Domingo de Soto

Relection on Dominium

Foreword

1. Passage to be read [for the relection]: “Subdue the earth, and have dominion over the fishes of the sea and the birds of the air and over all living things that move upon the earth.” (Genesis 1)

2. Question: Whether man alone of all living things has dominium over other [living creatures].

3. First conclusion: That *dominium* of things may be divided into that of ‘use’ and that of ‘usufruct’, and possible into a third category containing certain things that are ‘consumed in use’; and that since the Fall this division has obtained among mankind according to the law of nations.

4. Second conclusion: That man may justly have *dominium* over man, and rule over him as a master over a slave; but none save God has *dominium* of the whole earth. Nor does a man have *dominium* over his own life, nor a husband over his wife, nor a father over his children; but the first-born does have the *dominium* appropriate to primogeniture.

5. Third conclusion: That *dominium* may be transferred at the behest of its holder, even on the basis of an interior act alone; but human law may override even the holder's behest, and transfer the *dominium* ‘to the court of con-

science' even against his will; even if there are no charges preferred, he may still lose it *ipso facto.*

6. We have arrived in our series of commentaries at the subject of restitution. This however we are obliged to keep on one side, since our ill-health earlier this year prevented us from completing our study of the fourth book of [Peter Lombard's] *Sentences*. For this reason we have decided it would be wholly worthwhile to speak of it in this relection, since of all the topics of debate pertaining to this subject, this is the most important, and offers an introduction to the investigation of the whole issue.

7. The subject we have undertaken is indeed a large one, and one well-known to philosophers, theologians, and lawyers alike. I am however afraid that I will still fail to fulfill your expectations, as my ill-health did not permit a precise and exact scrutiny of the whole question. But if I can do nothing more, I hope at least to present the salient points in the correct order and fashion.

8. As the theme for this commentary we have taken the words from the beginning of Genesis, where the Lord God blesses our first parents and says: "Subdue the earth, and have *dominium* over the fishes of the sea and the birds in the air and over all living things that move upon the earth." From this passage we have selected the following as the question to be debated: Whether man alone of all creation has *dominium* over other creatures.

9. This question may be tackled via a negative: if man has *dominium* over other creatures, this, as we have seen in a first instance, is by virtue of his faculty of reason. However, there are many creatures that do not obey reason, as is particularly apparent in the case of plants and other insensate things; therefore, man does not have *dominium* over them.

10. Likewise, the wild animals have *dominium (dominantur)* over the plants which is conceded to them according to Genesis chapter 1. Therefore, man is not the only lord *(dominus).*

11. On the positive side the argument is as follows: Man alone of all creatures was told that he was to have *dominium* of the whole earth, as is clear from Genesis chapter 1; therefore, he alone has *dominium* over other creatures.

12. In order to weigh this conclusion up we have added three others; and it is under these four headings that we will now proceed to discuss the question of *dominium* over things, believing that under them the whole topic may be comprised.

13. Our first question concerns its essential nature; what is it, and how many types of *dominium* there may be.

14. The second concerns the subject of *dominium*; who is suitable to possess it.

15. The third concerns its object, that is, over what sort of things may one have *dominium*.

16. The fourth concerns its transferal; that is, how can the *dominium* of things be transferred from one party to another.

17. If therefore we do not have enough leisure to say all that might be said, we shall say as much as our brief time allows.

The Exact Meaning of *Dominium* Explained

18. In order to approach the topic of *dominium* according to the so-called nominalist method, [that is, on the basis of the definition of the term,] we must first of all ask what the name means.

19. The term *dominium* is either never found in the older Latin authors, or then so infrequently as to be almost never attested. Instead, the terms *dominatio* and *dominatus* are used. Having *dominium* over other things or people is thus the same as dominating *(dominare)* or ruling *(imperare)* them. The Emperor *(imperator)* thus has *dominium* over the Spaniards in the same way as it is written in 1. Maccabees, 11, "King Ptolemy gained *dominium* of all the cities as far as Seleucia Maritima."

20. Theologians and jurists however use the word in another sense, taking it to refer to the power or the right *(potestas*, or *ius)* that one may hold over something, that is to speak of the ownership *(proprietas)* of a thing, just as it is said that one can have *dominium* over booty, a house, a horse and other such sort of things which are one's property. Jerome uses it in his translation of Tobit 8: "Raguel gave one half of all he possessed to Tobit, and made a codicil, to the effect that half that remained should revert after his death to Tobit's *dominium*." It is in this sense that in the following we shall examine the concept of *dominium.*

21. In accordance with Cicero's teaching we will take the definition of the term *dominium* as the basis for our doctrine concerning it. The definition generally given by philosophers is as follows: "*Dominium* is the power, or the faculty immediately related to it, of assuming objects for one's own legitimate use, in accordance with the law of nature and all such positive law as is naturally ordained." This definition is first given in Gerson *De Potestate Ecclesiastica,* consilia 13 and his *Tractatus de Vita Spirituali,* lesson 3 and was subsequently followed by Conrad [Summenhardt]

and the modern philosophers. Conrad [Summenhardt] notes concerning it *(De Contractu,* 1, question 1) that to have power *(potestas)* in respect of a given object is the same as having a right *(ius)* over it.[1]

22. This right *(ius)* may thus be understood in two ways. It may on the one hand be the same as a statute law *(lex)*, just as we use it indifferently to refer to Canon Law (*ius canonicum),* Civil Law (*ius civile),* and natural law *(ius naturale).* On the other hand it may be synonymous with license or faculty in respect of something, for example that of a father over his children or husband over his wife. So Paul writes in his 1. Letter to the Corinthians, chapter 7: "A woman does not have power *(potestas)* over herself; her husband does." Gerson too defines *ius* in terms of *dominium.*

23. But not all those who have a right *(ius)* in this way have *dominium*, for *dominium* implies a degree of superiority. Thus a son has the right to receive food from his father, as even a slave does from his master, but he does not have the *dominium* that implies both the right of use plus superiority. But no-one who has this right has *dominium* except in the wider sense. If a man rents a house, he has the right to use it, but he does not have *dominium* except in the wider sense, as we will argue below.

24. These philosophers also note that *dominium* is a faculty *(facultas)* in respect of something, rather than a power *(potestas)* over it; for power may be used in an extended sense to refer to power used rightly or wrongly. A thief may have power over one of my possessions; but the term 'faculty', they say, is derived from [the Latin term] '*fas'*

[1] Cf. Vitoria, F. de, *On the American Indians,* question 1, article 4, (1992), p. 247 where the same passage from Summenhardt is cited.

([divinely sanctioned] right), and therefore means a ‘power rightfully used’ *(secundum ius).* But pace these philosophers, ‘faculty’ is not derived from ‘*fas’*, but has the same force as ‘facility’ *(facilitas),* and is the opposite of ‘difficulty’ *(difficilitas)*. To ‘have a faculty’ is, thus, the same as to ‘have a facility’. Someone may be said to ‘have a facility’ in respect of a horse in that they may easily *(facile)* use it, that is, they may use it without asking anyone else’s permission *(licentia).* And indeed power has the same meaning when understood in a moral sense, for in this way a thief has no power over my possessions; thus *dominium* is the same thing as power or faculty.

25. Nor need we add ‘immediately related to it’; for when a potentiality *(potentia)* is taken away, it is not in physical terms described as a potentiality, just as cold water is not said to have the potentiality to warm up. Nor need we add ‘permitted by the laws’, for this is what *potestas* means; to say we may do something implies we may lawfully do it; and a power, as we have stated, is the same thing as a right *(ius),* which in turn is the same as what is just *(iustum),* as Saint Thomas [Aquinas] says in *Secunda Secundæ*, question 57, article 1.

26. It is therefore enough if we define *dominium* as “the power or faculty of appropriating something for our own use”. For a definition should be brief and comprehensive, etc. It is clear that this definition holds good, as a power *(potestas)* should be defined either in respect of its action *(actio)* or its end *(finem)*; e.g. “vision is the potentiality to perceive colors”. But the end of *dominium* is use, and would be in vain if it did not entail the perpetual right of use. It is in order therefore that *dominium* should be defined with reference to its use.

27. But against this definition it may urged that the usuary and the usufructuary have the faculty and right *(ius)* of appro-

priating such and such a thing for their own use, in the same way that a man who rents a house has the right to inhabit it, or the man who hires a horse has the right to ride it, but does not have *dominium* in respect of it. Therefore, the definition is invalid.

28. Hence we must examine the difference between use, usufruct, and *dominium*. This distinction is in fact easier to understand than to explain, but nonetheless we should state what it is.

29. Firstly we shall deny the minor premise. The usuary is indeed the lord *(dominus)* of something in a certain sense, as long as he has the right to use it. Here we should note that master-principle adduced by Conrad [Summenhardt] *(loc. cit.),* that a man has *dominium* over something insofar as he can exercise his action upon it. That is to say, a usuary is one who has only the right to use something, but cannot transfer either the thing or the right to another party. The usufructuary however may transfer both the use of something and transfer the right of use, but cannot transfer the thing itself. The lord *(dominus)* however may transfer the thing to another party.

30. This is clear from the Institutions [of Justinian], *(De usu et habitatione)*. So for example if a man has the use of some garden-plots, he may use the flowers or fruit (e.g. by eating them), but he cannot sell or otherwise transfer this right of use.

