been sold for in cash merely on account of the extension of payment. This is the common opinion of the doctors. The reason thereof is that extension of payment in fact amounts to a kind of implicit loan. Extending the payment is just like lending back again the money that first you yourself have received from the debtor. Now, because in a loan it is illicit to acquire anything beyond the principal, it is illicit to receive more than the just price when selling on credit.

[52] If Doubt Exists About the Future Value of the Good

Remark the following. If a good now worth 10 is believed to be worth more or less than 12 at the future moment of payment, you are allowed to sell at 12 on credit, at least if initially you had decided to preserve the good until that time.⁴⁵ In that case, the seller is no longer charging a surplus on the basis of extension of payment but rather by virtue of profits foregone. Consequently, he could even have demanded the surplus when being paid in cash—on the same assumption that initially he had intended to preserve the good until later. In this respect, Caietanus errs when teaching that in a credit sale it is licit now to negotiate about the future, higher price foreseen at the moment of payment, even if the seller had not decided to preserve his good until then. He argues that from the perspective of the buyer, the contract is accomplished as soon as he has conveyed the price.

⁴⁵ As is evident from Decretal. 5, 19, 6 (Alexander III), which has been discussed above (dubitatio 4).

Because the good is worth more at the time of conveyance than at the time of the agreement, the equality principle requires the buyer to pay a higher price.

Yet, Caietanus' view is not in line with the common opinion of the doctors.⁴⁶ They hold that the very conveyance of the good to the buyer makes the seller lose his ownership and transfers it to the buyer. Thus, if the price of the good rises, it rises to the advantage of the buyer. The seller is not entitled to demand his share of the price increase, unless he had intended to preserve the good for himself. The common opinion does not contradict Decretal. 5, 19, 6, because this decree concerns a seller who had initially intended to preserve his good. This is explained by the gloss and the common opinion of the doctors. It can also be derived from Decretal. 5, 19, 19, where a similar case is treated.

As to Caietanus' argument, I reply that a sale-purchase contract is essentially concluded by a verbally expressed mutual consensus. Moreover, the price of a good has to be determined according to the value of the good at the time of conveyance, that is when the ownership is transferred to the buyer. In everyday speech, though, it is said that the contract is concluded through the payment of the price because that constitutes the purpose and the end of the contract.⁴⁷

[53] 3. On the Basis of "Profits Foregone"

It is licit, however, to raise the price by reason of profits foregone or damages incurred through the extension of payment.⁴⁸ As it is licit in a loan to demand a surplus beyond the principal on account of this legal ground, so it is in a sale beyond the just price because extension of payment is a kind of implicit loan.

[54] 4. On the Basis of the Risk of Capital and Troubles Concerning Payment

It is also licit to demand a surplus beyond the just price on the basis of the risk of capital to which you are exposed in selling on credit. Similarly, on the

⁴⁶ Covarruvias, *Variarum resolutionum*, lib. 2, cap. 3, num. 6; and Medina, *De poenitentia, restitutione et contractibus*, tom. 2, cap. *De rebus restituendis*, quaest. 38, § *Aliam quintam*.

⁴⁷ See above, dubitatio 1.

⁴⁸ This is clear from cap. 20, dubit. 11.

basis of the expenses and troubles you fear in recovering the money.⁴⁹ However, some doctors do not approve of the first legal ground.⁵⁰

This opinion is proven. First, because in all men's view it is estimable in money that you expose yourself to such great danger.

Second, the seller can call in a guarantor. Now, just as the latter can demand the just price of providing surety, the seller can also when the buyer wishes him to stand surety for payment himself.⁵¹

[55] Conditions

The following should be noted though. First, the risk must be real and not fictitious. Second, the seller is not allowed to force the buyer to make him rather than somebody else a guarantor. Third, the seller is not allowed to demand a price higher than the price he would be prepared himself to pay, if necessary, for passing on the risk to somebody else. Fourth, the seller should signify to the buyer on the basis of which legal title he is demanding a surplus, certainly if doubts exist whether the buyer really agrees to that title or not, for maybe he does not want to give anything on account of that specific title.

[56] 5. Goods Usually Sold on Credit Can Be Sold Dearer

There are goods that are usually sold only on credit or with payment on deferred terms. It is licit to sell them dearer than if they were retailed in cash.⁵² The commodities, for example, that are imported in massive quantities from the Indies or elsewhere and shipped off to the main ports are subsequently distributed

⁴⁹ Ioannes Medina, *De poenitentia, restitutione et contractibus*, tom. 2, cap. *De rebus restituendis*, quaest. 38, § *Ad tertiam causam*; Antonius Cordubensis, *Tratado de casos de consciencia* [= *Summa Hispana*], quaest. 84; Petrus de Navarra, *De ablatorum restitutione in foro conscientiae*, lib. 3, cap. 2, num. 110.

⁵⁰ Dominicus Sotus, *De iustitia et iure*, lib. 6, quaest. 4, art. 1; and Navarrus, *Manuale*, cap. 23, num. 83.

⁵¹ See cap. 20, dubit. 13. There you will find a more elaborate proof and a reply to Sotus and Navarrus, who both develop the same argumentation.

⁵² This is derived from Sotus, *De iustitia et iure*, lib. 6, quaest. 4, art. 1, ad 4. Covarruvias, *Variarum resolutionum*, lib. 2, cap. 3, num. 6, referring to Salicetus and Decius believes this opinion to be probable.

among various merchants who send them to different places where they are to be retailed one by one in cash. In Antwerp, for instance, of the goods imported from Venice, some are sold on a term of 10 months, others on a term of 8; goods from Florence are sold on a term of 10; from Lucca on a term of 9; from Naples and Milan on a term of 6 or 8.

In the end, all kinds of goods are sold mainly on a term of 6, 8, 9, 10, or 12 months. It is not even exceptional that these terms are doubled under the binding condition that the buyer already pays half of the sum around midterm and the rest at the end of the term.

[57] The reason thereof is that these commodities cannot be sold at ready money in such quantities as are useful to the political community or wanted by the buyers. Therefore, it was necessary to introduce a mode of selling whereby it is possible to pay on credit, which is on deferred terms. As this mode attracts many buyers, it causes the prices of goods to climb. Thus, they are not dearer precisely because of extension of payment. Rather, the rise in prices is a side effect of this particular mode of selling, which has the potential of attracting numerous buyers. In addition, because a price is not indivisible in its nature, it often happens that in fact the price demanded in a credit sale does not at all exceed the rigorous just price licit in a cash sale. Furthermore, extension of payment is almost always inconvenient to merchants. Not infrequently, we see them negotiate in order to reduce the term agreed upon in return for a remission of more or less than 8 or 9 percent a year, depending on the length of the term. It does not matter that one person in particular does not suffer from this inconvenience because that does not prevent the common price from being effective.⁵³

[58] The Just Price of Goods Sold on Credit

In sum, the higher prices usually charged if goods are sold on credit cannot easily be condemned, unless they are unjust for another obvious reason. One can rightly assume that the true price of a particular commodity in a particular mode of selling price is precisely that price that has been imposed by the merchants in consideration of all the relevant circumstances. However, if the magistrate fixes a price, that price should be observed.

⁵³ This has already been demonstrated in the preceding chapters.

Dubitatio 7: Is the Buyer Allowed to Offer Less Because of Advance Payment?

[59] 1. Advance Payment

It is illicit to pay a price lower than the lowest just price merely by virtue of advance payment itself.⁵⁴ The reason being that this would amount to making a profit beyond the principal on account of an implicit loan. Paying in advance is like implicitly lending money now to be offered an implicitly usurious restitution later when the good, increased in value, is delivered. The surplus value of the good as compared to the price is given by virtue of a prior agreement on the basis of advance payment, that is, on the basis of the use the seller gets of the money for the period in between payment and delivery.

[60] 2. Legal Grounds to Buy Cheaper

It should be noted, however, that sometimes extrinsic factors make it licit to buy cheaper by reason of advance payment; for example, if the buyer suffers damage, foregoes profits, runs the risk of dealing with a fraudulent seller who will not respect the deadline, delivers filthy goods, or is not going to bring them altogether. All these circumstances are estimable in money. Ultimately, this mode of selling makes the price fall because it attracts plenty of sellers, whereas it repels the buyers.

[61] 3. The Wool Trade

Consequently, it is not easy to condemn the common practice of buying wool cheaper in advance. This occurs in Spain and in other regions, as an arroba of wool (which equals 25 pounds) is usually bought there in advance at a much lower price than it is worth at the time of delivery.⁵⁵

⁵⁴ According to the common opinion of the doctors.

⁵⁵ This practice can be defended according to Sotus, *De iustitia et iure*, lib. 6, quaest. 4, art. 1, ad 4; Cordubensis, *Summa Hispana*, quaest. 85; and Molina, *De iustitia et iure*, tom. 2, disput. 360, who very recently gave an elaborate account of the current wool practice.

Proof

3.1. Profits Foregone

Merchants buying on advance payment suffer a loss of profit precisely because of the anticipation. For several months before the delivery of the wool, they lack the money by means of which they could have made profits through money-exchanging activities in the meantime. A sign thereof is that they readily pay an additional one or two crowns per arroba if the seller permits them to extend the payment until the moment of delivery or even two or three months after delivery. Therefore, a buyer is allowed to enjoy a discount that equals the estimation of the profit he could have hoped to make and of which he deprived himself by paying in advance.

3.2. Fear of Perfidy

Merchants often fear default on the part of the seller. He might not deliver the total weight of wool promised, for instance, or deliver filthy wool or wool of bad quality. A sign thereof is that buyers readily pay somewhat more than usual, say half a crown per arroba, if they can trust the seller to bring goods of the right quality. Moreover, the extra sum they are willing to pay per arroba is all the higher the bigger the stock is of the seller because that makes the buyers less fearful of default on the part of the seller. Now, this fear is estimable in money. Therefore, it causes the estimation of the goods to decrease.

3.3. Scarcity of Buyers

Just as the particular mode of selling on credit makes the price rise in that it attracts plenty of buyers, conversely the particular mode of selling on advance payment makes the price fall in that it attracts only a few buyers but plenty of sellers. There are few who buy wool by this mode of sale-purchase, and many who sell. Therefore, the price in this mode of selling is lower than if the good is delivered immediately following payment.

3.4. The Good Is Less Convenient to the Buyer

Fourth, a good that needs to be delivered to the buyer only after a few months is worth less than a good to be handed down to him immediately. A present good and the immediate ownership over it offer many opportunities that a future good

does not. Thus, if he buys and gives the money at once, he is allowed to pay less than he should have paid at the time of delivery.

*[62] 3.5. Even in the Other Case, the Goods
Would Not Get a Higher Price*

3.5.1. Argumentation

Let us suppose that sale on advance payment did not exist, for instance because it was forbidden by a decree or because merchants were not prepared to pay in advance. In that case, the wool would not get a higher price than if advance payment had taken place. As experienced merchants claim, and as is proven by reason, the wool would rather be sold at an even lower price, for the price would seriously fall due to the huge amount of wool coming available at the time of shearing. What is more, the sellers would try to sell the wool immediately to avoid the costs of storage and to get the money they badly need at that moment to pay their debts and buy fodder for wintertime. To conclude, the sellers are not wronged by those advance payments because ultimately they get the same price as if no advance payment existed.

3.5.2. Objection

You might object that the value of the good at the moment of delivery exceeds the price paid in advance, and that, as a result, this price is unjust. This inference is proven as follows. The just price of a good is the value of the good at the time of delivery and not at the time of the agreement. If I buy grain worth 10 crowns at a price of 10 through advance payment, but this grain is only to be delivered after 4 months when the grain is worth 14, then the purchase contract is inequitable and implicitly usurious because the grain is worth more at the moment of delivery. Similarly, buying a pound of wool at 14 crowns that is in fact worth 18 crowns at the moment of delivery makes the purchase contract inequitable and implicitly usurious. The excess value of the good as compared to the price is a profit directly stemming from advance payment.