31. The usufructuary, however, has the right to use the fruit, and may transfer this right to another party, but cannot sell or alienate the garden-plots. The lord *(dominus)* however may also sell them. So, they say, the usuary is lord to a lesser degree and the usufructuary to a greater degree.

32. Therefore usufruct is known in law as '*dominium* of use' *(dominium utile),* that is, the full right over the use of something; but the man who has the ownership *(proprietas)* of something is the absolute lord *(est absolute dominus).* Thus *dominium* is not defined by right of use; this is common to usuary and usufructuary.

33. A difficulty remains. What is *dominium* as defined by ownership *(proprietas),* as opposed to that defined by use? We must therefore say that the definition of *dominium* should be understood as referring to a power *(potestas)* or right *(ius)* that is held as the holder's own property; it is not delegated to him, nor is it dependent on any other party. Now though the usuary has the right of using something, this right is dependent upon another party, who is the true owner *(dominus);* the usuary's right is not his own property, and therefore does not constitute *dominium*.

34. On the other hand, if someone has bequeathed a use or usufruct by testament to (say) his wife, and has left the ownership *(proprietas)* to his son, then the dead man's widow would have a right to use to the estate that was not dependent upon the another party holding the real *dominium* of it, for it would not be in the son's power to take away that right, but nonetheless she would not be the owner *(domina)*, ergo.

35. But if it is held necessary that for someone to have the real *dominium* of something it is necessary for them to have the right to use it in any way at all, e.g. the right of selling it or giving it away, as the moderns all agree, then it may be said to be contrary that the heir, while a minor, is the true lord of the estate, but cannot alienate it. Indeed, even when the mayorazgo *(maioricatus)* and is indeed the lord, he nonetheless cannot alienate it. Therefore the right to treat anything at all is not necessary for the possession of true *dominium*.

36. In the third place, therefore, it should be said that *dominium* is the power or right, proper to someone, of appropriating a thing to whatsoever use is not prohibited by positive law. This I add on account of the case of the minor and the *mayorazgo* [first born son], for though they are both lords *(domini)* and consequently may by the nature of things alienate the possessions that are their own, nonetheless such alienation is prohibited by law *(ius).* Our first conclusion is thus shown to be correct, that *dominium* may be divided into that of use and that of usufruct.

37. There is, however, an uncertainty at this point, which is very hard to resolve if one does not bear in mind the name *(nomen):* Can use be distinguished from *dominium* in respect of things that are consumed by use? These are things of which use is consumption, e.g. money; that the use of money is to consume it, that is, to alienate it from oneself. So also with food and drink. The things not consumed by use are those of which use is not consumption, e.g. a house or a field.

38. To increase the uncertainty, we may speak of things that are consumed in a single action, e.g. food, wine, money; for there are other things that are consumed but not by a single action, e.g. clothes. In these cases it is hard to tell how use may be distinguished from *dominium*, for these things (e.g. a horse or a house) may be hired out. This should be noted with reference to the Mendicant orders, especially the Franciscans, who say that they have no *dominium* either as individuals or as an order; and this applies not only to possessions, but even to money and the clothes they wear.

39. On this question there is disagreement not only among learned theologians. There are also varying opinions among the Pontiffs. The opinion of Nicholas III is extant

and is widely known; expounding the dicta of Gregory IX and other Popes, he says in his *De Verborum Significatione,* chapter 3, that the aforementioned friars do not have *dominium* either individually or collectively, either over their bowls, or their books, or their moveable goods, but that *dominium* and ownership of their books is reserved to the Church of Rome, with the friars granted the usufruct alone. The *dominium* of the money however remains with those who gave the alms. Such also was the opinion of Clement V, in *De Verborum Significatione,* chapter [incip.] *Exivi de paradiso.*

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40. It follows from this that in the case of these things use is distinguished from *dominium*. John XXII however took the opposite position, saying in his *Extravagantibus* title 14, *De Verborum Significatione; ad conditorem,* ibid., chapter 4, [incip.] *Quum inter nonnullos)* that in the case of things consumed by use, use is not distinguishable from *dominium*, and that no-one can have use without *dominium*. It is indeed a difficult question.

41. The argument runs in the first instance as follows: On the subject of usage, the opinion of all the philosophers is stated by Saint Thomas [Aquinas], *Secunda Secundæ,* question 78, article 1: In the case of things of which use and consumption are one and the same, the use cannot be reckoned to be separate from the *dominium*, but whoever grants the use of the thing grants the thing itself. From this, the philosophers infer that in return for the use of a sum of money I have loaned I cannot receive any interest, but only the capital. But the same applies in the case of bread and other foodstuffs, since the proper use of bread is its consumption, ergo.

42. But they say, use *de jure* and use *de facto* are two different things, as is set out in the aforementioned chapter; use *de jure* refers to the *right of use,* while use *de facto* refers to the actual action we perform upon a thing, such as eating or riding. The Franciscans, they say, do not have use of the first sort, but only of the second, in the same way that a servant, when he rides his master's horse, has the use of it only *de facto.*

43. However, this *de facto* use that the Franciscans possess in respect to their foodstuffs is not an unjust use, and must therefore be a just one. But a right *(ius)* is, as we have said, nothing other than what is just *(iustum),* that is, a just freedom *(licentia)* to use such and such a thing. Therefore, the Franciscans have a *de jure* right of use, to consume the object in question, and consequently they have true *dominium* of it.

44. Their second objection is as follows: Usufruct cannot perpetually be separated from *dominium*, as is stated in the *Digest* [*of Justinian*] *(De Usufructu)* and Gaius in the *Institutions of Justinian*, *(De Usufructu,* section [incip.] *constitutur*); for *dominium*, as we have stated, exists only for the purposes of use, and would be ineffectual without

the right of use. But the Pope is perpetually barred from the use of these same things that the friars may consume. As these goods are not to be considered as derelicts, they must belong to the friars themselves.

45. Their third argument is as follows: If use were distinguished from *dominium* in the case of these things, it would follow that someone could loan somebody else a loaf of bread, and transfer to them the use but not the *dominium*. He could therefore receive a second sum of money, over and above the price of the bread, in exchange for the consumption of it, in the same way I can rent out a horse or a house. The outcome of this is clearly usury, ergo.

46. Their final argument runs: So far as the thing itself is concerned, it makes no difference whether the Pope or the friars have *dominium*, since they use it just as if they were the true owners *(domini),* and the Pope abstains from it as if he were not; therefore, these are questions of name alone. This is proven by John XXII's renunciation of their *dominium* and his reluctance to be owner *(dominus).* Ergo, then at least the religious were the owners of them.

47. I am not sure that this is a dispute about names, but nonetheless it is our conclusion that in the case of these things use may be distinguished from *dominium*, and that the Franciscans have the right of use, but do not have *dominium* of them either collectively or as individuals. By “right of use” *(usus)* I mean the just freedom *(iusta licentia)* or right *(ius)* to eat and drink them, which may certainly be called *de jure* use so far as the action is concerned. Therefore they have the right of use by custom, even if they do not have *dominium*.

48. At his point it should be noted that it is not enough for true *dominium* that someone should the right of consuming

something; it is necessary that he should be able to alienate it, lay claim to it in a court of law, etc. These things the Franciscans cannot do, neither the order as a whole nor any specific individual. The Pope however can call in all his goods even against the wishes of the Franciscans, and alienate them as if they were his own property; or at least, if he did so, this action would hold good. But the religious alone have freedom *(licentia)* in respect of them, if only the limited one of eating and drinking and wearing them.

49. We can prove this in any number of ways. Firstly, with reference to Acts chapter 2: “All who believed were equal, and held everything in common”, thus, no-one had any private property; and as the term “everything” is used without qualification, it seems that even their food was in common, even if each one used it only so far as he needed it. But you will say that they had *dominium* collectively at least. But this is not so; I can have the use of a thing consumed by use without it being my own, and by the same logic I can have the use of it without it being my own even in common with others.

50. Secondly, it may be proven from Deuteronomy chapter 23: the law states: “If you enter your neighbor’s vineyard, eat as many grapes as you wish, but do not take any out with you. If you go into your friend’s field, you shall break off the ears of corn, and rub them between your fingers; but you shall not harvest them with a scythe.” The same right was used by the disciples in Matthew chapter 12. The ancients, therefore, had the right of use of the grapes, but could only eat them; they did not, however, have *dominium* of them, as they could not take them out of the vineyard, nor sell them, as their true owner could.

51. Likewise, the *Institutions of Justinian*, *De Usu et Habitatione,* [states]: “He who has only the right of use of an estate is understood to hold nothing more than the right to

use the vegetables, fruit, etc. for his daily use; but such a man has no right over the vegetables and fruit save that of use."

52. Likewise it may be argued: A man in extreme need may use another man's bread without acquiring *dominium* of it. This is clearly so, since a man who takes bread in such circumstances cannot sell it or alienate it; if his need is for bread and not for money, he may only eat it. If he does not eat it, the other man may take it back, as being its true owner.

This may be demonstrated thus: If a man in extreme need were to acquire *dominium* of a thing belonging to someone else, then that party, who had not given him the bread, would be liable thereafter for restitution, which is wrong. Likewise, Saint Thomas [Aquinas] argues in his *Secunda Secundæ,* question 66, article 2, on the basis of statements from Basil and Ambrose.