[63] 3.5.3. Response: Settlement of the Dispute
When the Price Is Not Attended at the Time of Delivery

I reject the inference made. The just price of a good is its value at the moment of delivery, unless on external grounds the good is estimated less at the moment of contracting, for instance, if there happen to be few buyers and many sellers because of the mode of selling at that time, or if buyers forego profit and fear fraud and default on the part of the seller by reason of this mode of sale-purchase. In that case, a good may well be considered to have a higher naked value of its own. It still is not worth that value because of the circumstances just mentioned. In addition, the just price of a good at the moment of contracting should not be estimated according to the price at the moment of delivery. If done, then the price is influenced by the contracts concluded before: due to the sale-purchase agreements on advance payment a scarcity of goods has been created until the time of delivery, and, concomitantly, prices have risen. Now, since this scarcity depends on the preceding contracts, it is not allowed to take the price of the goods at the time of scarcity as a measure for the prices agreed on in the preceding contracts. Otherwise you would have to pay the price prevailing in times of scarcity even if you buy in times of abundance, but the seller is unable to deliver the good immediately. That would be absurd.

[64] Consequently, it is required that the price at the time of delivery is not derived from the price brought about through the sales on advance payment. It must be derived from elsewhere, so that the good is worth that higher price at the moment of delivery even if such sales had not taken place, but that obviously is not the case. If the wool had not been sold through many a contract of that kind, it would not be dearer at the time of delivery than it was at the time of the prior agreement. Thus, the wool sold dear at the time of delivery is not at all the same wool as has been sold on advance payment. It is the wool supply that is still left and is dearer because of its scarcity. If all the wool already sold in advance would be put for sale at the moment of delivery as if it had not yet been sold, it will not be dearer. It is required, however, that the price of a good sold on advance payment is derived from the moment of delivery.

**Dubitatio 8: Is It Allowed to Buy a Bill of Debt
or Bond below Its Nominal Value?
For Example, You Now Buy at 96 or 97 Guilders
a Right on Payment of 100 Due Next Year**

[65] I suppose that it is allowed to buy that kind of bonds (plural in Latin, but I do not know if this is grammatically correct in English?) at a lower price if it will turn out to be difficult, risky, or very inconvenient to obtain payment. Equally licit titles are profits foregone and damage incurred.

Yet, the crux of the problem is whether these bonds can be bought at a lower price out of themselves, that is, when none of the titles mentioned interferes. There exist two diverging opinions regarding this question.

**1. Some Doctors Contend That It Is Allowed to Buy Such
Bonds at a Lower Price⁵⁶**

Proof

[66] 1.1. Common Estimation

As is evident from experience, when such bonds are offered for sale like merchandise, they are estimated by the common judgment of people to be worth less than ready money. After all, ready money offers many opportunities that bonds do not. Consequently, it is allowed to buy them at a lower price. This inference is right, because the just price of any saleable good is the price settled by the common estimation of men. Why not apply the common estimation to the bills of debt, if in all other cases the just price is held to be the price based on that estimation?

[67] You might object that in this case the common estimation is based on the neediness of those who are more in want of ready money. Hence the estima-

⁵⁶ Panormitanus, *Commentaria in quartum et quintum Decretalium libros*, super quinto Decretalium, *De usuris* rubrica 19, cap. 6 (*In civitate*), num. 7; Innocentius IV, *In quinque libros Decretalium commentaria*, super quinto Decretalium, *De usuris* rubrica 19, cap. 6 (*In civitate*); Caietanus, *Peccatorum summula*, s.v. *Usura implicite commissa*, casu 3; Navarrus, *Manuale*, cap. 17, num. 231. The same opinion was taught by the most learned Cardinal Bellarminus in Leuven, and by Petrus Parra in Rome.

tion is not prudent and, on account of that, should not be applied. Otherwise, it would be licit to demand twice as much from a person prepared to give that sum because of his need.

Yet, the inference made in the objection is not valid. The estimation of nearly all goods depends on the common need people are subjected to. If this common need were absent, nearly all goods would be considered worthless, like medicine, for instance, or food and shelter. Moreover, it is not required that this need is felt by everyone. It suffices that many or most people are in need of that good in order for the common estimation to be valid. In this particular case, those bonds are less needed than ready money and do not offer the same potential of benefits and opportunities to make a profit. Therefore, they are prudently estimated to be worth less.

It does not matter that you in particular do not prefer ready money to such bonds. That is just an accidental fact because their price does not depend on your estimation but rather on the common estimation. Likewise, you could sell medicine at the common price even though you yourself are never in need of it.

[68] 1.2. *Personal Annuities*

Let us assume those bonds were not of lower value than ready money. Then it would follow that the sale-purchase agreements on personal annuities—general practice in a great many places—are to be deemed unjust. Indeed, these contracts amount to nothing else but to buying a right to receive annually, say, one-sixteenth part of the principal so that after sixteen years the principal is restored in full. From the point of view of justice, it does not matter at all whether the repayment takes place by yearly installments or by lump sum at the end of the contract. If a right to receive 96 by 16 annual installments is worth as much as 96 in ready money, it will be illicit for the buyer of the annuity to receive anything beyond that sum after the sixteenth installment has taken place. Neither will it be licit for the buyer to receive the principal in full if the seller wants to buy back the annuity. In that case, the installments already paid should be deducted from the entire principal. However, both of these inferences run counter to current practice in plenty of provinces where the papal bull of Pius V has not been adopted, and it is utterly hard to condemn that practice as being inequitable.

[69] 1.3. Roman Law

It is stated in Dig. 50, 17, 204 that *it is less to have an action than to have the thing*. Bonds, then, are of less value and can be bought cheaper. Because of the danger of concealed usury at this point, some doctors add that this view should not be accepted as a general rule. It should only be applied with regard to annuities having a price fixed by a public law or common estimation and to other rights that have already been issued before. For example, if Peter owes me 100 guilders payable in two years by virtue of a loan or a sale-purchase contract, and I want to sell my bill of debt to you, then it is allowed for you to buy my right for 97 or 98 guilders.

Question: Can the debtor himself buy the bill of debt so as to release himself of his obligation?

Answer: The debtor is allowed to buy.

If the creditor offers that bill of debt for sale, there seems to be no reason for banning the debtor from buying that bill in the way anybody else can.⁵⁷ The debtor need not be put in a condition worse than that of other people in buying the bill of debt.

Unless he caused the trouble.

However, this does not apply in case the debtor is the immediate cause of the sale because of his unwillingness to pay. Then, he is not allowed to buy at the same price as anybody else is paying. The reason thereof is that he is obliged to stop making trouble and make it clear that payment will pass off smoothly and safely in due time. Consequently, he cannot estimate the debt to be lower on account of the trouble he causes. Others, however, can, because they are not causing the trouble and hence are not obliged to stop it.