53. Likewise it may be argued: a man invited to dinner at another man's board uses the foodstuffs in eating them, but is not the owner of them, since he cannot sell them, or take them home, ergo.

54. It follows from what we have said that in the case of money use cannot be distinguished from *dominium*, and that whoever has the right of use may use the money in any way at all, and is thus the true owner of it. So in the aforementioned chapter [incip.] *Exiit,* the Pope says that money cannot be given to the friars, and that *dominium* of the money remains rather with the almsgiver, and as long as the religious does not consume it, it remains in the owner's power to reclaim it. However, if the religious does use it to buy something, then either the laymen who gave the money, or the procurator of the order in his stead, is responsible for paying the price of the thing.

55. Secondly, the solution to the third argument also follows from these points. For usury does not consist in the mere fact (if fact it is) that use cannot be transferred without *dominium*. To constitute usury, it is enough that someone seeks return for the use of an object consumed by use that exceeds the value of the thing itself, when it has been so used that it no longer remains. As to the other argument, that the Pope renounced his *dominium*, it must be said that this would be impossible without revoking the statutes of the [Franciscan] order, and that this would be excessively harsh upon an order of such pre-eminence within the Christian church.

Who is entitled to have *dominium*?

56. The second main point concerns the subject of *dominium*, that is, who or what should properly possess it? Here it should be noted that all *dominium* falls into one of three categories; natural, divine, and human. This distinction is assigned according to the causes for which *dominium* is given. Natural *dominium* is that given by nature, as for example, the right of humans to food and drink. Divine *dominium* is that granted *directly* by God, for example the way the Jews possessed the Promised Land. Human *dominium* is that introduced by a human contract or a human law, for example, the way in which a man possesses either an estate or a house.

57. But Gerson and the modern philosophers after him make a further subdivision of these classes. They say that there is one sort of natural *dominium* in mankind and another among the beasts; for the beasts, they say, have natural *dominium* over the plants given to them as food. A lion has

dominium over he beasts he hunts [is confirmed in] Genesis chapter 1, and a dog over the hare; Jerome says in VII, question 1, canon *In apibus* that among bees, one bee is prince. They say that there is another sort of *dominium* among the parts of creation that are not endowed with consciousness; the sky is lord (*dominus)* of its own motion, and the sun has *dominium* over its shining; all the more so as it is said in Genesis chapter 1 that "the sun shall rule over the day and the moon over the night". Thus they call *dominium* any natural power over or inclination towards a thing.

58. By the way of reposte to these people I posit my second conclusion: that *dominium* is proper to man alone of all creation. This may be proven as follows: No one is lord of any thing unless it is in his power to use it; but man alone of all creation has this power by free will, ergo.

This is further proven by universal linguistic usage; for things that are led by their nature to perform their functions are not said to have *dominium* of them. Fire is not said to have *dominium* of its function of making hot. We say that a drunken man does not have *dominium* over his actions, as he is not in control of himself *(potens sui).* Hence Saint Thomas [Aquinas] demonstrates in his *Prima Secundæ,* question 1, that it is proper for man a lone to be *dominus,* as he has the free will through which he acts by moving himself, whereas the irrational creatures do not have *dominium* over their actions. It is more true to say that their actions take place in them, than that they perform them.

59. I am aware that some people make a distinction between moral and legal *dominium,* saying that free will is necessary for the former but not for the latter. In reply to this we may say: No-one is *dominus* of a thing unless he is *dominus* of the actions relating to that thing, as stated in our

definition of *dominium,* that is, 'the power to use some thing' *(potestas utendi re).* Therefore, just as man alone is *dominus* of his actions, so also is he alone *dominus* of things.

60. The same conclusion may be argued as follows: If the beasts had true *dominium,* it would follow that whoever took barley from a horse would do him an injustice. But this inference is not true, for a horse is capable neither of acting unjustly or suffering injustice. Likewise Saint Thomas [Aquinas] states in his *Secunda Secundæ,* question 64, article 1, *ad tertium,* that if someone kills a horse they do an injustice not to the horse but to his owner, and if someone blocks out the sunlight from a house he commits an injustice not to the sun, but to mankind, for whose sake the sun was created.

61. Likewise, Aristotle says in book 1 of his *Politics* that man does not have absolute *dominium* over his appetitive faculty, for it is not in his power to use it at will. This is clear from Genesis chapter 1: "Let us make man in our own image and likeness", says God. "Let him rule over the fishes of the sea and the birds of the air, over the beasts and the whole earth". So it is the basis of *dominium,* is the image of God, in which man alone was created; hence to man alone is it declared that he would have *dominium,* and to no other creature. It is only by analogy that beasts are said to have authority; it is clear that bees are not obliged to obey their kings, and do him no injustice if they disobey.

62. These modern philosophers also distinguish different categories of natural *dominium,* saying that there is on the one hand the 'gratific' sort, that the just possess in respect of grace, and the other the 'beatific' sort, that the saints possess in respect of glory. And they make countless other distinctions. But nonetheless I believe that these speculations are improper, for grace and glory do not lie within our

power; we can only come to them by God's help, and we do not possess as *domini* something that we can only attain through someone else's agency. God, therefore, makes a free gift of grace and glory, and would not do us an injustice if he took them away from our possession. Therefore it is not man who is their *dominus,* but God alone.

63. The moderns also make a separate category of original *dominium,* such as Adam had in his state of innocence in respect of the Tree of Life. But it is surely enough to posit just three categories; those of natural, human, and divine *dominium,* as stated above.

64. However it is not easy to distinguish between divine and natural *dominium.* It may be argued as follows: "There is no power (*potestas)* but that cometh from God" (Romans chapter 13); therefore, all *dominium* is divine. Likewise, if there were such a thing as natural *dominium,* the clearest instance would be that which man possesses over the fruits of the earth and over the animals necessary for his survival. But this *dominium* is granted by God, and hence is divine [as is confirmed] in Genesis chapter 1, ergo.

65. Gerson and the modern philosophers apparently suggest that natural *dominium* is also divine; however, there does exist a distinction between them. Natural *dominium* is the sort that proceeds, so to speak, from the very nature [of a thing] and is owed to it in accordance with its very principles. Thus just as it is owed to a man, in accordance with this very principle, that he is capable of laughter, so, since he is composed of corruptible matter, he has a right to all things necessary for his survival, for example over all creatures inferior to himself.

66. Hence Aristotle demonstrates on the basis of natural reason in book 1 of his *Politics* that everything in the world

was created for the sake of men, for in the case of natural objects the less perfect exist for the sake of the more perfect. From this he infers that the hunting of wild beasts is just and natural, since man has natural *dominium* over them. Divine *dominium* however is granted by God directly and not on account of a debt of nature, such as that which the children of Israel had over the Promised Land, and the vessels of the Egyptians. But since nature itself is a gift of God, natural *dominium* may in some circumstances be said to be divine.

67. From what we have said so far, it follows that for preset purposes there are three things which deserve further consideration, namely that *dominium* is the actual power of using something *(ipsa potestas utendi);* the cause, (being natural, divine, or human) which conveys *dominium;* [and finally] the title, that is, the thing on account of which *dominium* is granted. For example, nature grants man by title of necessity, *dominium* to eat, and civil law grants a son by title of hereditary succession, *dominium* over his father's good.

68. Secondly it follows, against [the position advanced by] Richard Fitzralph *(De quaestionibus Armenorum* question 10, chapter 4) and some others, that the title of natural *dominium* is not 'grace' *(charitas).* They say that a man without grace has no title to any *dominium,* human or natural; but this is false, and we do not intend to debate with them here. For although man, as a sinner, is not worthy in respect of his merit of his breath or of his very life, as Augustine says, nonetheless he is in virtue of his natural title the *dominus* of all common goods, for in Matthew chapter 5 [we read] "the Lord makes his sun to rise over the good and the bad"[2] and so by human title a man may

[2] This passage is also cited by Vitoria in a similar context, cf. ibid.

be king or pope just as in the Old Testament David, Solomon, Nebuchadnezzar and many other sinners were called ‘kings’. But more of this later.

69. Against this division of *dominium* it may be argued that Adam had *dominium* over the Tree of Life, and had *dominium* over the animals of a sort not possessed by the men of today, in that he could use them without difficulty; that they obeyed him in all things needful to his estate, for had they not done so his estate would not have been one of perfect felicity; and that his *dominium* was not natural in that it was not owed to his nature; hence it should be called *original dominium.* I will call it this if you wish; but I will say that it is in some sense *divine,* in that when considered in absolute terms it is above nature, but it is also *natural* in some sense, in that it is owed to the primal estate of man’s nature before the Fall.

70. The other main point of uncertainty is this: When did *dominium* come into being? Here we must distinguish between the three types of *dominum* enumerated above.

71. My first proposition is this: that natural *dominium* came into being when the world was first created. For God became by nature the lord of all the things he had created, by the title of creation. From eternity there had been no *dominium.* Had there been, it would have been *dominium* of the greatest sort, being *dominium* among the persons of the Trinity; but there was not, for among the persons of the Trinity there was a supreme equality.