2. The Contrary Opinion Is Safer

The other opinion, namely that it is not allowed to buy such bonds cheaper, is the common opinion of the doctors.⁵⁸ I take this view too. Proof:

⁵⁷ Navarrus, *Manuale*, cap. 17, num. 231.

⁵⁸ Medina, *De poenitentia, restitutione et contractibus*, tom. 2, cap. *De rebus restituendis*, quaest. 38; Sotus, *De iustitia et iure*, lib. 6, quaest. 4, art. 1, ad 4; Silvester Prierias, *Silvestrina summa*, part. 2, s.v. *Usura* 2, quaest. 14; Gabriel Biel, *Collectorium circa quatuor libros Sententiarum*, lib. 4, part. 2, dist. 15, quaest. 11, art. 3, dub. 4.

[71] 2.1. More Common and Safer

This opinion is more widely accepted and safer.

2.2. Implicit Money-Lending

A debtor who owes 100 guilders and pays less for the bill (say 96) commits usury because of the anticipation, for he implicitly lends 96 until the payment date, and then receives 100 because the debt of 100 guilders is extinguished. Now, this is exactly what happens when someone buys a bond worth 100 guilders at the price of 96. Consequently, etc.

Objection

The major term of this syllogism may be true if the buyer pays less merely on account of his anticipating the payment date. The situation is different, however, if he pays less because he acts not like the payer of a debt but as the buyer of someone else's right—a right that in the whole community is neither estimated nor sold dearer whenever it is put for sale like other merchandise. Of such importance is the legal title or the form on the basis of which the contract is made. Yet, this distinction might seem to be a product of the mind rather than a division to be found in reality. Therefore, I continue this proof as follows:

[72] 2.3. Concealed Usury

If the buying of bonds at a lower price were accepted, then all kinds of usury could be cloaked. A usurer could maintain that he is not willing to enter into a loan of consumption but still is prepared to buy a right on 100 or 200 guilders, and every borrower is able to impose this duty on himself.

Objection

There will not be concealed usury if such a right or claim is bought by the usurer for a price not lower than the price for which it is publicly sold against collateral.

Response

Yet, I have already discussed this possibility and disapproved of it in practice.⁵⁹

Objection Continued

An unconvincing addition to the objection is the following:

The objection should not be applied in case someone imposes upon himself the duty to pay a certain amount with the explicit intention to sell this duty immediately afterward as a right (annual rents are an exception), for this mode of contracting is not received, as it is more obvious indeed to enter into a loan for consumption. Consequently, this behavior is rightly considered to be usurious. However, we should make a distinction with regard to bills of debt or rights that have been constituted long before for another reason. That kind of bond is very frequently sold on the markets and always for a cheaper price than their intrinsic value.

Response

Yet, I hold this addition not to be convincing. In practice, this distinction does not exist. If no usury is committed in the sale-purchase at a discount of an old bond, why, then, is it committed in buying a new bond? Thus, the buyer of this bond is to be considered not a usurer but rather a miser and a harsh man toward his neighbor.

[73] 2.4. *Reductio ad absurdum*

Let us assume that a right on payment of 100 guilders at the end of the year is of less value than 100 ready guilders. It will follow, then, that someone buying at 100 ready guilders is sinning against the virtue of justice and obliged to make restitution.

I admit that this argument is not convincing because its conclusion is false. First, 100 ready guilders do not exceed the limits of the just price at all: they just pertain to the rigorous price. If someone is willing to give 100 guilders, the seller is allowed to accept that amount. Second, with this kind of bond the seller

⁵⁹ See higher, cap. 20, dubit. 14.

is not obliged to lower the price even though payment will be difficult. He can simply demand the intrinsic value of the bond without taking into account the difficulties or the extension of payment. Through common practice, it is received that a seller tries to get the highest price possible as long as it remains within the limits of the amount due. The same applies to old annuities. Thus, if he can find a buyer having a sound knowledge of the conditions of the good and still prepared to give that much, then he can justly accept the price.

3. Refutation

The first argument in favor of the former opinion can be refuted as follows. Bonds are estimated less either because there is some risk or difficulty involved or because the buyer who pays ready money deprives himself of potential benefits and opportunities that a bond does not yield him.

The second argument in favor of the former opinion can be refuted in that there is always some risk involved in the selling of personal annuities by reason of the length of time. Moreover, not the yearly installments but rather the right on them is bought.⁶⁰

Dubitatio 9: Is It Allowed Sometimes to Buy Bills of Debt, Also Known As Libranciae, at Half the Price in Case Payment Is Difficult or Uncertain to Obtain?

[74] Answer

It is often rightful to do so, namely when obtaining payment is so difficult or unsure that precisely on the basis of this accompanying circumstance the bills of debt are prudently estimated at half of their price. For example, if a bill of debt is intrinsically worth 100, yet the attending difficulty or uncertainty is so severe that any merchant would be happy to purchase it at 50, then it can be bought for 50 and a little bit lower. Depending on the extent of the difficulty and uncertainty, it may even be licit to buy at 40 or 30.

⁶⁰ See below, cap. 22, dubit. 5.

[75] Objection: What If Payment Is Not Difficult to Be Obtained for You in Particular?

Even though other merchants may experience difficulties in obtaining payment, Peter and his partners will not because they enjoy the favor of the prince and his officers or have concluded contracts with him. Consequently, they should not be allowed to buy at that moderate price because the ultimate reason for lowering the price is absent in their case. On account of this, some believe that it is not allowed for merchants who concluded contracts with the king to buy bills of debt originally issued to his soldiers or so-called *libranciae militares* at a discount, at least not at a noticeable one, for they are certain of integral payment without difficulties.

[76] Refutation: The Contrary Opinion

However, the contrary opinion is probable and more true, namely that this kind of bill can be bought at the lower price without committing any injustice.⁶¹ The reason thereof is that the market price of these bills of debt does not depend on the advantage of one person or a few people, but rather on the public estimation, that is to say, on the value they would get if they were publicly offered for sale on the marketplace with the whole town coming together and responding to the auctioneer.