72. Likewise, man became the first *dominus* of his own body and limbs. Hence it follows that matrimony is derived from the law of nature, for it is by nature that one human being can transfer his body to another. So also man received *dominium* over the whole external world, as it is said in the Psalms “You have put all things into subjection under his

feet", since it was for his sake that the whole earth was created; the commandment to "increase and multiply and subdue the earth" was in its entirety a declaration of natural *dominium.*

73. And thus man has the right under natural law to defend himself and all his property, and by the same logic the commonwealth has acquired natural *dominium* over individual men; for just as the limbs of a body exist for the sake of the body, so individual men exist for the sake of the commonwealth as a whole. Thus the king may hazard the life of anyone for the sake of the commonwealth. But to nothing below man in creation was *dominium* given.

74. But as to whether the angels were given any sort of natural *dominium* over any created thing, it must first be noted that they were undoubtedly created with *dominium* over their own actions; but it is less clear to me that they were ever given *dominium* over *dominium* pertaining to someone else. If they had *dominium* over their own glory, they were blessed indeed; but we have already said that no created things has *dominium* over grace or glory. They were blessed indeed if they had *dominium* over the spheres they move; but they do not. The spheres are not their own, since it was not for their sake that they were created, but for man's sake, and for man's sake the angels move them. The angels themselves do not need the spheres to move, and indeed do not cause them to move of their own free will, but because it is their nature to do so; but for true *dominium* it is necessary that the *dominus* should be able to use the thing of his own free will and for his own service.

75. Likewise we may argue that though the world was not made for the sake of the angels, neither was it made save for some teleological necessity *(nisi necessitatis finis).* The angels have no need of the earth, therefore, it was not

made for their sake; and consequently they are not the *domini* of it. The demons are said by some to have *dominium* over the damned whom they torment;, but though being ministers of God they have this ministerial right *(ius ministeriale),* they cannot be called *domini* in the proper sense.

76. Thus, in response to the principal question, I think that man alone of all creation has *dominium* over other things. But God has one sort of *dominium,* and man, his creation, has another. For God is absolute lord, in that he can use what he has created in any way at all, for example, by changing it or by destroying it from within. Man cannot change himself from within, as is said in Matthew chapter 5: “You cannot make one hair black or white”. But he *can* use the animals, by ruling them, and the other things in creation, by appropriating them to his use. Divine *dominium,* as we have stated, came into being in some sort in the earthly paradise, over the Tree of Life; and later in the Old Testament the Jews had divine *dominium* over the Promised Land and over the vessels of the Egyptians; and Saul also had divine *dominium* over his kingdom.

77. In the New Testament, however, I cannot see any *dominium* that may properly called divine; for though by divine law the churches are owed tithes, nonetheless they do not acquire this *dominium* directly from God, but from those who actually pay the tithes.

77. Then there are such things as divine powers *(potestates divinae),* for example, the power of the priest to consecrate the substances, or pronounce absolution.

On the division of things

78. Concerning human or civil *dominium* there is a greater difficulty; When and how did this appropriation of *dominium* arise, so that this thing should be mine and that yours?

79. My first proposition is this; that the appropriation of external goods did not arise in man's primal state of innocence in Paradise. This is clear, since appropriation was not created by divine or natural law, but by human as Augustine states in his C*ommentaria super Ioannem,* tract 6, and as is stated in the *Decretals of Gratian*, 1, distinction VIII, canon *Quo iure*.

80. It is clear, however, that not even then was a division created by human law, for nature as it was created did not require it. As Aristotle says in book II of his *Politics,* necessity for this division was twofold: Firstly, to prevent dissension from arising, and secondly, to improve cultivation of the land. But in Paradise there was no dissension, and all performed diligently whatsoever pertained to the common good, ergo.

81. Since fame and honor are also to be reckoned among the external goods, my proposition must be qualified. These goods may by natural law be appropriated, since everyone is naturally lord of his own fame and honor as he is of his own limbs; therefore no-one else is lord of it. Provided no blame attaches to me, not even the Emperor may take my reputation away from me; and indeed it is a general principle that man is by nature lord of all natural goods.

82. Concerning other goods we posit this second conclusion: that such an appropriation and division came into being immediately after the Original Sin. This may be proven as

follows: Immediately after the Fall there was reason and cause for the division of goods, therefore it immediately came into being.

83. The antecedent is clearly true, for Aristotle, as stated, gives to reasons for the division of goods, namely to improve the cultivation of the earth and to avoid dissensions, but such dissensions took place immediately after the Fall, ergo.

84. Secondly, in Genesis, chapter 4, we read that Cain made offering of the fruits of the earth to the Lord, while Abel offered the firstborn of his flock. It appears therefore that there were certain flocks which belonged to Abel and not to Cain, and certain fruits which belonged to Cain and not to Abel, inasmuch as “the offerings of Abel were pleasing to the Lord, but he had no regard for the offerings of Cain”.

85. This is confirmed by the authority of Augustine in book 15 chapter 20 of his *De Civitate Dei,* where he states that Cain was the king of the city he founded. It follows then that an appropriation of goods took place.

86. But how could such an appropriation come about? It may be argued as follows: at that time, all men were equal, and *dominium* of the earth was granted to them equally and in common; therefore no-one had the power to divide it up, so that any one individual should have the use of any part of it or of certain goods, so depriving the others of use of it.

But if you say Adam had this power it may be argued as follows: Adam was superior to others only in virtue of being their father, but this superiority does not extend to the right to establish laws. On this point we must state with Conrad [Summenhardt, *De Contractibus],* tract 1, question

2, conclusion 2, that there are two ways in which this could have come about:

87. Firstly, Adam may of himself possessed the right to divide property, not on the grounds that this is a universal right of fathers but because he possessed this right inasmuch as he was the origin of his race *(principium naturæ)*[3], in the same way that he possessed other prerogatives over and above those of other fathers.

88. But as it cannot be established from Holy Writ that Adam possessed this sort of coactive power, it is better to say he had it in the second way: it seems that the division of land took place by universal consent, that is, that all mankind agreed[4] that Adam should divide it up, or else that they elected another man to be their overlord.

89. Or thirdly, it was decided among them that in order to put a stop to all disputes one person should have one part and another, and thus each one transferred to his neighbor the interest he had in common over his neighbor's allocation, so that his neighbor should transfer the interest he had in his own. Thus we read in Genesis chapter 13 that Abraham says to Lot:[5] "I pray you let there be no contention between you and me. Behold the whole earth lies before you: if you go to the left I will take the right"; and so on.

90. Others say that by natural law all things that do not have a proper owner belong in the first instance to the person currently in possession of them *(occupans),* as it is stated in

[3] Cf. ibid. chapter 5, §25.

[4] Cf. §86.

[5] This passage is also cited by Vitoria in his relection *On the American Indians,* question 2, article 1, (1992), p. 255.

the *Institutions [of Justinian]*, *De Rerum Divisione;* that what belongs to no party is by natural reason conceded to this person, and thus a division could occur by natural law.

91. But this should be understood properly, for by natural law that which belongs to no party belongs to the current possessor *(occupans)* only as far as use *(usus)* is concerned, and not as far as *dominium* is concerned. For by natural law all things are common in respect of *dominium,* and therefore a division could not occur as far as *dominium* is concerned, save by human compact and agreement.

92. Just as division occurred in the beginning, so also it occurred in the days of Noah, after the Flood, when all things reverted to communal possession. Therefore in Genesis chapter 10 it is written: "By them (i.e. the sons of Noah) were the islands of the nations divided into their own lands", and in Genesis chapter 11 [we read]: "Come, let us make for ourselves a city and a tower." This was the origin of the realm of the Chaldeans.

93. But against this may be argued as follows. The division of things is against the law of nature, and is therefore not legal, for human law is not binding if it is not derived from natural law. The antecedent of this syllogism is clearly true, for by the law of nature all things are common property, as is confirmed in distinction VIII, canon 1. Therefore it is against the law of nature that this thing should be mine and that thing yours.

94. On this point Duns Scotus replies in his *In Quartum Sententiarum,* distinction 15, question 2, that this law was revoked after the Fall, for it was expedient before the Fall that all things should be common, but thereafter a division of property was expedient for the reasons given above.

95. There are others who say that neither these arguments nor their contrary are in accord with natural law, but that one is in accord with the law of nature before the Fall, and the contrary (i.e. the division of all things) is in accord with the law of fallen nature.

96. But against these Conrad [Summenhardt] rightly argues that the law of nature is immutable, and that what was once natural law is always natural law.[6]

97. Likewise it may be argued on the basis of Augustine's *Confessions,* book 3 chapter 7 as follows: The law of nature has not changed simply because formerly by natural law all things were common and now they are divided; it is the things themselves that have changed, just as the nature of wine does not change simply because it is good for a healthy man and harmful for a sick man. Therefore we must say with Saint Thomas [Aquinas], *Secunda Secundae,* question 66, article 2, *ad primum,* that it is not a positive precept of nature that all things are common, but it can only be taken in the negative way; to wit, this appropriation of goods does not come about by natural law, for that law was placed upon man while his estate was still whole and he had no need of such a division; therefore such an appropriation is not against natural law, but is rather a determination of it.

98. On the contrary it is urged that the religious live in peace without the division of property, therefore that is not the cause of the division.

99. In reply to this it may be said that a few can live this way, but for an entire kingdom it would be impossible.

[6] Cf. also Aquinas, Th., *Summa Theologiae*, 2a-2ae, qu. 10, art. 10, *respondeo.*

100. But from this the argument may proceed to the following extreme, as it is evident that the appropriation of goods is in accordance with natural law, as Aristotle perceived that such a division is by nature befitting. To this it may be replied that this division was indeed dictated by the law of nature, but its execution was entrusted to the *ius gentium.*

101. From these facts many corollaries proceed:

Firstly, that there are some things that are not appropriated, such as rivers, mountain passes, streams, and the very places the citizens inhabit, for by natural law these still remain common. So also do beasts, birds, and fish, as stated in the *Institutions [of Justinian]*, *De Rerum Divisione;* and therefore although some of the appropriation may occur, anyone may hunt or fish, etc.

102. Secondly, that if there are some lands that are now not divided, anyone currently in possession *(occupans)* of it may use it, but does not therefore acquire *dominium* of it.

103. Thirdly, that although some sort of appropriation may occur, all things are common in instances of extreme need, at least in respect of use.

104. Finally, that where appropriation occurs anyone may by the law of nature transfer his own *dominium* to someone else. But the transfer of *dominium* is treated elsewhere.

105. Thus the third conclusion, the last of my first principal, is clear.

Can One Man Justly Be Owner of Another?

106. My third principal point concerns the object of *dominium,* that is, of what things can we have *dominium?* Firstly we may ask: Can anyone justly be owner of another man as he would of his livestock or of his horse?

107. On this point it should be noted that there are two categories of slavery; there is the natural kind and the legal, as is described by Aristotle in book 1 of his *Politics.* The natural category is based on pre-eminence of rational powers; those of outstanding reason and foresight are by nature lords (*domini)* just as those of strong physique are made by nature for servitude. For this reason Aristotle says that some are lords *(domini)* by nature, and some are slaves.

108. But as Aristotle says (loc. cit.), legal slavery exists where people are not their own proprietors; whatever they are belongs to someone else. There is a difference, therefore, between these two categories of slavery; in the one, the master does not use the slave for his own benefit, but for the slave's benefit and good. Such would be the servitude of our estate before the Fall, and such should be the lordship exercised by kings and princes, that is, for the good of the subjects.

109. But the master according to the legal category of servitude does not use the slave for the slave's good, but for his own, as he would with livestock. It is with this sort of servitude that we are concerned, and whether it is just.

110. It may be argued that it is not just, as it is against nature. That it is against nature is shown to be true firstly by the authority of Gregory, "It is against nature for men to be the owners of other men". Indeed, servitude is defined in the *Institutions of Justinian*, *de Iure Personarum* in the following terms: "servitude is an institution of the law of nations *(ius gentium)* by which one man becomes subject to another's *dominium* against the law of nature".

111. It is also demonstrable on the basis of reason: Man is created free, as is said in *Ecclesiastes* chapter 15, “The Lord has placed him in the hand of his own counsel”, but by through this freedom man is [his own] master; and consequently it is against nature for him to be a slave in this way.

112. Likewise it may be argued on the basis of Genesis chapter 1: Men were given *dominium* over other creatures, but they are not told that they have *dominium* over other men, ergo.

113. Nonetheless it is our forth conclusion that legal servitude is permissible. On this point it should be noted that legal servitude may come about in two ways, just as there are two ways in which the *dominium* of things may be transferred, i.e. by the owner’s will or by law.

114. The first occurs when someone is compelled by poverty to sell himself, as is laid down in the *Institutions of Justinian*, *de Iure Personarum, §Servi,* that a person over the age of twenty may sell himself for a share of the price. It is this sort of servitude that is referred to in Exodus chapter 21 and in *Leviticus* chapter 25: “If your brother is driven by poverty to sell himself to you, you shall not oppress him in his servitude as if he were a slave *(famulus),* but he shall be yours as a hired laborer or tenant”; and further below (we read): “Let your servant and your maidservant be of the nations round about you. These you shall have as your slaves *(famuli),* and these shall you bequeath to your posterity, and you shall possess them forever.”

115. Thus the Hebrew slave *(servus)* is to be considered as a hired laborer, and is to be redeemed at the time of the Ju-

bilee;[7] but if the slave is a foreigner, he could be kept in perpetuity, or sold, as is now the case of those Africans who have sold themselves to the Portuguese under the pressure of hunger and famine.

116. The second type of servitude is that which is introduced by the law of war *(ius belli),* as is stated in the *Institutions of Justinian*, *de Iure Personarum.* For since in the case of a just war it is permissible to kill one's enemies, it has been decreed by the Emperors, as it is said there, that whoever takes his foe alive may keep him as his own possession, and so his life shall be saved; this is called 'servitude', for he has been spared.

117. That either kind of servitude is permissible may be demonstrated as follows: It is permissible to save one's life through captivity in this way (i.e. by surrendering one's liberty), for life is greater than liberty. If you argue that liberty cannot properly be sold for any amount of gold, I will reply that it is not being sold for gold, but given in exchange for saving one's life.

118. For this reason, Saint Thomas [Aquinas], responding to the arguments to the contrary (*In quartum Sententiarum,* distinction 36, says that there are two ways in which something can happen according to the law of nature. One is by the prime intention of nature, for example, the preservation of a species by generation. The other way is the possibility of something occurring naturally by contingency (*per accidens),* for example, the way corruption is 'natural' as generation could not occur without it.

119. Servitude, therefore, is not natural in the first way, as nature intended us to be free, but it is natural *per accidens*

[7] Cf. Locke, *Second Treatise on Government,* chapter 4, §24.

that is, it is given according to the logic of sin *(ratione peccati)* as a punishment. In war, hence, it is an enemy's punishment to become a slave.

120. On the contrary, it may be urged that everyone is by nature free, therefore, no one can make anyone a slave. To this it may be replied that in the same way that emperors may for the sake of public good place the lives of their subjects in jeopardy, likewise they may lay down the law concerning captivity. Alternatively it may be claimed that this servitude arose out of a compact and agreement to save the lives of the captured.

121. Therefore Aristotle says in book 1 of his *Politics* that such servitude is in accordance with the law of nations *(ius gentium).* The same is said in the *Institutions of Justinian*, *de Iure Personarum.* It is true that this servitude does not exist between Christians; indeed, in France it is not permitted in any circumstances that one man should be enslaved to another neither by debt-bondage nor by the law of war *(nec iure emptionis nec iure belli).*

122. It is not our present concern to examine in which matters a slave is bound to obey his master. but as for the opinion of some jurists that a slave captured in war may not run away, I do not believe it. Provided he does no violence to his master he may indeed run away. Such I believe is the law of war, unless he has promised not to run away, in which case he is bound to keep his promise. But slaves by debt-bondage *(de iure emptionis)* and likewise home-born slaves may not run away.

Whether the Emperor is by Title of Empire the Lord of the Whole Earth[8]

123. There now follows the second principal question in our commentary: Is the Emperor 'lord of the whole earth'? We are concerned here with the Emperor *qua,* for it is clear that *qua* he has territories which set borders as other kings do.

124. On this question there are various opinions among the jurisconsults, both canon and civil lawyers alike, as Johannes Faber states in his *Breviarum* chapter *De Summa Trinitate et Fide Catholica* where he says that Hostiensis, Johannes Andreas, Bartolus,[9] and all the jurists of peninsular Italy join the affirmative side.

125. But those from the North side of the Alps, such as James of Revigny *(Jacobus de Ravena)* and many others, including Faber himself, join the negative side. These latter scholars prove their point by reference to the law *bene a Zenone, C. de Quadrennali praescriptione,* and the gloss to the chapter *Per venerabilem, qui filii sunt legitimi,* and the gloss to the canon *in apibus,* VII, question 1*,* and by the gloss to the canon *Adrianus, 63 dist.* They also adduce countless other glosses.

[8] Cf. Soto, D. de, *De Justitia et Jure,* (1556), 4.4.1., pp. 300ff., *Utrum hominum quispiam totius sit orbis dominus*; and ibid. 4.4.2., pp. 403ff., *Utrum imperator sit dominus orbis*.

Cf. further: Vitoria, F. de, *On the American Indians,* (1992), question 2, article 1, pp. 252ff.: "The first unjust title that our most serene Emperor might be master of the whole world"

[9] Bartolus of Saxoferrato, *Ad.* 10.1.31.8. Cf. also Vitoria, F., *On the American Indians,* (1992), question 2, article 1, pp. 252f.

126. Likewise they adduce the texts on the law *Deprecatio ff., Ad legem Rhodiam de iactu,* and on the law *Cum multa, C. De bonis quæ liberis,* for in the first the Emperor Antonius declares:[10] “I am lord of the earth *(mundi dominus)*” and in the second he claims to be “the Supreme Emperor”; ergo, he is the lord of the whole world. However, we shall see [more] about these laws at the end [of this section].

127. Bartolus, moreover, adds (to the law *Hostes, C. 2 ff. De captivis et postliminio reversis* that whoever does not acknowledge the force of this commits a notable error in legal terms, and is indeed a heretic in the words of Luke chapter 2, “A decree went out from Caesar Augustus that all the world should be enrolled”. From this it is clearly thought to be true that the Emperor is ‘lord of the whole earth’.