Confirmation: The Estimation of Bills of Debt Depends on Public Judgment

The latter opinion is affirmed by the fact that these bills of debt do not have a price fixed by the law. Hence, the price needs to be determined by common estimation. Consider the following case. The prince of the Ottoman empire owes you 1,000 guilders and there is absolutely no or very little hope of obtaining payment unless you invest a lot of money and effort in it. Then, it is licit for you to buy the bill of debt cheaply, say at 100 or 50 guilders, even if you in particular know about a peculiar way to easily recover the integral sum. This is to be considered your good luck.

⁶¹ One of the doctors taking this view is the most learned Ludovicus Molina in his *De iustitia et iure*, tom. 2, disput. 361.

It Often Goes Against Charity

Nevertheless, merchants often sin against charity if they are not willing to pay a reasonable price to poor soldiers who by severe need are forced to sell their bills of debt, whereas they themselves make enormous profits.

Remarks

1. It Is Allowed to Sell the Bills of Debt at Their Intrinsic Value

It should be noted, however, that those who dispose of bonds can rightfully decide not to take into account the difficulty or uncertainty of obtaining payment and refuse to sell their bills of debt unless they receive the total sum. It is prevailing custom to sell such bills at the highest possible price in the absence of fraud or ignorance and within the limits of the sum they contain.

2. Collectors and Treasurers

It should further be noted that these bills of debt cannot be bought at such a low price by the debtor himself or his ministers, who by virtue of their office should pay out the bonds, because they are the very cause of bad payment.⁶² More often than not, the collectors or treasurers of princes commit grave sin in these matters. This does not hold true, of course, if absent scandal they are not the cause of bad payment.

Dubitatio 11: Is a Seller Obligated to Reveal a Defect in the Good He Wants to Sell?

1. Assumptions

[82] 1.1. Defects of Merchandise

It is inequitable to sell a good having a defect with respect to quantity or to quality at the same price as a good that lacks a similar defect.⁶³ (A defect in quantity concerns an unjust weight, an unjust number, or an unjust measure.) The reason thereof is that such a contract is not based on the equality required. This

⁶² See the discussion above, dubit. 8.

⁶³ Thomas, *Ila.IIae*, quaest. 77, art. 2–3.

sin is committed by wine-sellers mixing water into wine, and by grain-sellers intermingling grain of good and inferior quality, as for instance the salesmen in Amos 8:6 saying: “*let us sell the grain of bad quality.*” There are also people who, by tricks, make heavier paint pots that in the end are sold as if they had not been spoiled. Many businessmen in Antwerp and elsewhere have grossly enriched themselves by applying this method. Yet, the buyers are cheated and would not have been prepared to pay the price asked for that quantity of the good should they have known about the fraud. Finally, anyone using a fraudulent measure commits a sin and acts against Proverb 11:1: “*False scales are an abomination to God.*”

[83] Mixing

Suppose, however, that, following the mixing, the good did not become of inferior quality than similar goods sold by others. If the seller demands the same price as the other sellers do, he cannot be condemned as a matter of justice; in no way does he harm the buyer on account of the fraud. Why would it not be allowed for him to bring his good in the state that the goods of the other sellers are in, and, subsequently, sell them at the same price? This frequently occurs in the sale-purchase of wine, grain, and similar goods. Wine of supreme quality is mingled, then, with wine of lower quality or water, and genuine grain with unrefined corn. This practice is allowed on the condition that the wine or grain added is not of inferior quality than the wine or grain regularly sold by other merchants. This is Lopez’s opinion, even if a price has been fixed by the community.⁶⁴ I am inclined to take the view, however, that such a person should be punished on charge of forgery and deceit, for such admixtures are fiercely hated by the community and earn the forgers themselves a bad reputation.

[84] 1.2. *Buying a Precious Good at the Price of an Inferior Good*

By the same token, it is inequitable to buy a good that does not have any defect at the price of a defective good or to buy a precious good as if it were a cheap one. For example, when a gem is sold as glass. This rule applies, even if the seller, due to his ignorance, does not estimate his good higher than a defective or

⁶⁴ Ludovicus Lopez, *Instructorium conscientiae*, part. 2, cap. 42.

cheap one. The reason thereof is that the contract does not preserve equality, for the seller does not intend to make a donation with respect to the sum exceeding the just price. Quite the reverse, he wants to sell the good completely and get a just price in exchange for it.

[85] If, however, in a particular region, a good is commonly estimated to be cheap because people do not know that it is highly valued elsewhere, then one can buy it there at a low price. This is notably the case in South America where gold and other precious goods are exchanged for mirrors, bells, pocketknives, and that kind of item.

Likewise, if in a certain city gems of extraordinary intrinsic value are estimated lowly by the local dealers, then it is still allowed to buy them at the low price even if one knows that actually they are of great value. In this market they are estimated to be worth no more. Finally, you are allowed to buy a bunch of herbs sold as fodder at the common price, even if you know that the bunch contains some very special herbs. The reason thereof is that the good as a whole is not worth more with respect to the specific use it is normally bought for.

2. Response

[86] 2.1. *If Asked About a Defect, the Seller Is Obligated to Reveal*

2.1.1. Hypothesis

If the buyer asks the seller whether the merchandise is of good quality and void of any defect, or if he wants the good for a specific use, then, as a matter of justice, the seller is obliged to reveal the defects of the goods that are most hidden, or to offer the good that the buyer particularly desires. This is the common opinion of the doctors.

2.1.2. Proof

The common opinion is proven because by virtue of his office the seller is held to tell about the condition of his merchandise, especially when asked about it by the buyer. Otherwise a kind of fraud that is unavoidable for the buyers would be rife, for, as a general rule, nobody knows the condition of the good better than the seller himself. When the seller affirms that the good is void of any defect or even praises its qualities, although in fact it has a hidden defect, he does injustice to the buyer. More specifically, if in this manner he has enticed somebody into

the contract who would otherwise not have bought at all, the contract is invalid on the grounds of deceit causing the contract.⁶⁵

[87] If the buyer would still have been willing to buy the good, but not at the price he now paid because he could easily have found a good of better quality at that price, then the contract is not invalid; the deceit is not causing the contract itself but merely the excessiveness in the price. In this case, however, the seller must make restitution of the gap in between the price he charged and the lower price for which the buyer could have acquired the good, for the deceit concerns precisely that sum.

By the same token, the seller is held if he offers a good that is useless or inappropriate for the specific use the buyer wants from it; for example, when a worn-out piece of cloth is sold as if it were new, bad spices as fresh or contaminated grain as sound. This applies when the seller opens up his box of tricks to make it more difficult to detect the defects of the good so that he can sell it as if it were intact in which case he is not saying anything; he is still lying about the quality of the good through his acts. For instance, if you pour a drop of boiling silver over the ears of a horse to make it shake off its slowness and make a good impression.

2.1.3. Remedies

[88] The Seller Is Held for Subsequent Damage

In all these and similar cases in which deceit based on words or acts causes the contract, the seller is held for all damage ensuing from the deceit, unless he admonishes the buyer in time. This is to be understood about all damages that in probability could have been predicted to ensue from the deceit in question. If you sold a sick instead of a healthy sheep, for instance, then it is likely that the whole flock has been infected, or if you sold defective building materials, it is small wonder that subsequently the whole house has collapsed.⁶⁶

[89] Rescission of the Contract?

Question: Is the seller held to rescind the contract and make restitution of the price?

⁶⁵ As can be derived from cap. 17, dubit. 5.

⁶⁶ This is explicitly stated in Dig. 19, 1, 13.

Answer: If the good has remained intact, then he is held to inform the buyer and give him the possibility of rescinding the contract if he so wishes. Yet, if there is no need to fear that the buyer will suffer any noticeable incommodity, and if otherwise at the given price the good proves to be useful for the buyer, then he is not held. He risks committing a mortal sin, though. However, all in all, he is not held, because he did not cause noticeable damage, even if he sinned. In this manner, the practice of those who sell Moselle as if it were Rhine wine can often be excused away, as long as the just price is not exceeded. If the good has not remained intact, for example because it has been consumed, and the buyer did not suffer any detriment, then the seller is not held—on the assumption that the just price has not been exceeded. If the price did exceed the just price, then contractual equality needs to be restored through an amicable agreement.⁶⁷

2.1.4. The Most Hidden Defects

I said that *the seller is obliged to reveal the defects of the goods that are most hidden* because he may consider the manifest defects to be easily detectable by the buyer. If he believes, however, that they are not detectable, then he is held to reveal the manifest defects, for a buyer generally asks about all kinds of defects.

[90] 2.1.5. If the Seller Extols the Merits of His Good

It is to be noted, however, that even though a seller praises his good higher than it is really worth, or conceals a defect that does not make it noticeably less useful for the purpose for which it is sought, neither is the contract to be deemed void nor is the seller obliged to make restitution. The reasons thereof are manifold. First of all, it is common practice among the merchants, and the buyers widely know that. Furthermore, it does not cause the buyers any noticeable damage. Finally, it would be far too harsh to demand from such an eminent group of people to observe such a strict rule as to reveal every single defect. This is especially true when the buyer does not pose any specific questions about possible defects but merely asks the seller to deliver him a qualitative and useful product.⁶⁸

⁶⁷ See Lopez, *Instructorium conscientiae*, part. 2, cap. 42, and the other advocates of this opinion cited by him.

⁶⁸ Such is the opinion of Lopez in the passage quoted, and of Victoria and other authors cited by him.

[91] 2.2. *If the Buyer Relies on His Own Judgment*

2.2.1. Hypothesis

If the buyer relies on his own judgment and chooses a good at random without posing questions apart from the price, the seller is not committing a sin against justice, even though he does not reveal a hidden defect. He should only beware of selling above the just price and adjust, that is, lower the price according to the defects of the good. This is clearly stated by Divine Thomas who only requires the seller to reveal a defect that might make the buyer run a risk—and that he can still do after concluding the contract.⁶⁹

2.2.2. Proof

This is proven by the fact that the seller is not committing any injustice in the contract itself because he is selling his good at the just price. Furthermore, he is not enticing the buyer into the contract through unjust practices. Neither through lying nor fraud is he causing the buyer to enter into the contract. Consequently, in this case, he is not committing any injustice. In sum, if there is no injustice in the contract itself or in the way in which the contract was entered into, there is absolutely no trace of injustice here.

The fact that he is not revealing the defect is not a valid counterargument because the seller is not obliged as a matter of justice to do that. In fact, the task of exploring the goods falls on the buyer. Consequently, the buyer cannot recover the damage from a seller who did not reveal the defects. He should rather blame the deception on himself, because without asking the opinion of the seller, he relied solely on his own judgment to buy the good.

The second counterargument is inappropriate too. It consists of the Roman maxim, to be found in Dig. 19, 1, 13 and Dig. 21, 1, 1, that “*a seller should reveal all hidden defects to the buyer, if not an actio redhibitoria will be granted.*” This maxim is not a valid counterargument, since it pertains to positive law, and, consequently, is only in force where it is received in practice. Alternatively, it needs to be understood in the case in which the buyer explicitly posed questions,

⁶⁹ See Divine Thomas, *Ila.Ilae*, quaest. 77, art. 3, and *Quaestiones quodlibeticae*, quodlib. 2, art. 10. This view is shared by Sotus, *De iustitia et iure*, lib. 6, quaest. 3, art. 2; Saint Antoninus, *Summa Theologica*, part. 2, tit. 1, cap. 17, par. 6; Lopez and Victoria, *l.c.*

or in the sense that an action to rescission or restitution will only be given if decreed by the judge.

2.2.3. Remarks

[92] 1. It should be noted that a seller who conceals defects by means of tricks cannot be excused because his deceit causes the contract, as has been said before. The same holds true if he exhibits the defective good along with qualitative products, so that a buyer cannot possibly distinguish them from one another.

2. Even though not to inform a buyer relying on his own judgment does not go against justice, it may go against charity; for example, if the seller notices that the buyer is deceived through naïveté, and if he thinks that the good might be useless for this person, though it may be very useful for other buyers indeed.

3. If the good is thought to be noxious on the ground of the hidden defect, then it seems like the seller is obliged to reveal the defect as a matter of justice too, at least after concluding the contract. This is the common opinion of the doctors, for by the mere fact that he is offering for sale a good with a hidden defect, the seller is obliged to prevent himself by virtue of his office that nobody suffers from its noxiousness. Otherwise, he seems to be the cause of the ensuing damage, like in the case of a wild horse, sheep suffering from a disease, or defective building materials.⁷⁰ Nevertheless, I repeat that in my view the seller is not obliged to do this before the conclusion of the contract if the buyer is relying on his own judgment, as long as after concluding the contract, the buyer can be admonished against all damages and inconveniences of the good.⁷¹

Dubitatio 16: Is the Mutual Sale-Purchase of the Same Good at a Different Price, a Practice Known by the Spaniards as *Baratae-Mohatrae*, Licit?