128. But to prevent us from proceeding through uncharted waters we should distinguish between two sorts of *dominium.* On the one hand there is the right or property over possessions *(ius seu proprietas rerum),* about which we have been speaking thus far.

129. On the other hand there is the faculty of jurisdiction over something *(potestatis iurisdictionis),* which is the same as *dominatus* or *dominatio*, just as princes have *dominium* over their subjects.

130. There are some who flatter the Emperor to the extent of saying that he has *dominium* of the earth in the first way, and may thus use the goods of the earth as if they were his horse or his clothes.

[10] This passage is also cited in Vitoria, F. de, *On the American Indians,* question 2, article 1, (1992), p. 253.

131. But as Aristotle says, it is a fool's part to concern oneself over men who have an opinion on anything. What they say bears no resemblance to the observed facts, and is unworthy of rebuttal, for in this way the goods of Castile would not be his, any more than the goods of the Kingdom of France would belong to the King of France, nor could he use them except for the common good.

132. Concerning the second sort of *dominium,* however, they say that he possesses overlordship and jurisdiction over the whole world inasmuch as he is Emperor.

133. Here however we draw a fifth conclusion:[11] The Emperor is not the lord of the earth *(dominus orbis),* nor is his jurisdiction so universal as to cover the whole world. Indeed, in order to prove this it would be enough if the Emperor's flatterers fail to prove the contrary proposition; it would not be incumbent on us to prove but simply to state the positive proposition.

134. Nonetheless we may argue as follows:

Firstly, if the Emperor were in fact lord of the whole earth in this way, it would either be by natural, divine, or human law; but it is none of these, ergo. The lesser proposition may be demonstrated as far as the law of nature is concerned: Natural law is equal to all, since all are of the same nature: ergo, no-one is lord of others in this way.

135. But one may claim: Given that none is defined by nature as lord (we are still speaking of the lordship of jurisdiction), nonetheless it may be claimed that nature inclines to the

[11] Cf. Vitoria, F. de, *On the American Indians,* question 2, article 1, (1992), p. 253f.

lordship of one person over the earth, just as the head alone is supreme over the body. Jerome, too, claims in VII, question 1, canon *In apibus* that among the beasts one is head and king.

136. But against this it may be argued: given it is conformable to the law of nature that in a particular household or commonwealth there should be one single head, it does not follow that there be one head of all the commonwealths of the earth, just as no one bee is queen of all the bees in the world.

137. The argument may be underscored by reference to book VII of Aristotle's *Politics,* where he says that a state does not does not become better according to its size, nor should it increase in size without bounds, but the number of citizens should be such that they may be governed by one man, and that he should know them and that they should know each other by sight, for otherwise there is no proper community of interest, ergo.

138. By the same reasoning, the borders of the state should be determined to such an extent that all may come before the king in times of hardship; but the whole earth cannot come before one man, ergo.

139. It may also be proven in a second manner: Just as every form determines the quantity of matter proper to itself, and cannot inform a greater mass, so every principality should determine the proper extent it can exercise its authority.

140. Likewise a second argument may be advanced in line with the principal: If there were by nature some lord of the earth, it would follow that there had always been such a person in the world. But this cannot be inferred, for before the coming of Christ there was no lord of the earth, and the very word 'Emperor'! had not been heard in this sense;

there were only kings. The first of these after the Flood was Nimrod (in *Genesis* chapter 10) who founded the realm of the Chaldeans in Babylon. The realm of the Medes and Persians later succeeded to this under Cyrus and Darius (Daniel chapter 5) on account of the pride of the King Balthasar. From the Persians it later passed to the Greeks under Alexander the Great, and lastly to the Romans under Octavian Augustus. These were the four realms signified figuratively in the statue seen by Nebuchadnezzar (in Daniel chapter 2).

141. But none of those kings was 'lord of the whole world', for as the histories tell us, there were other kingdoms running concurrently, as for example the kingdom of Spain, which was never subject to them, or the kingdoms of the Romans and of the Jews. But if you say that they were all one kingdom in the time of Octavian, this is wrong, for there were many nations at that time which were not subjugated, as the history of Rome itself attests.

142. This is most clear in the case of the other hemisphere and of the land beyond the seas which as been recently 'discovered' by our compatriots. Likewise it is also clear that by divine law there is no one single 'lord of the [whole] world'; for nowhere in all of the Holy Scriptures is God said to have made one single man 'lord of the [whole] world'; it is only found to have made some men (for example Saul, David, and so forth) kings of one particular part of the world.

143. This may be proven thus: it is not in accordance with the law of nature for one man to be lord of the whole earth, therefore, God has not granted it to anyone.

144. In the third instance it may be argued as follows: *dominium* exists on account of use *(dominium est propter usum),* as has been stated above; it is impossible, morally

speaking, for one [single] person to exercise *dominium* of the whole earth, for no one [single] person has visited all four corners of the earth, either in person or through deputies; therefore, such *dominium* would be meaningless. But God and nature do nothing that is meaningless, ergo.

145. Finally it may be argued as follows: Neither by natural nor by divine law is any [one single] man lord of the earth so far as temporal civil power is concerned, for by the law of nature every [sovereign] commonwealth is sufficient unto itself. Civil and ecclesiastical power differ in the following regard: ecclesiastical power does not exist directly within the ecclesiastical polity, but is granted directly by God to a specific person or to specific persons (for example to the pope or the General Council of the Church) This is not the point at issue. Civil power, however, exists by the law of nature within every commonwealth. Consequently, if someone were lord of the earth, he would be so on the basis of election by all the people on the earth and not by divine or natural law.

146. We can take the argument one step further and assert that no-one is 'lord of the earth'. If there were someone, then he would be so temporarily by the consent of all the people on earth who elected him. The people of the earth, however, have never agreed on any one overlord, ergo.

147. At this point I wish to say that if it were possible for all the people on earth to assemble either in person or through delegates, it would be possible for them to elect a single lord for the whole world, in the way that France and Castile do; but, as has been pointed out above, not only has such a convention never occurred, it is also impossible that it should occur. Nor is it appropriate *(conveniens)* for reasons already stated, that there should be one lord of all people.

148. There remains one very potent difficulty in this matter: There are some who say that God conferred the Empire upon the Romans because of their virtues, and that the Romans later conferred it upon their Emperor.

149. The classic statement of this is found in the *De Civitate Dei,* book 5 chapters 12 and 15, where Augustine states that, since the realms of the East had long been illustrious, it was the will of God that there should be one Western Empire, and that he conferred it upon the Romans, so that by their virtue they might put down the grave vices that beset many nations, the virtue in question being love of country and zeal for justice. In chapter 15 he concludes: "They have no cause to complain of the justice of God, they have had their reward," alluding to the passage in Matthew chapter 6 meaning that those who fulfill the task of virtue for the sake of worldly glory deserve a temporal reward.

150. Likewise, Saint Thomas [Aquinas] in book III of his *De Regimine Principum* says[12] that God conferred the Empire upon the Romans for the following three reasons, namely, outstanding love of their country, domestic concord, and zeal for justice.

151. And in case this should seem a fiction on part of both Augustine and Saint Thomas [Aquinas], we may argue thus: Emperor Constantine the Great, a most holy man having done many notable works as befitting a true friend of Christ, did not renounce the Empire, nor did Pope Sylvester admonish him to do so. The same goes for Theodosius, whom Ambrose never instructed to renounce the Empire, but rather recognized him as a most saintly

[12] Cf. Vitoria, F. de, *On the American Indians,* question 2, article 1, (1992), p. 224f.

man, and most obedient to himself. It is not likely that God would permit a holy man like this to remain in such error; therefore, it seems that these Emperors had the right to the Empire.

152. I would not venture to assert anything which contradicted the opinion of Augustine or the authority of Sylvester or Ambrose. But it is not clear to me what right the Romans had over the lands they conquered, to which, it seems from their own histories, their right rested on their arms; they subjugated many nations against their will by no other title save that of being the stronger. Nor is any passage found in which God gives them such a right. Even given that the Romans had a right over certain nations, nonetheless, Julius Caesar, as becomes clear from his own *Commentarii,* obtained the Empire by tyranny and through civil discord.

153. But let us grant that Augustine, as some would have him, means that many nations willingly surrendered themselves to the Romans in recognition of their ‘zeal for justice’, as witness the words of the Jews,, in John chapter 19, “We have no king but Caesar” or the words of Christ in Matthew chapter 22; Mark chapter 12; and Luke chapter 20: “Render unto Caesar that which belongs to Caesar”, and let us also grant that the Roman people later conferred the Empire upon Octavian or any other successor of his down to the current [Holy] Roman Emperor, nonetheless, this does not weaken our conclusion to the least. For the Romans could not give the Empire, unless they had it; but they never had ‘imperial sway over the whole earth’, for it is nowhere recorded that they reached the antipodes, or the lands that have lately been ‘discovered’ [in the New World]; ergo, the Romans could not confer imperial sway over these nations to anyone, as they did not have it, any more than the French could appoint the King of Castile. In-

deed, in Asia, Africa, and in Europe there were many peoples who were never subject to the Romans.

154. The truth of this statement - being that the Emperor is not lord of the whole world - may also be proven on the basis of canon and civil law. There is a text in the law *Cunctos populos, C., De Summa Trinitate et Fide Catholica,* where it is written that: “All peoples which are ruled by the empire (*imperium)* of Our Clemency ... ”, makes it clear that the Emperor is not lord of the whole world. Likewise, in law II, *De Officio praefecti praetorio Africae,* the Emperor refers to the fact that he has many enemies, and that he has made peace with the Persians. There is also the passage in the law *Hostes ff. De Captivis et postliminio reversis* where the Emperor says: “Between us and all free peoples and kings ordained by law and custom ....” where he speaks in the plural of (other) ‘free peoples and kings’. Likewise there is the passage in the chapter *Per venerabilem, Qui filii sint legitimi* where it is said that the King of France acknowledges no overlord in respect of temporal matters. There are countless other passages that we might adduce, which for the sake of brevity we omit (to list here).

155. But as is customary among jurists, the glosses relating to these texts assert precisely the opposite of the texts themselves. The most significant texts which the jurists (in favour of the universal lordship of the Holy Roman Emperor) adduce are these: the law *Deprecatio ff. Ad legem Rhodiam de iactu,* where Antonius Pius says: “I am the lord of the earth”, the law *Si duas, ff. De Excusationibus et temporibus earum,* where it is said “It is appropriate for the whole earth”, the law *Raptores, C., De raptu virginum,* where it is written: “Throughout the various regions of our realm”, and [finally] in Luke, chapter 2, “A decree went out .... ”

156. To these and all other similar passages we would say, however, that it was custom of the Romans to describe themselves as 'lords of the earth', for so it is that Rome is called 'the Capital of the World'. They did so, firstly, because they did not acknowledge the existence of an overlord in the whole world, nor any province that could withstand them; secondly, because it was their intention to [eventually] subdue the whole earth; and thirdly because they subdued the greater part of the earth then known [in Europe] to the East, the West, the North, and the South. This is clearly the case, for when Augustus "decreed that all the world should be taxed", he did not decree that the antipodeans should be taxed, nor the inhabitants of the recently-discovered Peru, but rather he used the words "the whole earth" to refer to the lands subjected to the Roman people.

157. The jurists also adduce other texts, such as that found in the law *Bene a Zenone, C., de quadrenii praescriptione* where it is written: "All things belong to the prince", and in the law *Cum multa, C., de bonis quae liberis,* where it is said: "As the Imperial fortune exceeds all others ...". These texts, however, do not deserve further explanation. One can see the consequence: all things belong to the Emperor, ergo, he alone is lord of the whole earth; the Imperial fortune exceeds all others, ergo, he alone is lord. It is not surprising that the jurists draw such conclusions, yet it is characteristic of the way they heap text upon text.

158. From these [passages listed above] it follows that the Emperor has neither right *(ius)* nor *dominium* to the lands of the non-Christians *(infideles)* with the exception of those lands which formerly belonged to the Christians, such as those in Africa, or the lands which have been invaded and taken away from the Christians according to the law of war, as the Turks have done.

159. But these two considerations certainly cannot be applied in the case of the island-territories recently ‘discovered’, for the fact that the inhabitants are non-Christians does not mean that they lose either their goods or the *dominium* of jurisdiction they [hitherto] possessed, just as these rights are not lost on account of ‘greater sins’, as Saint Thomas [Aquinas] proves in his *Secunda Secundae,* question 10, article 10. For, as he says, distinctions of *dominium* and precedence *(praelatio)* were introduced by human law, whereas the distinction between believers and non-believers was introduced by divine law. Divine law however, being derived from grace, does not revoke human law, which is conformable to natural reason. It is not our intention to discuss this issue here. We will rather state as a fact that, as [the natives of the New World] are [in fact] non-Christians, and provided they were not Christians at an earlier time,[13] there is [absolutely] no reason why they should lose their rights over their own goods *(ius bonorum suorum).*

On the Temporal *Dominium* of Christ and the Pope,and on the Right by which the Spaniards Justify their Empire Overseas

160. Some people claim that if no-one else than the Pope, who is lord of the whole earth, conferred *dominium* upon the Emperor. This is the opinion of many summists on the chapter *Venerabilem, De Electione.* This, however, is a

[13] Non-Christian *(infideles)* sovereigns are able to legitimately exercise *dominium* as long as they have never before professed the Christian religion and can therefore not be convicted of *apostasy*. Cf. Thomas Aquinas, *Summa Theologiae*, 2a-2æ, qu. 10, art. 10 and Vitoria, *On Civil Power,* (1992), question 1, article 6, pp. 17f.

mere figment and without any foundation, despite the fact that it has been frequently propounded over time. Indeed, Christ himself was not king according to any temporal title, and so far from having *temporal dominium* of the earth, that he was not even the lord of the smallest hamlet. He only possessed power in temporal matters with a specific spiritual end *(in ordine ad finem spiritualem),* meaning (of course) for the specific end of redemption.

161. Thus it is that Psalm 2: “by him I am ordained king over Zion His holy mountain, telling forth his teaching” declares the grounds on which Christ’s kingdom is founded, namely to teach the new law. Similarly, in John chapter 18, Christ refuses to give an unqualified response to [Pontius] Pilate’s question as to whether he was a king, and when Pilate said, “Thine own people ... etc.” he replied: “My kingdom is not of this world”. This is as much as to say: “If you had spoken of your own accord and without qualification, I would have said that I am not a king, for I am not a king in the sense that other kings are, in the way you would have understood it. But as the Jews have said that I am a king I do not deny it, but my own kingdom is not of this world, that is to say, it is not like the kingdoms of this world”. It would be remarkable if Christ, who came into the world to preach [earthly] poverty, had himself accepted *dominium* of the world, and all the more so as this would have been superfluous on his part, as he never possessed the use of it.

162. A corollary of this would be that he would have left such *dominium* to his vicar without ever having possessed it himself. It is most strongly confirmed in Matthew chapter 20 and Luke chapter 22: “The princes of the nations lord over them. I shall not be so among you”, and later “The Son of Man came not to be served, but to serve”. Bernard in his discussion of this passage writes in book II of his *De consideratione ad Eugenium*: “What else did the holy

apostle leave when he said in Acts chapter 3: “What I have I give unto you?” What he had was neither silver nor gold”, and “Let us grant that you have some reason to justify yourself, but you cannot do so by the law of the apostles”. From this it is clear that the Pope does not have temporal *dominium.* Therefore it must have been Constantine [the Great] who [allegedly] gave imperial power to the pope, and not vice versa. But this does concern our present debate.

163. We can hold, then, that the Emperor by no means has imperial authority over the whole earth.

By what right, therefore, do we [Spaniards] then justify our Empire in the lands across the ocean recently discovered?

164. In truth, I do not know. In the Gospel we read in Mark chapter 16: “God and preach the Gospel to every creature”[14]; this grants us the right to preach throughout the whole world, and consequently, we are also given the right of defending ourselves against all who impede us from preaching.

165. If we were in danger, therefore, we could protect ourselves from our attackers at their expense; but as for taking their

[14] Cf. Mat. 28:19. The passage from the Gospel of Mark forms also the basis for a very similar discussion on the *ius prædicandi* in Vitoria, F. de, *On the American Indians,* (1992), question 3, article 2, pp. 284ff. On some of its limitations, cf. ibid., question 2, article 4, pp. 265ff.

In Vitoria, the *ius prædicandi* or the right to preach appears to be treated as a specific aspect of the *ius communicationis* or right of natural partnership and communication. It's foundation is in the *ius gentium* or law of nations which is defined in the *Institutions of Justinianian*, 1.2.1. The limitations of this right of partnership and communication from a Christian point of view are spelled out e.g. in Thomas Aquinas, ST 2a-2æ, qu. 10, article 9.

goods beyond the value of what we need for self-defence, or for making them subjects of our Empire, I do not see what gives us this right, least of all as the Lord, when sending out his disciples to preach the Gospel commissioned them (Matthew chapter 10) to go not as lions, but a sheep among wolves - i.e. not only without arms, but without staff, scrip, bread, or money. And he added in Luke chapter 9: "Whosoever do not receive you, depart from their town, and shake the very dust from your feet in testimony against them." He did not instruct his disciples to preach against peoples' will but that they were to depart and leave vengeance to God.

166. In saying this I do not mean to condemn all that happens among the dwellers of those isles [in the New World], for great are the depths of God's judgments, and it may be He purports to convert [to Christianity] all these nations to himself in ways unknown to us. But let this suffice for the present on these matters.

Man is Not Properly Speaking the Lord of [His Own] Life

167. I now come down to a consideration about particular types of *dominium.* The first question is this: Is a man lord of his own life, as he is of his external goods? It would appear that he is, for that for which all other things exist is greater than them; but man is lord of all things inferior to him, because they are ordained to maintain his life; therefore, he is all the more the lord of his own life.

168. Likewise, secondly, in Ecclesiastes, chapter 15, it is written: "God appointed man from the beginning, and left him in the hand of his own counsel", but to "leave him in the

hand of his own counsel" is [surely] to make him lord of himself; ergo, he is the lord of his own life.

169. Likewise, he is lord of the members [of his body], for he may cut off his hand or his foot for the sake of salvation of his body, but the life of the hand is the life of the whole, ergo.

170. Likewise, he may risk his life for the sake of his friend in the same way that he can risk his money, ergo, he is lord of his life just as he is lord of his money.