[129] 1. Example

A person *A* asks a merchant *B* to lend him 100 guilders. *B* refuses to do so but proposes *A* the following twofold contract. *B* sells *A* merchandise on credit

⁷⁰ See Dig. 19, 1, 13.

⁷¹ See Sotus and Lopez, *supra*.

at the highest just price, say 105 or 106 guilders, in such a way that *A* is free to sell it to anyone else against ready money. Now *A* offers it for sale to the very person *B* who buys it back in exchange for ready money but at a lower price, namely the medium or lowest just price, say 100 guilders. In this manner, *A* still owes *B* 105 guilders.

[130] 2. Mohatrae-Baratae

2.1. *The Opinion of the Doctors*

Some doctors contend that this practice is unjust and is applied to cloak usury if the buyer is the same person as the original seller.

2.2. *My Own View*

Yet, it is more true that as long as the limits of the just price are not exceeded this practice is not unjust. In the credit sale, the rigorous just price is the maximum; in the repurchase, the lowest just price is the minimum.⁷²

2.3. *Argumentation*

The reason thereof is that the contract consists of two sales, each of which is perfectly just: The first sale is executed at the just price, however rigorous it may be, as is the resale of the same wares. It is not relevant that the resale is executed at the minimum price. First, because the lowest just price is a just price anyway and, certainly is so, if payment is performed against ready money. Second, because goods brought to the market on proposal of the seller himself decrease in value. Nor is it relevant that the buyer in the resale is actually the seller in the first agreement, for if all are allowed to buy at the lowest price, why not the original seller? In point of fact, he is doing a service to the other party because the latter is freed from the concern to look for a buyer or an expensive broker. On the other hand, *B* is not allowed to force *A* to take him as a buyer but rather let him be free to sell his good to the person of his choice.

⁷² Such is the view of Navarrus, *Manuale*, lib. 3, num. 91; Petrus de Navarra, *De ablatorum restitutione in foro conscientiae*, lib. 3, cap. 2, num. 170; and more recent authors.

3. Remarks

[131] *It Often Goes Against Charity*

It should be noted, however, that this kind of contract is not entirely free of fault with respect to the merchant who deliberately sells on credit in order to be able to repurchase the good at a minimum price.

He might sin against charity, for example, when he forces a poor man to incur considerable costs to buy commodities that on top of it are of no use to him, whereas actually he could easily lend him money without experiencing any inconvenience from it. Second, he might sin by setting a bad example because, in the end, the contract smells of evil and usury. Last, he might sin by bringing himself and his colleagues into disrepute.

[132] He is not held to make restitution, though, at least not as a matter of justice. Indeed, he might well be held as a matter of charity, as when the other party is poor and is severely harmed by the contract. Because person *B* is causing the severe inconvenience suffered by *A*, he is held to remove it as a matter of charity as long as he can do so without suffering inconvenience himself. If, however, *A* is no longer poor, *B* is bound neither by justice nor by charity any more. Should he have sold in good faith without having considered a repurchase originally but just because he was being asked to do so against present money afterward, then he did not commit a sin.⁷³ The same holds true in case he has a good reason, absent scandal, to conclude such a contract with a rich person.

Dubitatio 21: Are All Kinds of Monopoly Unjust?

[144] Preliminary Remarks

Definition of Monopoly

Properly speaking, monopoly is any effort made by one or a couple of merchants to ensure that they alone can sell a particular product at a price arbitrarily determined by themselves. In a wider sense, the doctors consider monopoly to be machination and industry deployed by merchants to ensure that they alone

⁷³ As is correctly taught by Angelus Carletus a Clavasio, *Summa Angelica*, 2a part., s.v. *Usura* 1, num. 60.

either can sell a particular good or decide over its price. A monopoly can be established in four different ways.

Four Ways of Creating a Monopoly

Sellers *conspire* about the price to ensure that no one sells at a lower price, or they make sure that they alone sell a particular good. The latter can be brought about either through a special *privilege* from a prince, or through *industry*, that is, by buying up all goods and then holding them back until prices rise, or through *impeding* other merchants from importing the goods from elsewhere.

[145] 1. A Conspiracy about the Price

1.1. Within the Limits of the Just Price

Sellers conspiring about the price are not sinning against justice (but still against charity), as long as the price does not exceed the legal price or the highest common price. The same applies to buyers' conspiring about the lowest price or telling other people not to buy a good at a certain price. Now and then this occurs at public auctions when one buyer tells another not to bid higher so that he can buy the good at a lower price. It is not allowed, however, to go under the lowest just price of that particular market.

[146] Remark

If through fraud and menaces some merchants impede others from selling at a lower price, they are held to make restitution to the buyers who suffered damage as a consequence.⁷⁴

[147] 1.2. Above the Legal Price

If the price stemming from conspiracy exceeds the legal or upper common price, the sellers sin against justice. Consequently, they are held to make restitution of the surplus the buyers were forced to pay and of all the damage that ensued from it. The reason thereof is that the price is not dependent on the arbitrary will of the merchants. A price should be based on the assessment of a superior or a common estimation, made in good faith and uninfluenced by conspiracy or

⁷⁴ See higher, cap. 12, dubit. 18.

deceit, of circumstances such as the abundance and scarcity of goods, buyers, and sellers. Therefore, a person who by his counsel or consent is the cause of another's paying more than this price, the unjust cause of loss is his, and he is obliged to make restitution.

It should be noted, however, that in the first place the person who received the money is held. The other conspirators are only held in the second place, as kind of assistants of the principal person. They are held to make restitution in proportion to their share in the conspiracy.⁷⁵

1.3. *Buyers*

Similarly, buyers who conspire or tell others to underbid the just price are sinning against justice. The reason thereof is that the sellers have a right at a higher price, notably at a price corresponding to an estimation made in good faith. Consequently, the sellers suffer injury from such a conspiracy.