171. Likewise, as we have said, he is lord of all his vital functions; ergo, he is lord of his life.

172. But notwithstanding all these it is our sixth conclusion that man is not lord of his own life. This may be proven as follows: For man to have true *dominium* it is necessary that he should be able to use a thing in any way he wishes. But man may not kill himself at will; on the contrary, there is no cause for which he may do so, save by divine revelation or by the [express] command of God; ergo, he is not the lord of his own life.

173. But one may claim: "Very well, he has *dominium* of his life, but that use (that is suicide) is forbidden to him, as it is against (the principle of) charity." But I would reply that *dominium* without use is ineffectual, as we have stated above; but a man could never use the sort of *dominium* you propose, and therefore it would be ineffectual.

174. Likewise it may be argued that if man were lord of his own life it would be either on the basis of natural, divine, or civil law. He is not lord by the law of nature, for by nature all things seek to preserve their existence, ergo, no thing has a natural inclination to kill itself; ergo, man does not have

this power by nature, and consequently is not lord of his own life.

175. This may be proven as follows: Nature has not endowed anything with the means of self-corruption, for example, it has not given fire coldness, nor water heat, ergo.

176. By the same logic it follows that man, too, does not have divine *dominium* over his life; indeed such *dominium* is prohibited by divine law.

177. Hence in Genesis chapter 1 and following man is given *dominium* over the other creatures, but not over his own life, for he was given the right to conserve his own life, and may therefore, by the law of nature, defend himself; he does not have the right to take his life.

178. Thus, in Wisdom, chapter 16, the wise man says: “It is you, O Lord, who holds the power over life and death”. Likewise in Deuteronomy, chapter 32, it is written: “I kill, and I make alive”, for God alone is Lord of life and death. Therefore one man may not give another the right to kill him, but God may give a man the right to kill himself and others, as he does in Exodus chapter 32: “Let each man slay his neighbor and his friend.”

179. Hence we may proceed to the argument that man may risk his life for his friend. We would say that it is true that he may suffer death for his friend, but he cannot kill himself [willingly]. And the fact that he may risk his life for his friend in accordance to the law of nature, just as he may risk one limb of that body for the sake of another.

180. Nonetheless, although man is not lord of his own life insofar as he cannot use it in any way he pleases, he still has the right of self-preservation; and therefore whosoever kills him commits an injustice against him, to God, and the

state to which life belongs. In the same way, if a man kills himself, he not only commits a sin against love but also against justice, for his life is not his own.

181. Our perspective on the ownership of life may be extended even further: we may say that no-one - not even the (sovereign) prince - is absolute lord of the lives of others. We have heard that the Turk considers that he is, and thinks he has *dominium* over human life as he does over the life of animals, and may thus kill other human beings without cause. The (sovereign) prince, however, can only use the life of his subjects as an instrument to further the common good.

Neither the Father's nor the Husband's Authority Falls in the Category of *Dominium* in its Proper Sense

182. There is another question: is a husband the lord over his wife, or to ask both questions at the same time, is a father the lord over his sons (as well)? It would (initially) seem that he is.[15]

183. Firstly, in Genesis, chapter 3, it is written: "You shall be under his authority, and he shall be lord over you". And concerning sonship Aristotle writes in book 5 of the [*Nichomachian] Ethics* that the son belongs to the father *(filius est aliquid patris),* as a slave is a slave for the very reason that he belongs to his master *(servus est aliquid*

[15] Cf. Aquinas, ST, 1a, qu. 92, art. 1, *ad secundum;* ibid., qu. 96, art. 4. Vitoria integrates this argument in his relection *On the American Indians,* question 2, article 1, (1992), p. 254.

domini). Ergo, (it would appear that) the father is lord over his sons.

184. This may be confirmed as follows: Aristotle in the same sense demonstrates that between father and son there is no such thing as right *(iustum)* in its proper sense, just as by the same reason there is no such thing between a master and his slave; for the son belongs to the father.

185. Likewise it may be argued that a wife is bound to obey her husband and a son his father because by disobedience in a small matter they would be committing a venial sin, and by disobedience in a serious matter they would be committing a mortal sin; but it is for this very reason that one man is the slave of another, that he is bound to obey him, ergo.

186. Furthermore, it was in ancient times laid down by law that a father could sell his sons. Likewise he had the right to contract marriages on their behalf, unless they themselves objected, ergo.

187. Nonetheless, it is our seventh conclusion that a husband is not properly the lord over his wife, nor as a father over his sons.

188. The question of *dominium* over the wife is proven by Aristotle in book I of his *Politics*; she is not made to be a slave. Indeed, a woman and a slave are very distinct by nature; they are, as it were, different instruments of nature, the woman being created for the purposes of reproduction and the slave for the purposes of serving.

189. For this reason Aristotle says it is among barbarians that women are held to be slaves, and he calls barbarians by that name because they are deficient in their rational capabilities. In book V of the *Nicomachian Ethics,* Aristotle

calls the husband and wife partners *(socii),* and in Genesis chapter the woman is not made from the head of the man, so as to be his master, nor from his feet [or hands], so as to be his slave, but from his rib so as to [be close to his heart and] be his equal, and so they be two in one flesh.

190. Likewise it may be argued by reason as follows: A lord *(dominus)* is properly one who uses a slave not for the slave's benefit, but for his own, as we have said above. But a many may only use his wife and children for his benefit if it is also for their benefit.

191. Hence Aristotle says in book I of his *Politics* that in a household there are three aspects of *dominium,* paternal, as well as conjugal. He says this because the man does not have authority over his wife and children as he does over his slave, but as over free people, to rule and to govern them.

192. He posits a further difference between the wife and the children, namely, that he has authority over his wife according to 'political principality' *(principatus politicus),* that is, in the same way as does a man who rules solely by popular consent and at the people's request, whereas a father has authority over his children by 'regal principality'*(principatus regalis),* just as a king has authority over his kingdom by his own power and not by another's request; and therefore a man has greater power over his children than over his wife.

193. But neither of these aspects can be considered as authority which derives from *dominium* because a wife and children obey as free people, by their own free will.

194. Against this it may be argued in the case of the wife that the superiority of the man over the woman would have existed even in their primal state of innocence; for, as Aris-

totle notes, the man stands out more by nature than the woman. (??? Passage missing)

195. In reply to this it should be said that before the fall the woman was not subject to the man in the many ways she now is; for now she cannot give away any of her goods or dispose of them without her husband's consent, nor can she place herself under legal obligation.

196. Likewise, it should be said that this subjection was not felt by the woman in her primal state to be a punishment, but now she does find it a punishment to obey her husband, as husbands themselves all know by experience; but what we have said about the ownership of life should likewise be said on this present question, namely, that though a man is not in the lord *(dominus)* over his wife and children in the proper sense, nonetheless he has the right *(ius)* of protecting and governing them, and therefore whoever hurts the wife viz. the children commits an act of injustice against the husband viz. the parents.

Primogeniture and Birthright Imply True *Dominium*

197. There is another question: Is the first-born lord of his (right of) primogeniture? In other words, is the one who holds the birthright *(maioricatus)* truly the lord of it? Is for example, the Duke of Alba the lord *(dominatus)* of Alba?

198. The jurisconsults take the negative line. Baldus says on the law *Feminae, C., De secundis nuptiis* that absolute *dominium* is the ownership of a thing along with the power to alienate it; but the holder of the birthright cannot alienate it, and any alienation would be null and void.

199. Likewise, if someone holds a birthright immerses himself in debt *(facit aes alienum)* that is to say, if he contracts a debt liable to restitution, his successor is not bound thereafter to repay that debt, ergo, it would appear that the goods are not his own, for otherwise they would remain liable to restitution.

200. This may be an argument about names. But I am convinced that the holder of the birthright is truly the lord over it. This may be prove as follows: If not, one might concede that the goods linked to the birthright belong to no-one with respect to ownership.

201. Secondly, it may be argued thus: When the Emperor places a law or obligation on John Doe preventing him from selling his goods, by elevating them to the status of his birthright he does not take *dominium* away from the proprietor, but simply makes a law that the goods may not be sold or alienated, ergo.

202. My thesis may be underscored with this: When the Emperor authorizes the Duke of Alba to sell part of his primogeniture, he does not give him any new *dominium,* but when this authority has been granted he may sell it as if (he were) the true lord of them.

203. Likewise, it may be argued thus. A minor, such as a ward, is truly the lord of his possessions, but may not sell them or give them away; ergo, notwithstanding his primogeniture, he cannot alienate his goods, but is nonetheless the true lord of them.

204. Finally, my position may be confirmed with the following: If John Doe were to strip and dissipate his goods by gambling or in some other manner, and the king were to prohibit him by law from alienating his goods, the king would thereby not take his *dominium* away from him. Therefore,

it is clear that the holder of the birthright is notwithstanding the lord of it.

205. But to all the arguments to the contrary we would say that the authority of *dominium* is restricted by civil law insofar as the use of alienation is concerned, as we have stated in the case of a ward.

Conclusion

206. There remains a final point for us to debate, the one which we promised in our third conclusion, namely, on the question concerning the transfer of *dominium.* But as we are constrained by the time we shall postpone the discussion to our ordinary series of lectures.

The End. Praise be to God!