[148] 2. A Privilege from the Prince

A merchant obtains a special privilege from a prince that lends him the exclusive right to import and sell a specific kind of commodity. In this case, a distinction should be made depending on whether for the privilege is either based on a just title or it is not.

2.1. *Based on a Just Title*

If the privilege is based on a just title, then the monopoly is licit too, as long as the just price (estimated by the prince or by prudent people taking into account all relevant market circumstances) is not exceeded. This is notably the case when the prince observes that without the temporary benefit of a privilege no one would be prepared to import a particular kind of good in sufficiently large quantities because of the costs involved. The prince might also decide to sell a privilege if he urgently needs money to be spent for the common good.

[149] It should be noted that when the prince grants a privilege for the importation and sale of goods that are essential to the preservation of the political community, he is obliged to fix the price of the goods. If he leaves the price-fixing to the arbitrary will of those who received the privilege, the privilege will be

⁷⁵ According to what we have said in cap. 13, dubit. 4.

inequitable in this respect, for he gives them the opportunity to sell the goods at an inequitable price to the noticeable detriment of the community—something he in particular is held to prevent by virtue of his office.⁷⁶

This is not the case, however, with privileges involving luxury goods or products bought for the pleasure that can be derived from possessing them. Nobody is forced to buy paintings, for instance; or special kinds of tapestry; or textile and garments made of silk, let alone dices, a pack of cards, pebbles, and the like. On that account, nobody has a charge to buy these goods (apart from a few rich people perhaps), unless he wants so spontaneously, the prince can easily have a just reason not to impede the goods from exceeding the just price.

2.2. Not Based on a Just Title

If the privilege was granted without a just title, it is inequitable. Then injustice is done to both other citizens who want to sell but are unrightfully impeded and to the buyers who could have received a better price. Consequently, the following persons are held to make restitution: In the first place, the sellers who received the unrightful privilege (they are the main cause of the harm done, because they persuaded the prince to grant the privilege and to unrightfully impede others from entering the market). In the second place, those who granted the privilege, at least when it is abundantly clear that the privilege is inequitable. In case of doubt, the latter group is not held for the authority and prudence of the prince makes the privilege granted by him get the benefit of the doubt.

[150] 3. A Few People Buying Up the Whole Supply

The third mode of establishing a monopoly is by buying up all the goods of a certain kind (e.g., grain at harvest time, before or after it) in order to sell them afterward at a price fixed through their own arbitrary will.

3.1. The Opinion of the Doctors

Several doctors contend that these people sin against justice and are obliged to make restitution.⁷⁷ The reasons they put forward are twofold. First, these sellers

⁷⁶ See the correct remark by Navarrus, *Manuale*, cap. 23, num. 92.

⁷⁷ See Gabriel Biel, *Collectorium circa quattuor libros Sententiarum*, lib. 4, part. 2, dist. 15, quaest. 10, art. 5, dubit. 2; Ioannes Medina, *De poenitentia, restitutione, et contractibus*, tom. 2, cap. *De rebus restituendis*, quaest. 36, and other doctors.

are doing injustice to the political community by holding back the goods and inducing scarcity. As long as the supply is stored on its territory, the political community disposes of a right implying that the price should not rise. Second, they commit injustice by afterward selling the goods at a very high price, whereas this price is actually not just with respect to the sellers because it is they in particular who, through fraud, lie at the basis of the high level of that price. This opinion is very probable.

[151] 3.2. *The Other View Is Not Improbable*

However probable the former opinion may be, the contrary view has never seemed to me to be improbable. It can be argued indeed that such people are not held to make restitution as a matter of strict justice and have not sinned against the principles of particular justice but only against charity and legal justice or public utility.⁷⁸

It can be proven as follows.

First of all, by buying, they have not sinned against justice, for I assume they bought at the current price. Nor is it relevant that, in so doing, they have induced scarcity and high prices, because a large number of buyers also cause prices to rise; yet, they do not for that reason sin against justice by buying, given that the action giving rise to the price increase is not against justice. Nor did they sin against justice by holding back the supply, that is, by not selling, because justice did not oblige them to sell at a time when they had actually not obliged themselves by an agreement to do so. They could have held back the goods for another occasion or taken them off to another place or even destroyed them without inflicting injustice on anybody because they had the absolute ownership over those goods. The members of the community also had no right as a matter of justice to buy the goods if the sellers had not wanted to sell them. Otherwise, one would have to conclude that they were going to sin against justice if they threw their wares into the river. Nor is it relevant that the magistrate can force the sellers to bring out their stock and sell at a good price, or that he provides severe punishments for holding back a stock. There are many crimes that can be punished by public authority, yet at the same time do not run counter to particular

⁷⁸ This standpoint was already adopted by Ludovicus Molina, *De iustitia et iure*, tom. 2, disput. 345, num. 7–10.

justice. For a public measure to come into existence, it is already sufficient that crimes are somehow against the common good.

[152] 3.3. Refutation

First, the political community does not have, as a matter of justice, a right implying that the price does not rise, if the supply of goods in the city is held back or unknown.⁷⁹ The price depends on the common estimation. Otherwise, people selling dear in good faith at that moment would afterward be held to make restitution. Consequently, even with respect to those who withheld the supply, the price is not unjust; they obtained that price without committing any unjust act.

The second counterargument only proves that they have sinned against particular justice if the estimation of the price, which takes into consideration the circumstances prevailing at the moment of the sale-purchase agreement, is unreasonable, like when they conspire about the price.⁸⁰ That is the way this argument should be understood.

[153] The Fourth Mode: Impeding Other Importers

A merchant applies violence or fraud to prevent more goods from being imported from elsewhere and to keep up the scarcity in the community. In that case, he is held to make restitution to the political community, as far as it has been unjustly forced to pay high prices, and to the merchants excluded from the market, as far as they were deprived from a probable profit.⁸¹ If, however, the merchant has not used any violence or fraud, he is not held to make restitution. A survey of the means of punishment for monopolies before the external court is included in Silvester's *Summa*.⁸²

⁷⁹ This is clear from dubit. 5, higher.

⁸⁰ See supra num. 147.

⁸¹ Silvester Prierias, *Silvestrina summa*, part. 1, s.v. *emptio*, quaest. 13.

⁸² Silvester Prierias, *Silvestrina summa*, part. 1, s.v. *emptio*, quaest. 13 and 18.